

THE SOURCES OF INTERNATIONAL NORMS AND STANDARDS ON THE SUPPRESSION OF THE FINANCING OF TERRORISM

The main sources of international obligations in the combating of the financing of terrorism are the Resolutions of the United Nations Security Council, and in particular, Resolution No. 1373 (2001) (hereinafter “the Resolution”) and the earlier resolutions requiring the freezing of assets of listed terrorists, and the International Convention for the Suppression of the Financing of Terrorism (hereinafter “the Convention”). In addition to these formal sources of international obligations, the Financial Action Task Force (FATF) issued a set of eight Special Recommendations on Terrorist Financing (hereinafter “the Special Recommendations”) on October 30, 2001 and invited all countries to implement them and to report to the FATF on their implementation.

There is considerable overlap among these various obligations and standards. For example, both the Resolution and the Special Recommendations call for countries to become parties to the Convention and to implement its provisions internally. Similarly, the Resolution, the Convention, and the Special Recommendations each deal with aspects of the freezing, seizure, and confiscation of terrorist assets. The Convention requires states parties to consider adopting some of the standards contained in the FATF 40 Recommendations on Money Laundering. Apart from these and other areas of overlap, each instrument contains provisions not found in the others. For example, the Special Recommendations contain references to alternative remittance systems, wire transfers and non-profit organizations—three topics that are not covered by the Resolution and the Convention.

The three main sources of international obligations and standards, namely the Convention, the Resolution and the FATF Special Recommendations, will be examined in turn.

The International Convention for the Suppression of the Financing of Terrorism

The International Convention for the Suppression of the Financing of Terrorism is the result of a French initiative strongly supported by the Group of Eight (G-8).⁹ In May 1998, the Foreign Ministers of the G-8 identified the prevention of terrorism fund-raising as a “priority [area] for further action.”¹⁰ In the fall of 1998, France initiated the negotiations of the Convention, and proposed a text to the United Nations. In December 1998, the General Assembly decided that the Convention would be elaborated by the ad hoc committee established by Resolution 51/210.¹¹ The text of the Convention was adopted by the General Assembly on December 9, 1999.¹² The Convention has been signed by 132 states, and, as of April 30, 2003, it was in force among 80 states.

The Convention contains three main obligations for states parties. First, states parties must establish the offense of financing of terrorist acts in their criminal legislation. Second, they must engage in wide-ranging cooperation with other states parties and provide them with legal assistance in the matters covered by the Convention. Third, they must enact certain requirements concerning the role of financial institutions in the detection and reporting of evidence of financing of terrorist acts. Table 1, below, sets out a list of the substantive provisions of the Convention.

⁹ See Clifton M. Johnson, “Introductory Note to the International Convention for the Suppression of the Financing of Terrorism,” 39 ILM 268 (2000).

¹⁰ *Conclusions Of G8 Foreign Ministers*, May 1998, paragraph 28, http://www.dfait-maeci.gc.ca/g8fmm-g8rmae/bir_g8concl-en.asp.

¹¹ Measures to Eliminate International Terrorism, G.A. Res. 53/108, U.N. GAOR, 53rd Sess., 83rd mtg. Supp. No. 49, at para. 12, U.N. Doc. A/Res/53/108 (1999).

¹² International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. GAOR, 54th Sess., 76th mtg., Supp. No. 49, U.N. Doc. A/Res/53/108 (1999) [hereinafter “Convention”].

6 SOURCES OF INTERNATIONAL NORMS AND STANDARDS

Table 1. Summary Contents of the Convention

Article	Contents
Article 4	Criminalize the financing of terrorism (FT) as defined in Articles 2 and 3.
Article 5	Establish liability (criminal, civil, or administrative) of corporations for FT.
Article 6	Exclude excuses for FT based on political, philosophical, etc., considerations.
Article 7	Establish jurisdiction over FT offenses.
Article 8	Establish power of state to identify, detect, freeze, or seize assets used in committing FT offenses.
Articles 9, 17, and 19	Establish procedure for detention of persons suspected of FT (including notification of other jurisdictions).
Article 10	Implement principle of "prosecute or extradite."
Article 11	Implement provisions on extradition.
Articles 12–15	Implement provisions on mutual cooperation and extradition.
Article 16	Implement provisions on transfer of detainees and prisoners.
Article 18, 1	Take FT prevention measures, including:
(a)	Prohibit illegal encouragement, instigation, organization, or engaging in FT offenses.
(b)	Require financial institutions to utilize the most efficient measures available for customer identification, pay special attention to suspicious transactions, and report suspicious transactions, and, for this purpose, consider regulations on unidentified account holders and beneficiaries; on documentation for opening accounts for legal entities; on suspicious transaction reporting; and on record retention.
Article 18, 2	Consider:
(a)	Supervision measures, including, for example, licensing of all money transmission agencies; and
(b)	Feasible measures to detect or monitor cross-border transportation of cash.
Article 18, 3	Establish channels for exchange of information between competent agencies and services.
(a)	
(b)	Establish procedures for cooperating with other parties in enquiries on (i) persons and (ii) funds suspected of FT involvement.
Article 18, 4	Consider exchanging such information through Interpol.

