

## **Combating the Financing of Terrorism**

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### **I. INTRODUCTION**

In the aftermath of the September 11, 2001 terrorist attacks against American targets, the question of the financing of terrorism took on a new dimension. The sheer magnitude of the attacks and the complex web of preparation they required highlighted the importance of financial resources needed to carry them out. But the international community had not waited until this moment to start working to prevent and punish the financing of such acts. While the September 11 attacks gave renewed urgency to the issue, actions had been started earlier in various United Nations fora. By the end of 2000, two international conventions on relevant topics had been negotiated and opened for signature, and the United Nations Security Council had already put in place a mechanism to identify the assets of terrorists and to require countries to freeze them. Soon after the attacks, the Financial Action Task Force issued a new set of eight Special Recommendations on Terrorist Financing and these new standards were incorporated in the Fund's draft Methodology for assessing anti-money laundering frameworks.

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The international efforts to curb the financing of terrorism take a comprehensive approach, which combines repressive measures of criminal law with preventive measures. These two approaches have involved the use of different kinds of international instruments. The repressive measures involve agreements among countries to make certain acts criminal offenses in their legislation, and to cooperate among each other by exchanging information and providing mutual legal assistance. The need to ensure uniformity of definitions of the offenses to be criminalized, and the need to organize the greatest degree of cooperation among States in giving each other mutual legal assistance, has led to the use of international treaties to deal with the repressive part of the strategy. Two important international conventions have been negotiated in this respect. They are the International Convention for the Suppression of the Financing of Terrorism<sup>2</sup> (the Financing of Terrorism Convention) and the United Nations Convention against Transnational Organized Crime, also known as the Palermo Convention.<sup>3</sup>

The preventive measures involve the establishment of a regulatory regime for financial institutions that is intended to reduce the scope for using financial systems to collect and transfer funds for terrorism purposes. As these measures must be integrated in the local regulatory framework of each country, they have been contained in more informal arrangements, such as the FATF Recommendations. However, the two approaches are not

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<sup>2</sup> Adopted by the U.N. General Assembly on December 9, 1999 by Res. A/Res/54/109; 39 ILM 270 (2000).

<sup>3</sup> Adopted by the U.N. General Assembly November 15, 2000 by Res. A/RES/55/25; 40 ILM 335 (2001)

isolated, and there is constant interaction between them. The FATF requires that countries become parties to the Financing of Terrorism Convention, and that Convention as well as the Palermo Convention contain provisions obligating countries, in very general language, to implement the preventive measures required by the FATF.

In early 2001, the Fund, in cooperation with other organizations, began developing what was to become the Draft Bank/Fund Methodology for Assessing Legal, Institutional and Supervisory/Regulatory Aspects of Anti-Money Laundering. At the outset, the Fund generally recognized the FATF 40 recommendations “as the appropriate international standard for combating money laundering,”<sup>4</sup> and these were adapted and made operational in the draft Methodology. When in October 2001, the FATF adopted the eight Special Recommendations on Terrorist Financing, those were integrated into the draft Methodology. The FATF Special Recommendations and the draft Methodology require countries to become parties to the Financing of Terrorism Convention and to implement certain UN Security Council resolutions on the prevention and suppression of the financing of terrorist acts. The draft Methodology (but not the FATF) requires countries to also become parties to the Palermo Convention. In order to fully understand the Methodology’s coverage of terrorism financing, it is thus necessary to examine the two conventions as well as the United Nations Security Council resolutions, as well as to examine the FATF Special Recommendations.

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<sup>4</sup> International Monetary Fund, International Monetary and Financial Committee (IMFC), communiqué of April 29, 2001, paragraph 14.

In part II of this paper, the two international convention and the Security Council resolution are examined briefly after which, in Part III, the manner in which these instruments are reflected in the Special Recommendations of the FATF and incorporated into the draft Methodology will be discussed.

## **II. INTERNATIONAL LEGAL INSTRUMENTS RELEVANT TO THE COMBATING OF THE FINANCING OF TERRORISM**

The three international instruments that are relevant to the combating of terrorist financing and reflected in the draft Methodology are the International Convention for the Suppression of the Financing of Terrorism, the Palermo Convention, and the Resolutions of the United Nations Security Council on Counter-terrorism. They will be discussed in turn.

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

The most important element in the international arsenal of legal norms to combat the financing of terrorism is without doubt the International Convention for the Suppression of the Financing of Terrorism.