Criminalization of Financing of Terrorist Acts

The Convention requires each party to adopt measures (a) to establish under its domestic law the offenses of the financing of terrorist acts set out in the Convention, and (b) “to make [these] offences punishable by appropriate penalties which take into account the grave nature of the offences.”¹³ Financing of terrorism is defined as an offense established when a person “by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they will be used in full or in part, in order to carry out [a terrorist act as defined in the Convention].” The mental element and material elements of the offense will be discussed in turn.

The mental element

There are two aspects to the mental element of the financing of terrorism as defined in the Convention. First, the act must be done willfully. Second, the perpetrator must have had either the intention that the funds be used to finance terrorist acts, or the knowledge that the funds would be used for such purposes. In this second aspect, intent and knowledge are alternative elements. The Convention does not provide further information on these two aspects of the mental element, and therefore they are to be applied in accordance with the general criminal law of each state party.

The material elements

The definition of the offense of terrorism financing in the Convention contains two main material elements. The first is that of “financing.” Financing is defined very broadly as *providing or collecting funds*. This element is established if a person “by any means, directly or indirectly, unlawfully and willfully, provides or collects funds [...]”¹⁴

The second material element relates to terrorist acts, which are defined in the Convention by reference to two separate sources. The first source is a list of nine international treaties that were opened for signature between 1970 and 1997, and which require the parties to them to establish various terrorism offenses in their legislation. The list is set out in the Annex to the Convention, and is reproduced in Box 1, below.¹⁵ The Convention allows a state party to exclude a treaty from the list, but only if the state is not a party to it. The exclusion ceases to have effect when the state becomes a party to the treaty. Conversely, when a state party ceases to be a party to one of the

¹³ *Id.* Art. 4.

¹⁴ *Id.* Art. 2, para. 1.

¹⁵ See *infra* Annex to the Convention, Appendix II, p. 93.

8 SOURCES OF INTERNATIONAL NORMS AND STANDARDS

listed conventions, it may exclude it from the list of treaties applicable to it under the Convention.¹⁶

Box 1. The Annex to the Convention

The Annex to the Convention sets out the list of the nine international treaties that contain terrorist crimes, as follows:

- (1) Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on December 16, 1970.
- (2) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on September 23, 1971.
- (3) 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 December 14, 1973.
- (4) International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979.
- (5) Convention on the Physical Protection of Nuclear Material, adopted at Vienna on March 3, 1980.
- (6) 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 February 24, 1988.
- (7) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988.
- (8) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988.
- (9) International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997.

The second source is a “self-contained” definition of terrorist acts set out in the Convention itself. It defines terrorist acts 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.”¹⁷ Thus, under the

¹⁶ Convention, *supra* note 12, Art. 2, paras. 2(a) and (b).

¹⁷ *Id.* Art. 2, para. 1(b).

general definition of the Convention, an act is an act of terrorism if it meets two conditions:

- It is intended to cause death or serious bodily injury to a civilian or a person not taking an active part in the hostilities in a situation of armed conflict; and
- Its purpose is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

Other aspects of the criminalization provisions

Other aspects of the definition of the offenses set out 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.¹⁸
- 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.¹⁹
- 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 either (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 made in the knowledge of the intention of the group to commit an offense under the Convention.²⁰
- Attempts to commit the acts are also criminalized in the same way as the offenses themselves.²¹
- The Convention does not apply where the offense was committed in a single state, the alleged offender is a national of that state and is present in its territory, and no other state has a basis under the Convention to exercise jurisdiction over the alleged offender.²²

¹⁸ *Id.* Art. 2, para. 3.

¹⁹ *Id.* Art. 2, para. 5.

²⁰ *Id.* Art. 2, para. 5(c).

²¹ *Id.* Art. 2, para. 4.

²² *Id.* Art. 3.

10 SOURCES OF INTERNATIONAL NORMS AND STANDARDS

- 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.²³
- The financing of terrorism offense may not be excused by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature.²⁴

A state party must assume jurisdiction over the offenses at least when the offense is committed in its territory, on board a vessel flying its flag or an aircraft registered under its laws, and when it is committed by one of its nationals. A state may also take jurisdiction in other circumstances. A state that does not extradite an alleged perpetrator to another state party on the other party's request must, without exception, submit the case to its competent authorities for the purpose of prosecution.²⁵

International Cooperation

To ensure the greatest degree of cooperation between the parties with respect to the offenses set out in the Convention, the Convention contains detailed provisions on mutual legal assistance and extradition. These provisions tend to go further than the nine conventions listed in the Annex in what they require from states in providing each other mutual legal assistance and extradition. Indeed, the establishment of a uniform, detailed, and thorough framework for international cooperation in the area of terrorism financing may well be one of the most important achievements of the Convention.

Mutual legal assistance

The states parties undertake to give each other “the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences [established pursuant to the Convention].”²⁶ Requests for legal assistance under the Convention may not be refused on the grounds of bank secrecy, and the offenses set out in it are not to be considered for purposes of extradition or mutual legal assistance as fiscal²⁷ or political²⁸ offenses.

²³ *Id.* Art. 5, para. 1.

²⁴ *Id.* Art. 6.