The Convention was elaborated by an ad-hoc committee established by the United Nations General Assembly in 1998 and adopted by the General Assembly on December 9, 1999. The

Convention has been signed by 132 States. It came into force on April 10, 2002, among the 31 States that had ratified it.<sup>5</sup>

The Convention contains three main obligations for States parties. First, States parties must establish the offense of financing of terrorism in their criminal legislation. Second, they must engage in wide-ranging cooperation with other states parties and provide them with legal assistance. Third, they must enact certain requirements concerning the role of financial institutions in the detection and reporting of evidence of financing of terrorism.

### **Criminalization of Terrorism Financing**

The Convention requires each party to adopt measures: (a) to establish under its domestic law the offenses of financing of terrorism set out in the Convention, and (b) to make these offenses punishable by appropriate penalties which take into account the grave nature of the offenses.<sup>6</sup> There are two main elements to the offenses established by the Convention: first, the act must be one of *financing*, and second, what is being financed must be an act of *terrorism*.

Financing is defined very broadly as *providing or collecting funds, knowing that they will be used in the commission of certain defined acts*. The element of financing is established if a person “by any means, directly or indirectly, unlawfully and willfully, provides or collects

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<sup>5</sup> As of July 29, 2002, the Convention was in force among 42 countries.

<sup>6</sup> Financing of Terrorism Convention, Article 4.

funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out one of two types of acts defined in [the Convention].”<sup>7</sup>

Acts of terrorism are defined by reference to two separate sources. The first is a list of nine other international conventions which were opened for signature from 1970 to 1997, and which require the parties to them to establish various terrorism offenses. The list is set out in the Annex to the Convention.<sup>8</sup> The Convention allows a State to exclude a convention from the list, but only if the State is not a party to it. When the State becomes a party to one of the listed conventions, that convention is automatically added to the list of conventions applicable to that State. Conversely, when a States ceases to be a party to one of the listed conventions, it automatically ceases to be included in the list for purposes of that State.<sup>9</sup>

The second source is a “self-contained” definition of terrorism set out in the Convention itself. This definition is the first definition of terrorism contained in an international

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<sup>7</sup> *Ibid.*, Article 2, paragraph 1.

<sup>8</sup> The conventions are: 1. the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970; 2. the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971; 3. the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; 4. the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; 5. the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980; 6. the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988; 7. the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988; 8. the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988; and 9. the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

<sup>9</sup> Financing of Terrorism Convention, Article 2, paragraphs 2 (a) and (b).

agreement. It defines terrorism as: “Any [...] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”<sup>10</sup>

Other aspects of the definition of the crimes defined in the Convention may be mentioned:

- For an act to constitute an offense under the Convention, it is not necessary that the funds be actually used to commit one of the defined offenses.<sup>11</sup>
- The fact of participating as an accomplice in the commission of an offense, and the fact of organizing or directing the commission of the offense are also criminalized in the same way as the offense itself.<sup>12</sup>
- Contributing to the commission of the offense by a group of persons acting with a common purpose, is also considered as committing an offense under the Convention, provided the contribution is intentional, and provided (i) it is made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offense under the Convention; or (ii) it is

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<sup>10</sup> *Ibid.*, Article 2, paragraph 1 (b).

<sup>11</sup> Palermo Convention, Article 2, paragraph 3.

<sup>12</sup> *Ibid.*, Article 2, paragraph 5.

made in the knowledge of the intention of the group to commit an offense under the Convention.<sup>13</sup>

- Attempts to commit the acts are also criminalized in the same way as the offenses themselves.<sup>14</sup>
- The facts must be international; the Convention does not apply where the offense was committed in a single State.<sup>15</sup>
- Legal entities may be held liable for the offenses set out in the Convention, but the liability need not be criminal; it may also be civil or administrative.<sup>16</sup>
- The financing of terrorism offense may not be excused by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.<sup>17</sup>

### **International Cooperation**

To ensure the greatest degree of cooperation between the parties with respect to the criminalization of the offenses under the Convention, the Convention contains detailed provisions on international cooperation, including mutual legal assistance and extradition. These provisions tend to go further than the nine conventions listed in the Annex in requiring cooperation among States parties in providing each other mutual legal assistance, and the

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<sup>13</sup> *Ibid.*, Article 2, paragraph 5 (c).

<sup>14</sup> *Ibid.*, Article 3, paragraph 4.

<sup>15</sup> *Ibid.*, Article 3.

<sup>16</sup> *Ibid.*, Article 5.

<sup>17</sup> *Ibid.*, Article 6.



establishment of a uniform, detailed and thorough framework for international cooperation in the area of terrorist financing may well be one of the important achievements of the Convention.

The areas of international cooperation covered by the Convention include measures to be taken when an offender or alleged offender is found to be on the territory of a State party, extradition and mutual legal assistance.