²⁵ *Id.* Arts. 7 and 10.

²⁶ *Id.* Art. 12, para. 1.

²⁷ *Id.* Art. 13.

²⁸ *Id.* Art. 14.

Extradition

The Convention contains detailed provisions on the obligations of states parties with respect to extradition, similar to those found in most of the other counterterrorism conventions. First, the offenses established by the Convention are deemed to be extraditable offenses in any extradition treaty existing between any states parties before the coming into force of the Convention, and the parties undertake to include these offenses in any such treaty to be concluded between them in the future.²⁹ Second, when a party that makes extradition conditional upon the existence of a treaty receives a request for extradition from a country with which it does not have such a treaty, the requested state may, at its option, consider the Convention as a legal basis for granting extradition for any offense established under the Convention.³⁰ Third, states parties that do not make extradition conditional upon the existence of a treaty are required to recognize the offenses established under the Convention as extraditable.³¹ Fourth, for the purposes of extradition, to the extent necessary, the offenses are to be treated as having been committed not only in the territory of the state in which they occurred, but also in the territory of the state that has established jurisdiction under Article 7, paragraphs 1 and 2 of the Convention.³² This provision is intended to ensure that extradition is not denied on the grounds that the offense has not been committed in the territory of the requesting state. Fifth, provisions of all extradition treaties and arrangements between states parties are deemed to have been modified as between these parties to the extent that they are incompatible with the Convention.³³

The Convention also implements the principle of *aut dedere aut judicare* (either prosecute or extradite) with regard to the offenses set out in it. When a state party receives information that an offender or alleged offender is present in its territory, the state party must investigate the facts contained in the information. Upon being satisfied that the facts so warrant, 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.³⁴ Unless it agrees to

²⁹ *Id.* Art. 11, para. 1.

³⁰ *Id.* Art. 11, para. 2.

³¹ *Id.* Art. 11, para. 3.

³² *Id.* Art. 11, para. 4.

³³ *Id.* Art. 11, para. 5.

³⁴ *Id.* Art. 9, paras. 1 and 2.

12 SOURCES OF INTERNATIONAL NORMS AND STANDARDS

extradite the person to the state party that claims jurisdiction, the state party must, without exception, submit the case to prosecution authorities.³⁵

Preventive Measures

The criminalization of the financing of terrorism is mandatory in the Convention. By contrast, only a few general provisions of the Convention dealing with preventive measures, which are set out in Article 18, are mandatory. 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 fact that the preventive measures are borrowed from the FATF 40 Recommendations, which remain the international standard for money laundering, and which are not legally binding. Nevertheless, the Convention sets out a general duty of states parties to require financial institutions and other financial intermediaries to take measures necessary to identify their customers (including the beneficiaries of accounts), to pay special attention to unusual or suspicious transactions, and to report suspicious transactions.

The states 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 offences within or outside their territories.”³⁶ Such measures include (a) “[m]easures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of the offences [established in the Convention],”³⁷ and (b) “[m]easures 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.”³⁸

For this purpose, the states parties are required to *consider* adopting rules that are part of the FATF 40 Recommendations, including:

- prohibiting the opening of accounts, the holders or beneficiaries of which are unidentified or unidentifiable, and adopting measures to ensure that

³⁵ *Id.* Art. 10, para. 1.

³⁶ *Id.* Art. 18, para. (1).

³⁷ *Id.* Art. 18, para. (1) (a).

³⁸ *Id.* Art. 18, para. (1) (b).

financial institutions verify the identity of the real owners of such transactions;

- with respect to 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.³⁹

Becoming a Party to the Convention

The Convention was open for signature by all states from January 10, 2000 to December 31, 2001. During that period, 132 states signed it. States that signed the Convention may become parties by presenting an instrument of ratification, acceptance, or approval to the Secretary General of the United Nations.⁴⁰ States that did not sign the Convention while it was open for signature may become parties to it by presenting an instrument of accession to the Secretary General.⁴¹

³⁹ *Id.* Art. 18, para. 3(a).

⁴⁰ *Id.* Art. 25, paras. 1 and 2.

⁴¹ *Id.* Art. 25, para. 3.

United Nations Security Council Resolutions on Terrorism Financing

Background

The Security Council has seized itself of the phenomenon of international terrorism as a result of several crises it had to face. Among the crises that have prompted the Security Council to deal with this issue are attacks against civilian aircraft, airports, and cruise ships, and political assassinations.⁴² Box 2 sets out the main resolutions of the Security Council dealing with the financing of terrorism.

Box 2. Selected Security Council Resolutions on Terrorist Financing

1267 (1999) of October 15, 1999 on the freezing of the funds and other financial resources of the Taliban.

1333 (2000) of December 19, 2000 on the freezing of the funds and other resources of Usama bin Laden and the Al-Qaida organization.

1363 (2001) of July 30, 2001 on the establishment of a mechanism to monitor the implementation of measures imposed by Resolutions 1267 (1999) and 1333 (2000).

1373 (2001) of September 28, 2001 on threats to international peace and security caused by terrorist acts, and mandating the formation of the Counter-Terrorism Committee.

1377 (2001) of November 12, 2001 calling upon states to implement fully Resolution 1373 (2001).

1390 (2002) of January 16, 2002 effectively merging the freezing measures of Resolutions 1267 (1999) and 1333 (2000).

1452 (2002) of December 20, 2002 allowing for some exclusions to the freezing requirements of Resolutions 1267 (1999) and 1333 (2000) to cover expenses for basic expenses, including food, rent, legal services, and charges for routine maintenance of assets, and for extraordinary expenses after approval of the "1267 Committee."

1455 (2003) of January 17, 2003 on measures to improve the implementation of the freezing measures of Resolutions 1267 (1999), 1333 (2000), and 1390 (2002).

Notes: The summary descriptions are not part of the resolutions. A more complete list is available on the Web at <http://www.un.org/terrorism/sc/htm>.

⁴² See Bassiouni, *supra* note 1, pp. 1–3 for a summary of the 24 resolutions, 6 presidential statements, and 2 verbatim records issued by the Security Council dealing with the problem of terrorism through the end of 2001.

Two aspects of the Security Council's approach to terrorism may be mentioned in the present context. First, the Security Council has recently characterized acts of terrorism as threats to international peace and security. Resolution 1373 (2001) expresses this characterization in very broad terms, stating that the terrorist acts of September 11, 2001, "*like any act of international terrorism*, constitute a threat to international peace and security" (emphasis added).⁴³ The legal consequence of characterizing acts of terrorism as threats to international peace and security is that when the Security Council establishes such characterization, it is entitled to take, if necessary, the collective measures (or "sanctions") envisioned by Chapter VII of the United Nations Charter. The measures that the Council decides to take in these circumstances are mandatory for all the members of the United Nations by virtue of Articles 25 and 48 of the Charter.⁴⁴

Second, the collective measures adopted by the Security Council in reaction to terrorism as a threat to international peace and security require states to take action against individuals, groups, organizations, and their assets. Traditionally, the Security Council had directed the contents of its decisions toward the acts and policies of states.⁴⁵

Resolution 1373 (2001) incorporates these elements of the Security Council's approach, but it is unique in a more profound way, given its quasi-legislative character.⁴⁶ Although the Resolution was adopted in reaction to

⁴³ Earlier resolutions declared specific acts of terrorism of which the Security Council was seized as threats to peace and security. Resolution 1373 (2001) is the first one to declare that *any* act of terrorism represents such a threat. A similar statement was made in Resolution 1040 (2002) regarding the taking of hostages in a theater in Moscow on October 23, 2002.

⁴⁴ Article 25 of the Charter states that: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Article 48 states: "1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. 2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members." Charter of the United Nations (1945).

⁴⁵ See, e.g., Resolution 1171 (1998), U.N. SCOR, 53rd Sess., 3889th mtg., U.N. Doc. S/INF/54 (1998) regarding the measures taken against the former leading members of the military junta in Sierra Leone; Resolution 1127 (1997) U.N. SCOR, 52nd Sess., 3814th mtg., U.N. Doc. S/INF/53 (1997) regarding the measures taken against the senior officials of the Angolan movement UNITA; Resolution 917 (1994) U.N. SCOR, 49th Sess. 4376th mtg., at 47, U.N. Doc. S/INF/50 (1994) regarding the measures taken against the Haitian military and the participants to the coup d'Etat of 1991; and Resolution 942 (1994) U.N. SCOR, 49th Sess. 3428th mtg., at 30, U.N. Doc. S/INF/50 (1994) concerning the measures of sanctions against the assets of any entity in the areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces.

⁴⁶ See Paul Szasz, "The Security Council Starts Legislating," 96 Am. JI Int. Law 901 (2002) and Nicolas Angelet, "Vers un renforcement de la prévention et la répression du
(continued)

the terrorist attacks of September 11, 2001 in the United States, the measures it includes are much broader in their terms and are not limited to the identification and punishment of the alleged perpetrators of the September 2001 attacks. These measures are general in character, and are directed at the prevention, prosecution, and punishment of all acts of financing of terrorism. Similarly, with respect to the freezing of assets of terrorists, no list of individuals or entities is mentioned or referred to in the Resolution. The Resolution requires the freezing of the assets of terrorists in general, leaving unchanged the special regime for requiring the freezing of assets of listed terrorists established under earlier resolutions of the Security Council.⁴⁷

Contents of Resolution 1373 (2001)

While decisions taken by the Security Council under Chapter VII of the Charter are binding on all members, the exact nature of the obligations they impose depends on the language used in the resolutions. It is generally accepted that decisions of the Security Council are mandatory while its recommendations (e.g. when the Council “calls upon” member states) do not have the same legal authority. Of the three operative paragraphs of the Resolution addressed to states, the first two are expressed as binding decisions of the Security Council, while the third paragraph is expressed as a recommendation. In practice, however, the distinction may not be significant for purposes of drafting implementing legislation, since the Security Council has expressed its determination to take all the necessary steps in order to ensure the “full implementation” of the Resolution,⁴⁸ and as the purpose of the Counter-Terrorism Committee established by the Resolution is to monitor the implementation of the resolution as a whole.⁴⁹

Table 2, below, sets out in summary form the contents of the three operational paragraphs of the Resolution addressed to states. The Resolution takes a very broad approach to the suppression of the financing of terrorism, and only those parts of the Resolution dealing directly with the topic are discussed in this handbook.⁵⁰

terrorisme par des moyens financiers et économiques?” in Catherine Bannelier et al. (ed.), *Le Droit international face au terrorisme, après le 11 septembre 2001*, CEDIN-Paris I, Cahiers internationaux no. 17 (2003), Paris, Pedonne, p. 219.