When a State party receives information that an offender or alleged offender is present in its territory, and after appropriate investigation, the State party must take the person into custody and notify the other States parties that have jurisdiction over the offense and indicate whether it intends to exercise its jurisdiction and prosecute the person.<sup>18</sup> The offenses established under the Convention are to be deemed to be extraditable offenses, and States parties that require a treaty in order to extradite an offender may consider the Convention as fulfilling this requirement.<sup>19</sup> Unless it agrees to extradite the person to the State party that claims jurisdiction, the State party must, without exception, prosecute the person.<sup>20</sup>

The State parties also undertake to give each other “the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offenses [established pursuant to the Convention].”<sup>21</sup> Requests for legal assistance under the Convention may not be refused on the grounds of bank secrecy, and the offenses set out

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<sup>18</sup> *Ibid.*, Article 9.

<sup>19</sup> *Ibid.*, Article 11, paragraph 2.

<sup>20</sup> *Ibid.*, Article 10, paragraph 1.

<sup>21</sup> *Ibid.*, Article 12, paragraph 1.

in it are not to be considered for purposes of extradition or mutual legal assistance as fiscal<sup>22</sup> or political<sup>23</sup> offenses.

### **Rules for Financial Institutions**

The obligation of States to criminalize the financing of terrorism is unconditional. By contrast, only a few general provisions of the Convention which deal with preventive measures, which are set out in Article 18, are obligatory.<sup>24</sup> Most of the detailed provisions are expressed as obligations of the States parties to consider requiring certain things, rather than obligating them to do them. This reflects the nature of the preventive measures, which are to a large extent borrowed from the FATF recommendations.

The State parties are required to cooperate in the prevention of the offenses established by the Convention by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offenses within or outside their territories, including (a) measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of the offenses established in the Convention, and (b) measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are

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<sup>22</sup> *Ibid.*, Article 13.

<sup>23</sup> *Ibid.*, Article 14.

<sup>24</sup> Article 18 of the Convention is set out in Annex I.

opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity.

For this purpose, the States parties are required to consider adopting rules that are borrowed from the FATF 40 Recommendations, including:

- prohibiting the opening of accounts, the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that financial institutions verify the identity of the real owners of such transactions;
- with respect to the identification of legal entities, requiring financial institutions to verify the legal existence and the structure of the customer
- requiring financial institutions to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith; and
- requiring financial institutions to maintain, for at least five years, all transaction records.

In addition, the States parties are required to establish and maintain channels of communication between their competent agencies and services (which could be the financial

intelligence units) to facilitate the secure and rapid exchange of information concerning the offenses established under the Convention.<sup>25</sup>

In the Convention, the main elements of the FATF recommendations on money laundering are made part of an international agreement, but not quite in a fully binding way. The States parties are not obligated to implement these measures, but only to consider implementing them. As we will see, the Palermo Convention has a similar structure and also stops short of obligating the States parties to implement the FATF recommendations.

## **B. The Palermo Convention**

The United Nations Convention against Transnational Organized Crime is the first international instrument to deal comprehensively with transnational organized crime. Its importance for the combat against terrorist financing is easy to understand, if we bear in mind the links that are often established between organized criminal organizations and terrorist organizations. While the Convention on the Suppression of the Financing of Terrorism and the Palermo Convention were negotiated separately and are structured somewhat differently, they are in fact complementary.

The original idea for a convention on international organized crime was proposed by Poland in the United Nations General Assembly in 1996. The Convention was elaborated over 24

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<sup>25</sup> Financing of Terrorism Convention, Article 18, Paragraph 3 (a).

months of 1999 and 2000. It was opened for signature in December 2000. As of July 29, 2002, it has been signed by 141 States, and ratified by 16 States.

The purpose of the Convention is “to promote cooperation to prevent and combat transnational crime more effectively.”<sup>26</sup> It consists of the Convention itself, and of three protocols: one on the prevention, suppression and punishment of trafficking in persons, specially women and children, one against the smuggling of migrants, and one, which has not been finalized, against the illicit manufacturing of, and trafficking in firearms.