⁴⁷ Some elements of Resolution 1373 (2001) were also contained in the earlier Resolution 1269 (1999) U.N. SCOR, 54th Sess. 4053rd mtg., U.N. Doc. S/INF/55 (1999), but that Resolution had not been adopted under Chapter VII of the Charter, and had thus no binding character.

⁴⁸ Resolution *supra* note 5, para. 8.

⁴⁹ *Id.* para. 6.

⁵⁰ For a discussion of the parts of the Resolution not discussed in this Handbook, see Commonwealth Secretariat, *Report of the Expert Working Group on Legislative and Administrative Measures to Combat Terrorism* (2002) (unpublished manuscript available from the Secretariat).

Table 2. Resolution No. 1373 (2001) and Corresponding Provisions of the Convention

Resolution 1373 (2001)	Convention	Comments
1. The Security Council decides that all states shall (a) prevent and suppress the financing of terrorist (FT) acts;	Purpose of the Convention is similar.	
(b) criminalize the provision or collection of funds for terrorist acts by their nationals or in their territories;	Art. 4 requires that states parties criminalize the financing of terrorism as defined in the Convention.	Implementing the Convention would satisfy this requirement of the Resolution.
(c) freeze assets of terrorists and of entities owned or controlled by them and of persons acting on their behalf; and	Art. 8 requires that states parties take appropriate steps to identify, detect, freeze, seize, or forfeit assets used in committing FT offenses.	States are to freeze assets of listed terrorists under Resolutions 1267, 1333, and 1390.
(d) prohibit their nationals and residents from making funds available to persons who commit terrorist acts.	The conduct described in the Resolution is distinct from the financing of terrorist acts criminalized under the Convention.	
2. Decides that all states shall		Implementation of paragraph 2 requires mainly administrative measures, and is not discussed in this handbook (except paragraph 2(f)).
(a) not provide support to those who commit terrorist acts;		
(b) take steps to prevent commission of terrorist acts, including by provision of early warning to other states by exchange of information;	Art. 18 (2) requires states to prevent FT by considering exchanging information between counterpart agencies and conducting inquiries.	
(c) deny safe haven to those who finance, plan, support, or commit terrorist acts or provide safe havens;		

18 SOURCES OF INTERNATIONAL NORMS AND STANDARDS

Resolution 1373 (2001)	Convention	Comments
(d) prevent use of their territory to finance, plan, facilitate, or commit terrorist acts;	Art. 18 (1)(a) requires states to cooperate to prevent their territories from being used to finance terrorists.	
(e) ensure that those who participate in financing, planning, preparation, or perpetration of terrorist acts are brought to justice;	Articles 9, 10, and 17 have a similar purpose.	
(f) afford one another the greatest measure of assistance in connection with criminal investigations or proceedings relating to the financing or support of terrorist acts; and	With respect to the financing of terrorist acts, Art. 11 (Extradition) and Arts. 12–15 (Mutual legal assistance and extradition) cover the same matter.	See Chapter 4, page 60 for discussion of mutual legal assistance requirements.
(g) prevent movement of terrorists by effective border controls.	Art. 18 (2)(b) requires states to consider measures to detect or monitor physical cross-border transportation of cash and certain bearer instruments.	
3. Calls upon states to (a) find ways of intensifying and accelerating exchange of information;	Arts. 12 and 18 (3) contain related FT prevention requirements.	Except for the notes below in this table, the contents of paragraph 3 are not discussed in this handbook.
(b) exchange information to prevent the commission of terrorist acts;	Arts. 12 and 18 (3) contain related FT prevention requirements.	
(c) cooperate to prevent and suppress terrorist attacks;	Arts. 12 and 18 (3) contain related FT prevention requirements.	

Resolution 1373 (2001)	Convention	Comments
(d) become parties to relevant conventions including the SFT Convention;		The Convention and the 9 treaties listed in its Annex are among the 12 conventions considered "relevant" by the Terrorism Committee.*
(e) increase cooperation and fully implement relevant international conventions and Security Council Resolutions 1269 (1999) and 1368 (2001);		The reference to "relevant conventions" includes the Convention.
(f) take measures to ensure that asylum seekers are not planning, facilitating, or participating in the commission of terrorist acts; and		
(g) ensure that (i) refugee status is not abused by terrorists; and (ii) that claims of political motivation are not recognized as grounds for refusing requests for extradition of alleged terrorists.	Art. 14 of the Convention contains language similar to (ii).	
<p>* In addition to the Convention and the nine treaties listed in its Annex, the Counter-Terrorism Committee takes the view that "relevant conventions" include two other conventions: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963 and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991. Neither of these conventions are "criminalization" conventions in the same sense as the nine treaties listed in the Annex to the Convention. The first refers to offenses under the penal laws of the states parties, and the second requires states parties to prohibit and prevent the movement into and out of their territory of unmarked explosives.</p>		

The obligations of states under the Resolution may be grouped for purposes of presentation under the two headings of setting international norms on combating the financing of terrorism, and freezing assets of terrorists.