As in the case of the Financing of Terrorism Convention, the Palermo Convention contains provisions requiring States parties to criminalize certain acts, provisions on international cooperation and also provisions related to prevention. But the Palermo Convention contains one additional feature that the other one is lacking. That is a mechanism under which the parties agree to follow up on their own implementation of the Convention. By Article 32, the Parties establish a Conference of the Parties “to improve the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of the Convention.” The Conference of the Parties could function in much the same way as the FATF itself, since it has the power to require the parties to provide information on the manner in which they have implemented the provisions of the Convention, and to make recommendations to improve its implementation. Experience indicates that such follow-up

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<sup>26</sup> Palermo Convention, Article 1.

mechanisms can be powerful tools to ensure full and uniform implementation of international commitments by the States parties.<sup>27</sup>

### **Criminalization of Certain Acts**

The Convention applies to the prevention, investigation and prosecution of (i) offenses established by the Convention; (ii) other serious crimes, which are defined as conduct constituting an offense punishable by a maximum deprivation of liberty of at least four years of a more serious penalty; provided in each case that the offense is transnational in nature and involves an organized criminal group.<sup>28</sup> The offenses established in the Convention are: (i) participation in an organized criminal group; (ii) laundering of the proceeds of crime; (iii) corruption; and (iv) obstruction of justice. With respect to money laundering, the Convention follows the language of the 1988 Vienna Convention. In addition, it requires States to seek to apply money laundering to “the widest range predicate offenses,”<sup>29</sup> and in any case to include the offenses established by the Convention.<sup>30</sup>

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<sup>27</sup> Examples of such follow-up mechanisms are can be found in the related field of anti-corruption: the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions establishes the OECD Working Group on Corruption as the Convention’s follow-up mechanism; the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption refer to the Group of States Against Corruption (GRECO) established by the Council of Europe as the follow-up mechanism under these conventions. In May 2001, the States Parties to the Inter-American Convention against Corruption established a mechanism for follow-up on implementation of that Convention, which did not originally have such a mechanism.

<sup>28</sup> Palermo Convention, Article 3, paragraph 1. The Convention also applies to “protocol offenses”, *i.e.*, offenses established under one of the three protocols to the Convention.

<sup>29</sup> *Ibid.*, Article 6, paragraph 2 (a).

<sup>30</sup> *Ibid.*, Article 6, paragraph 2 (b).

The Convention does not refer specifically to crimes of terrorism, and the definition of ‘organized criminal group’ used in the Convention may lead to the exclusion of terrorist groups from the scope of the Convention. The Ad Hoc Committee of the General Assembly that negotiated the Convention appears to have been aware that this constituted a significant omission. In its *travaux préparatoires* the Committee noted “with deep concern the growing links between transnational organized crime and terrorist crimes” and expressed its strong conviction that that the Convention would constitute “an effective tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money-laundering, corruption, [...], and the growing links between transnational organized crime and terrorist crimes.”<sup>31</sup>

Questions concerning the applicability of the Convention to crimes of terrorism may be raised with respect to the criminalization provisions of the Convention, and with respect to the provisions dealing with international cooperation. With respect to criminalization, although the Convention applies only to the offenses of money laundering, corruption and obstruction of justice when the offense is transnational and involves an organized criminal group, the Convention requires the criminalization of these offenses, “independently of the transnational nature or the involvement of an organized criminal group” (except for the

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<sup>31</sup> United Nations General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum, Interpretative notes for the official record (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, paragraph 7. The Ad Hoc Committee also expressed the view that the Ad Hoc Committee of the General Assembly established to develop what was to become the Financing of Terrorism Convention ‘should take into consideration the provisions of the [Palermo] Convention (*Id.*)

offense of participation in an organized criminal group).<sup>32</sup> Thus the parties are required to criminalize money laundering, corruption and obstruction of justice domestically, without reference to an international element or to organized criminal group. These offenses will be incorporated in the domestic law of the States parties independently of any reference to an organized criminal group, and members of organized terrorist groups may be prosecuted under them as any other person. In the case of money laundering, the Convention requires that States parties apply it to “the widest range of predicate offenses”, including all serious crimes as the term is defined in Article 2 of the Convention (i.e., crimes punishable by a maximum deprivation of liberty of at least four years or a more serious penalty), as well as participation in an organized criminal group, corruption and obstruction of justice, as these offenses are defined in the Convention.<sup>33</sup>

The parties must also criminalize the offenses of participation in an organized criminal group set out in Article 5 (without reference to an international element). There are two such offenses, the first one having two separate definitions: (a) (i) agreeing with one or more persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit, or (ii) knowingly taking an active part in the criminal activities of an organized criminal group or in other activities of such a group in the knowledge that such participation will contribute to the achievement of the criminal aims of

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<sup>32</sup> Palermo Convention Article 34, paragraph 2.

<sup>33</sup> *Ibid.*, Article 6, paragraph 2. The Convention allows countries that use a list of offenses (rather than a generic definition of predicate offenses) to include at a minimum “a comprehensive range of offences associated with organized criminal groups” (*Ibid.*, paragraph 2 (b)).



the group; and (b) organizing, directing, aiding, abetting, facilitating or counseling the commission of serious crimes involving an organized criminal group.

The first definition does not actually use the expression ‘organized criminal group’, and simply requires that the objective of the agreement to commit a serious crime be to obtain a financial or other material benefit.<sup>34</sup> This definition would not seem to leave room for including agreements to commit terrorist crimes.

The other two definitions have in common that they make reference to the existence of an organized criminal group, and this term is defined in the Convention as requiring that the group pursues, directly or indirectly, a financial or other material benefit.<sup>35</sup> If this requirement is to be taken literally, it excludes organizations whose only objective is a political or religious one, which in turn implies that Article 5 does not extend to participation in organized terrorist groups.

However, there may be room for a wider reading of the expression ‘in order to obtain a financial or other material benefit’. The *travaux préparatoires* state that this expression “should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members

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<sup>34</sup> The Convention recognizes that in some jurisdiction, this definition requires the involvement of an organized criminal group, and allows this requirement to be included in the offense as it is criminalized in these jurisdictions.

<sup>35</sup> The Convention defines “organized criminal group” as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.” (Article 2 (a)).

of child pornography rings, the trading of children by members of paedophile rings, or cost-sharing among ring members.”<sup>36</sup> Under this reading, organized terrorist groups could be included in the scope of ‘organized criminal group’ for purposes of Article 5 even if their predominant motivation was religious or political, as long as the group engaged in some trading or other kind of material (*i.e.*, economic) activity, and Article 5 would apply at least with regard to the criminal activities related to such trading or other material activity of the organized criminal group.

### **International Cooperation**

As in the case of the Financing of Terrorism Convention, and to an even greater extent, the Palermo Convention establishes a detailed regime of international cooperation between the parties. The Convention contains detailed provisions on international cooperation with respect to confiscation and the disposal of confiscated proceeds of crime, extradition, mutual legal assistance, joint investigations and the use of special investigation techniques, and measures to enhance cooperation between law enforcement authorities, among others.

The provisions of the Convention relating to international cooperation apply to the crimes established under the Convention as well as to “all serious crimes”, provided that the crime with respect to which cooperation is requested or considered is transnational in nature and

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<sup>36</sup> *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its eleventh session, Addendum, Interpretative Notes for the official record (travaux préparatoires) on the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, United Nations Document A/55/383/Add. 1, page 4, paragraph 3.

that it involves an organized criminal group.<sup>37</sup> The definition of an organized criminal group for purposes of international cooperation is the same as for criminalization of participation in an organized criminal group. The scope for using the Convention as the basis for international cooperation in terrorism matters will depend on the interpretation the parties give to the “organized criminal organization” requirement. At a minimum, as in the case of criminalization, the Convention could be applied to crimes of terrorist organizations that provide them with a financial or other material benefit, independently of the ultimate religious or political motivation of the group. A broader view would hold that as long as an organized terrorist group engaged in some trading or other material activity, then it would fall under the definition of an organized criminal group, and all serious crimes involving such organized terrorist group would fall under the Convention.

### **Prevention of Money Laundering**

As is the case of the Convention for the Suppression of the Financing of Terrorism, the Palermo Convention sets out preventive measures to combat money laundering. And also as is the case of Convention for the Suppression of the Financing of Terrorism, the Palermo Convention divides its provisions into some that are mandatory, but of a rather general nature, and others that require States parties to consider implementing more detailed measures.

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<sup>37</sup> Palermo Convention, Article 3, paragraph 1.

The Convention requires parties to “institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering [...] in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions”<sup>38</sup> It also requires parties to ensure that their authorities dealing with money laundering have the ability to cooperate and exchange information at the national and international levels, and, to this end, requires them to consider the establishment of FIUs.<sup>39</sup> The Convention also requires State parties to consider taking measures to monitor cash movements across borders.<sup>40</sup> The Convention does not provide any more details to guide States parties in their implementation of these requirements, but it calls upon them to “use as a guideline the relevant initiatives or regional, interregional and multilateral organizations against money laundering”, which the *travaux préparatoires* identify more precisely as the 40 FATF recommendations and the work of the Caribbean Financial Action Task Force, the Commonwealth, the Council of Europe, the Eastern and Southern African Anti-Money-Laundering Group and the Organization of American States.<sup>41</sup>

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<sup>38</sup> *Ibid.*, Article 7, paragraph 1 (a). The text of Article 7 is set out in Annex II.