Setting international norms on combating the financing of terrorism

The Resolution contains two separate requirements with regard to combating the financing of terrorism, one relating to the financing of terrorist acts, the other relating to the financing of terrorists. The first requirement is contained in paragraphs 1(a) and 1(b) of the Resolution. In paragraph 1(a), the Resolution requires states to “prevent and suppress the financing of terrorist acts.” In paragraph 1(b), the Resolution requires states to “[c]riminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.”⁵¹ The language of paragraph 1(b) is very close to that of the Convention. Under paragraph 3(d) of the Resolution, the Security Council “calls upon states” to become parties to the Convention. States must also make sure that such terrorist acts are established as a serious criminal offense in their domestic law and that the criminal punishment associated with this offense reflects its seriousness.⁵² The Convention contains similar provisions. Thus, paragraphs 1(a) and 1(b) of the Resolution appear to be references to the Convention.

The second requirement is contained in paragraph 1(d) of the Resolution, which requires states to “prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.” This part of the Resolution sets out an autonomous obligation, not contained in the Convention, as the Convention does not deal with the question of financial support to terrorists or terrorist entities.

States are also bound by other obligations in respect of terrorism, including the obligation to refrain from providing support to terrorists, to take steps to prevent terrorist acts, to deny safe haven to terrorists and those who finance terrorist acts, to bring such persons to justice, to afford other states the greatest measure of assistance in respect of criminal investigations or pro-

⁵¹ Resolution, *supra* note 5, para. 1(b).

⁵² *Id.* para. 2(e).

ceedings, and to prevent the movement of terrorists or terrorist entities by effective border controls and other measures.⁵³ The Resolution also calls upon states to intensify and accelerate the exchange of information on terrorist movements and actions, on administrative and judicial matters to prevent the commission of terrorist acts, to cooperate through bilateral and multilateral arrangements and agreements to prevent, suppress, and prosecute terrorist acts, to become parties to the “relevant” global conventions against terrorism (including the Convention), to fully implement these conventions and Security Council Resolutions 1269 (1999)⁵⁴ and 1368 (2001),⁵⁵ to ensure that asylum seekers are not planning, facilitating, or participating in terrorist attacks, and to ensure that refugee status is not abused by terrorists and that claims of political motivation are not recognized as grounds for refusing requests for extradition of alleged terrorists.⁵⁶

Freezing assets of terrorists and terrorist organizations

The Resolution imposes on states an obligation to freeze without delay funds and other financial assets of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts.⁵⁷ The obligation extends to entities owned or controlled directly or indirectly by such persons. The Resolution does not mention the earlier resolutions of the Security Council that established the obligation to freeze the assets of named individuals and entities, nor does it refer to any list of such individuals or entities issued under the earlier resolutions. As a result, the general obligation to freeze assets of terrorists under the Resolution is independent of the regime established by these earlier resolutions. The general obligation to freeze terrorist assets under the Resolution is similar to the obligation contained in the Convention to take measures for the freezing of funds used or allocated to commit terrorist acts.⁵⁸ The Resolution and the Convention give considerable latitude to states in the design of an appropriate freezing, seizure, and confiscation regime.

⁵³ *Id.* para. 2(a) through (g).

⁵⁴ U.N. SCOR, 54th Sess. 4053rd mtg., U.N. Doc. S/INF/55 (1999) [calling upon states to cooperate in the prevention and suppression of terrorist acts].

⁵⁵ U.N. SCOR, 56th Sess. 4370th mtg., U.N. Doc. S/INF/57 (2001) [calling upon states to redouble their efforts to prevent and suppress acts of terrorism].

⁵⁶ Resolution, *supra* note 5, para. 3(a) through (g).

⁵⁷ *Id.* para. 1(c).

⁵⁸ Convention, *supra* note 12, Art. 8, paras. 1 and 2. The Convention is broader than the Resolution on this point, as it requires that states parties take measures for the *identification, detection, freezing, and confiscation* of funds used or allocated for the purpose of committing the terrorist acts that states are required to criminalize under the Convention, while the Resolution requires only the *freezing* of assets of terrorists and those who support them.

22 SOURCES OF INTERNATIONAL NORMS AND STANDARDS

In view of the wide language used in paragraph 1(c), the Counter-Terrorism Committee has taken the position that the Resolution requires the freezing of the assets of persons and entities suspected of terrorism, whether they are included in lists established by the Security Council or are identified as such by states.⁵⁹ However, given the lack of uniformity in the definition of terrorism among states, the varying degrees of legal protection given to those whose name appears on such lists, and the fact that states are often reluctant to provide full factual information on which their suspicions are based, questions have been raised with regard to the obligation to freeze the assets of suspected terrorists identified by states.⁶⁰ The listing of suspected terrorists by the Security Council, under internationally agreed procedures, alleviates these concerns.