<sup>39</sup> *Ibid.*, Article 7, paragraph 1 (b).

<sup>40</sup> *Ibid.*, Article 7, paragraph 2.

<sup>41</sup> *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its eleventh session, Addendum, Interpretative Notes for the official record (travaux préparatoires) on the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, United Nations Document A/55/383/Add. 1, page 4, paragraph 17, *supra*, note 36.

### **C. Resolutions of the United Nations Security Council**

The Security Council of the United Nations has been involved in the fight terrorism since 1989, and it has dealt with terrorism related to the situation in Afghanistan since 1999. With regard to the financing of terrorism, the Security Council has established a system for identifying terrorist organizations related to the Taliban and Al-Qaida, and for freezing their assets.

In October 1999, the Security Council adopted a resolution on the situation in Afghanistan, requesting the Taliban government in Afghanistan to cease to provide sanctuary to terrorists and turn in Usama bin Laden, and requiring all member States to freeze funds controlled by the Taliban. By the same resolution, the Security Council established a committee to follow up on its sanctions against the Taliban.<sup>42</sup> In December 2000, the Security Council adopted a further resolution deciding that members of the United Nations would freeze the assets of Usama bin Laden and others designated by the committee. The resolution also broadened the mandate of the committee and requested it to maintain, among other things, lists of individuals and entities associated with Usama bin Laden, and called on all States to report to the Committee on the measures they imposed in response to the resolution.<sup>43</sup> And in the aftermath of the September 2001 terrorist attacks, the Security Council adopted a further resolution in which it established a new Committee on Counter-terrorism with broad powers

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<sup>42</sup> U.N. Security Council Res. 1267 (October 15, 1999).

<sup>43</sup> U.N. Security Council Res. 1333 (December 19, 2000).

to follow-up its decisions in this regard, and called on all members to report to the committee on the actions they had taken to implement them.<sup>44</sup>

These resolutions were taken under Chapter VII of the United Nations Charter, which deals with threats to international peace. Under Article 48 of the Charter, members of the United Nations are obligated to carry out the decisions adopted by the Security Council under Chapter VII of the Charter. As a result, all members of the UN are under an obligation to carry out the terms of the resolutions regarding the freezing of terrorist assets.

Through these actions, the Security Council established a mechanism by which internationally sanctioned lists of terrorist organizations are maintained, and United Nations member States are obligated to freeze their assets and report their actions to the Counter-terrorism Committee.

### **III. THE EIGHT FATF SPECIAL RECOMMENDATIONS AND THE DRAFT METHODOLOGY**

The Security Council resolutions described above constitute binding obligations of the members of the United Nations. The two conventions are only binding on the States that have become parties to them, once the conventions have come into force. While such conventions provide the greatest degree of formal commitment on the part of States, the fact that they only apply to countries that have taken all the steps to become parties to them limits their geographical scope, at least in the first years after their being opened for signature and

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<sup>44</sup> U.N. Security Council Res. 1373 (September 28, 2001).

accession. Moreover, the mechanisms for ensuring the implementation of these instruments vary. The implementation of the Security Council resolutions is closely monitored by the Anti-Terrorism Committee, and the Conference of the Parties may play a similar role with respect to the Palermo Convention. However, no such follow-up mechanism exists with respect to the Financing of Terrorism Convention.

The international community is also using other means to achieve its objectives of combating the financing of terrorism. These other means involve the use of methods that are formally less binding than the international instruments described above, but which have in common the possibility of wider geographical application, and greater flexibility (the process of modifying them is simpler than in the case of international conventions). The FATF is an example of such an informal mechanism, and so is the Draft Bank/Fund Methodology for Assessing Legal, Institutional and Supervisory/Regulatory Aspects of Anti-Money Laundering being developed by the Fund and other international organizations.

#### **A. The Eight FATF Special Recommendations on Terrorist Financing**

On October 29 and 30, 2001 the FATF met in Washington in an extraordinary Plenary and decided to expand its mandate beyond money laundering to include the financing of terrorism, and to also focus its energy and expertise on the world-wide effort to combat it. At the same meeting, the FATF adopted a new set of eight special recommendations on terrorist financing. Some of the recommendations reinforce actions taken in other fora. For example, the first recommendation calls on States to ratify and implement the International Convention for the Suppression of the Financing of Terrorism and to implement the resolutions

of the United Nations Security Council. Other recommendations cover new ground, such as the use of charities or traditional forms of money transfer to finance terrorism.

The Special Recommendations require countries to:

- I. Take immediate steps to ratify and implement the relevant United Nations instruments, which are stated to be the for the Financing of Terrorism Convention and the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly United Nations Security Council Resolution 1373.
- II. Criminalize the financing of terrorism, terrorist acts and terrorist organizations.
- III. Freeze and confiscate terrorist assets.
- IV. Report suspicious transactions linked to terrorism.
- V. Provide the widest possible range of assistance to other countries' law enforcement and regulatory authorities for terrorist financing investigations.
- VI. Impose anti-money laundering requirements on alternative remittance systems.
- VII. Strengthen customer identification measures in international and domestic wire transfers.
- VIII. Ensure that entities, in particular non-profit organizations, cannot be misused to finance terrorism.

Also in October 2001, the FATF asked its members to undertake a self-assessment of their implementation of the special recommendations, to be submitted by May 1, 2002. The same



invitation was later issued to all countries of the world. In March 2002, the FATF Secretariat issued a Self-assessment Questionnaire on the eight Special Recommendations, and a Guidance Note for the Special Recommendations.<sup>45</sup> In June 2002, the FATF was to initiate a process to identify jurisdictions that lack appropriate measures to combat terrorist financing and to discuss its next steps, including the possibility of counter-measures, for jurisdictions that do not adequately counter terrorist financing.

The inclusion of the Financing of Terrorism Convention and the Security Council Resolutions in the new recommendations will bring the matter of the coming into force and implementation of the Convention and of the implementation of the Security Council Resolutions within the framework of the assessment undertaken by the FATF of the measures taken by its members in implementation of its Special Recommendations. Since the resolutions of the Security Council are fully binding on the members of the United Nations, and their implementation is monitored by the Security Council's Anti-terrorism Committee, the actions of the FATF in this regard may be expected to be limited. With respect to the Financing of Terrorism Convention, however, its inclusion in the Special Recommendations will bring pressure on countries to ratify and implement it, and this may accelerate the rate at which FATF member countries ratify it, as well as enhance its full and uniform implementation by FATF member countries.

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<sup>45</sup> FATF Secretariat, *Self-Assessment Questionnaire: FATF Special Recommendations on Terrorist Financing*, and *Guidance Note for the Special Recommendations on Terrorist Financing and the Self-assessment Questionnaire*, March 27, 2002.

## **B. Financing of Terrorism Elements in the Draft Methodology**

As the preceding sections have showed, when the Fund, together with other organizations, started developing its program of assessment of the anti-money laundering measures of its member countries, it was not facing a void, but rather a significant web of relevant internationally developed criteria. At the outset, the Fund generally recognized the FATF 40 recommendations “as the appropriate international standard for combating money laundering,”<sup>46</sup> and these were adapted and made operational in the draft Methodology. When in October 2001, the FATF adopted the eight Special Recommendations on Terrorist Financing, those were integrated into the draft Methodology. The draft Methodology incorporates both sets of recommendations in a single document.<sup>47</sup> Compliance with the anti-financing of terrorism criteria of the Draft Methodology will be assessed together with the anti-money laundering aspects. This is to be contrasted to the FATF, which so far is treating its eight Special Recommendations on Terrorism Financing as separate from its earlier 40 Recommendations on Money Laundering.

Taking the Special Recommendations as the international standard, the Draft Methodology requires the criminalization of terrorism financing, broadens other criteria related to money laundering to include terrorism financing, and contains additional criteria reflecting specifically some of the Special Recommendations.

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<sup>46</sup> International Monetary Fund, International Monetary and Financial Committee (IMFC), communiqué of April 29, 2001, paragraph 14.

<sup>47</sup> References to the draft Methodology are to the April 2002 version (this document has not been published).

### **Criminalizing the Financing of Terrorism**

The most important consequence of the addition of terrorism financing to the concerns of the Draft Methodology is the requirement to criminalize it. The Draft Methodology states that money laundering and the financing of terrorism should be criminalized as serious offenses and that the definitions should be consistent with those of the Financing of Terrorism Convention.<sup>48</sup> To this end, the Draft Methodology requires countries to sign and ratify the Convention. But, and by contrast to the FATF, it also requires the signature and ratification of the Palermo Convention, presumably in view of the recognition of the ‘growing links’ between organized criminal organizations and terrorist crimes, and also because the Palermo Convention is the only global legal instrument which incorporates the principle that States parties should widen predicate offenses to include all serious crimes.

Paragraph 3.5 of the Draft Methodology requires that predicate offenses for money laundering extend to all serious crimes, including the financing of terrorism. The extension of predicate offenses to all serious crimes is consistent with the Palermo Convention.