Under the earlier resolutions 1267 (1999) and 1333 (2000), the Security Council, acting under Chapter VII of the Charter, decided that members of the United Nations would freeze the assets of the Taliban and of Usama bin Laden, respectively, and entities owned or controlled by them, as designated by the “Sanctions Committee” (now called the 1267 Committee)⁶¹ established under each of the resolutions. By contrast to Resolution 1373 (2001), these resolutions establish an “autonomous” asset-freezing regime under which lists of persons and entities whose funds are to be frozen are issued and modified from time to time under the authority of the Security Council. The 1267 Committee has the same composition as the Security Council. It has issued lists of individuals and entities belonging or associated with the Taliban and the Al-Qaida organization.⁶² On the basis of Resolution 1390 (2002),⁶³ one consolidated list is now issued.

⁵⁹ Letter from Jeremy Wainright, Expert Adviser, to the Chairman of the Counter-Terrorism Committee (November 12, 2002), endorsed by the Counter-Terrorism Committee on November 24, 2002. In view of this, many states now base their response to the freezing decisions of the Security Council on Resolution 1373 (2001), rather than on the earlier resolutions.

⁶⁰ See Kern Alexander, “International Legal Developments” in “The Funding of Terror: The Legal Implications of the Financial War on Terror,” 6.3 *Journal of Money Laundering Control* 201, 212–13 (2003).

⁶¹ Security Council Committee Established Pursuant to Resolution 1267 (1999), *Guidelines of the Committee for the Conduct of Its Work*, para. 1 (November 7, 2002).

⁶² The latest status of the list is available on the website of the Sanctions Committee established pursuant to Resolution 1267 (1999), <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>.

⁶³ U.N. SCOR, 57th Sess. 4452nd mtg., U.N. Doc. S/INF/58 (2002). The text is set out in Appendix IV of this handbook.

The 1267 Committee's guidelines for the conduct of its work contain detailed provisions on the manner in which additions and deletions are made to the list of persons and entities whose assets are to be frozen. The designations are made by the Committee, in closed session, on the basis of the information provided by the states members of the United Nations. To the extent possible, proposed additions should include "a narrative description of the information that forms the basis or justification for taking action."⁶⁴ Individuals and entities can seek to be removed from the list by following the procedure established by the Committee. If it wishes to be removed from the list, an individual or entity must petition the government of residence or citizenship to request a review of the case. If the government to which the petition is submitted endorses the petition, it must try to reach an agreement for the de-listing with the original designating government. In the absence of an agreement, the petitioned government may refer the case to the Committee (and, later, to the Security Council). Updated lists, including lists of names removed from the list, are sent to UN members without delay. The list is also posted on the website of the 1267 Committee.

The FATF Special Recommendations on Terrorist Financing

Background

The FATF was established by the Group of Seven Summit held in Paris in 1989. It issued its first set of recommendations on combating money laundering in 1990 and modified them in 1996. The FATF has also issued Interpretative Notes which amplify or clarify some of the recommendations. A further review of the recommendations is currently underway. As of April 30, 2003, the FATF had 31 members. Members of the FATF agree to perform self-assessments, in which they report on the status of their implementation of the 40 anti-money laundering recommendations, and to undergo mutual evaluations, in which the anti-money laundering system of each country is assessed by a team made up of experts from other member countries. Members not in compliance with the recommendations face a graduated set of responses ranging from having to deliver progress reports at plenary meetings to suspension of membership. Two rounds of mutual evaluations have already taken place for most members.

⁶⁴ *Guidelines of the Committee for the Conduct of its Work*, para. 5(b) (November 7, 2002), http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf. The proposed names of individuals or entities are circulated among the members of the Committee. The designation is considered accepted if no state objects to it within 48 hours.

24 SOURCES OF INTERNATIONAL NORMS AND STANDARDS

The reaction of the FATF to the terrorist attacks in the United States on September 11, 2001 was swift. 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 also to focus its energy and expertise on the worldwide effort to combat it. At the same meeting, the FATF adopted a new set of eight Special Recommendations on terrorist financing (the text of the Special Recommendations is set out in Appendix V). 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. The FATF also issued a Self-Assessment Questionnaire on the eight Special Recommendations⁶⁵ and *Guidance Notes for the Special Recommendations*,⁶⁶ intended to clarify certain aspects of the Special Recommendations. In September 2002, the FATF reported that more than 120 countries had responded to the request for a self-assessment.⁶⁷

In November 2002, the Fund adopted a Methodology for Assessing Compliance with Anti-Money Laundering and Combating the Financing of Terrorism⁶⁸ (hereinafter referred to as “the Methodology”), which had been developed by the IMF, the World Bank, the FATF, the Egmont Group, and other international standard-setting organizations. The FATF “40+8” recommendations were added to the Fund’s list of areas and associated standards and codes for use in the operational work of the Fund, and a 12-month pilot program of AML/CFT assessments and accompanying Reports on the Observance of Standards and Codes (ROSCs) was undertaken, involving the participation of the Fund, the World Bank, the FATF, and the FATF-style regional bodies. By contrast to the Recommendations and the Special Recommendations, compliance with which had been assessed separately thus far, the Methodology brings together the 40 Recommendations on Money Laundering and the 8 Special Recommendations on Terrorist Financing in a single assessment document. It should be emphasized, however, that the

⁶⁵ FATF Secretariat, *Self-Assessment Questionnaire: FATF Special Recommendations on Terrorist Financing* (Jan. 31, 2002), http://www.fatf-gafi.org/TerFinance_en.htm.