The Draft Methodology does not require countries to respond to the United Nations Security Council Resolutions. The reason for this would appear to be that since the members of the United Nations are already under an international obligation to carry out these resolutions adopted under Chapter VII of the Charter of the United Nations, and the Security Council has

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<sup>48</sup> Draft Methodology, paragraph 3.1.

established an effective monitoring mechanism in the form of the Counter-terrorism Committee, there was no need to duplicate these efforts.

### **Broadening Other Criteria to Include a CFT Component**

Some of the Special Recommendations require that actions countries should take in response to the 40 FATF recommendation on money laundering be extended to cover terrorism financing. The Draft Methodology takes this requirement into account and the relevant criteria related to anti-money laundering measures are extended to include the financing of terrorism. For example, the definition of the suspicious transactions that financial service providers must report includes transactions suspected of being related to terrorism financing.<sup>49</sup> Similarly, with respect to freezing and confiscation of criminal assets, the requirement to be able to confiscate criminal assets includes assets used to finance terrorism.<sup>50</sup> The requirement for financial service providers to have appropriate internal procedures includes procedures to prevent their being used to finance terrorism.<sup>51</sup> The criteria of the Draft Methodology regarding international cooperation also cover terrorism financing as well as money laundering.<sup>52</sup>

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<sup>49</sup> *Ibid.*, paragraph 1c.4.

<sup>50</sup> *Ibid.*, paragraph 4.2.

<sup>51</sup> *Ibid.*, paragraph 1d.1.

<sup>52</sup> *Ibid.*, paragraphs 6.1 and 6.2.

### **Adding New Criteria**

In some cases, the Special Recommendation are reflected in specific criteria of the Draft Methodology. Two such cases may be mentioned.

*Alternative remittances.* Special Recommendation VI would require the licensing or registration of all persons or legal entities that provide money transmission services, even informal ones, and their submission to all the FATF Recommendations that apply to banks and non-bank financial institutions. Given the difficulty of implementing such a proposal in the short term, the Draft Methodology establishes a more modest immediate objective and requires that authorities pay enhanced scrutiny to entities susceptible of being used as conduits for criminal proceeds or financing of terrorism.<sup>53</sup>

*Non profit organizations.* Special Recommendation VIII requires countries to ensure that charitable organizations cannot be misused by terrorist organizations posing as legitimate entities, to exploit legitimate entities as conduits for terrorist financing, and to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organizations. The Draft Methodology broadens the requirement, and attempts to give it a more specific content. It broadens it to a larger group of entities, which consists of shell corporations, trust and company service providers charitable and not-for-profit organizations, or other similar entities. And it sharpens the requirement by requiring countries adopt laws

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<sup>53</sup> *Ibid.*, paragraph 2.4.

authorizing government officials to require these entities to produce names of their controlling owners/shareholders/trustees.<sup>54</sup>

#### **IV. CONCLUSION**

The Draft Methodology incorporates the criteria that have been developed internationally to prevent, detect and prosecute the financing of terrorism. These criteria are concerned with the repression of acts of financing terrorism under criminal law, and with the development of a regulatory and supervisory framework that will make it more difficult for terrorists to move funds in financial systems. The Draft Methodology incorporates criteria related to the financing of terrorism into a single document that also includes criteria related to money laundering. In this way, measures taken by countries related to the financing of terrorism will be assessed at the same time, and using the same methodology document, as measures taken related to money laundering.

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<sup>54</sup> *Ibid.*, paragraph 2.5.

## ANNEX I

### THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

#### PROVISIONS ON PREVENTION OF TERRORISM FINANCING

##### *Article 18*

1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:

(a) Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;

(b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

(i) Adopting regulations prohibiting the opening of accounts, the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;

(ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity;

(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic and international.

2. States Parties shall further cooperate in the prevention of offences set forth in article 2 by considering:

(a) Measures for the supervision, including, for example, the licensing, of all money-transmission agencies;

(b) Feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

3. States Parties shall further cooperate in the prevention of the offences set forth in article 2 by exchanging accurate and verified information in accordance with their domestic law and coordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in article 2, in particular by:

(a) Establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in article 2;

(b) Cooperating with one another in conducting inquiries, with respect to the offences set forth in article 2, concerning:

(i) The identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences;

(ii) The movement of funds relating to the commission of such offences.

4. States Parties may exchange information through the International Criminal Police Organization (Interpol).



## **ANNEX II**

### **PALERMO CONVENTION**

#### **PROVISIONS ON PREVENTION OF MONEY LAUNDERING**

##### *Article 7*

##### *Measures to combat money-laundering*

1. Each State Party:

(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

(b) Shall, without prejudice to articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

4. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.