⁶⁶ FATF Secretariat, *Guidance Notes for the Special Recommendations on Terrorist Financing and the Self-Assessment Questionnaire* (March 27, 2002), http://www.fatf-gafi.org/TerFinance_en.htm [hereinafter “Guidance Notes”].

⁶⁷ FATF Press release, Russia, Dominica, Niue, and Marshall Islands removed from FATF’s list of non-cooperative countries and territories (October 11, 2002), http://www.fatf-gafi.org/Newsarchive_en.htm.

⁶⁸ *Report on the Outcome of the FATF Plenary Meeting and Proposal for the Endorsement of the Methodology for Assessing Compliance with Anti-Money Laundering and Combating the Financing of Terrorism Standards*, Annex II, IMF (November 8, 2002), <http://www.imf.org/external/np/mae/aml/2002/eng/110802.pdf>.

Methodology is not a standard-setting instrument, but an instrument intended to facilitate AML/CFT assessments in a uniform way. The parts of the Methodology dealing directly with the financing of terrorism are set out in Appendix V.

The Special Recommendations

The first five Special Recommendations contain standards that are similar in content to the provisions of the Convention and the Resolution. The last three cover new areas. Table 3 summarizes the contents of the Special Recommendations. They are described briefly in turn in the next paragraphs.

SR I: Implementation of international legal instruments

Special Recommendation I states that countries “should take immediate steps to ratify and to implement fully” the Convention, and to “immediately implement the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly United Nations Security Council Resolution 1373.”⁶⁹

⁶⁹ Under the Methodology, which covers the 40 Recommendations on Money Laundering as well as the eight Recommendations on Terrorist Financing, this criterion would be assessed by verifying that the country has also ratified and implemented the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December, 1988 [hereinafter “the 1988 Convention”], as well as the United Nations Convention Against Transnational Organized Crime, December, 2000 [hereinafter “the Palermo Convention”]. The reference to the 1988 Convention is contained in FATF Anti-Money Laundering Recommendation No. 1. The reference to the Palermo Convention is new, and in this case, the Methodology would assess a broader standard than is set out in the Recommendations. However, it is understood that the revised Recommendations to be considered by the FATF Plenary in June 2003 may include the ratification and implementation of the Palermo Convention.

Table 3. Summary of FATF Special Recommendations

Number	Contents	Comments
I	“Ratify and implement fully” the Convention and UN resolutions	This standard is satisfied by becoming a party to the Convention and implementing it, and responding to the obligations contained in the relevant UN Security Council resolutions.
II	Criminalize the financing of terrorism, terrorist acts, and terrorist organizations	Refers to the Convention (financing of terrorist acts) and Section 1 (d) of the Resolution (providing financial support to terrorists and terrorist organizations).
III	Freeze and confiscate terrorist assets	Refers to Section 1 (c) of the Resolution; Resolutions 1267 (1999), 1333 (2000), and 1390 (2002); and Article 8 of the Convention.
IV	Report suspicious transactions linked to terrorism	Similar to Article 18, paragraph 1 (b) of the Convention.
V	Provide widest possible range of assistance to other countries	Similar to Section 3 (e) of the Resolution and Articles 11–16 and 18, paragraphs 3 and 4 of the Convention.
VI	Impose anti-money laundering requirements on alternative remittance systems	New
VII	Strengthen customer identification measures in wire transfers	New
VIII	Ensure that entities, in particular nonprofit organizations, cannot be misused to finance terrorism	New

Special Recommendation I also states that countries should “immediately implement” UN Security Council Resolutions “relating to the prevention and suppression of the financing of terrorist acts, particularly Resolution No. 1373 (2001).” The *Guidance Notes* list the following resolutions as being relevant in this context: 1267 (1999), 1269 (1999), 1333 (2000), 1373 (2001), and 1390 (2002).

SR II: Criminalization of the financing of terrorism, terrorist acts, and terrorist organizations

Special Recommendation II sets as a standard the criminalization of the financing of *terrorism, terrorist acts, and terrorist organizations*. The term “terrorist acts” refers to the acts that the parties to the Convention have agreed to criminalize. The Special Recommendation does not define “terrorist organizations,” thus leaving each country to define it for its own purposes. The term “terrorism” would appear to be redundant with “terrorist acts.”⁷⁰ In addition, countries must make these offenses predicate offenses for the crime of money laundering.

In assessing compliance with Special Recommendation II, the Methodology states that the financing of terrorism “should be criminalised on the basis of the Convention,” and lists a number of assessment criteria, including:

- The offense should also apply when terrorists or terrorist organizations are located in another jurisdiction or when the terrorist acts take place in another jurisdiction.⁷¹ (See Chapter 4, page 54 for a discussion of this point.);
- The offense should apply at least to those individuals and legal entities that knowingly engage in financing of terrorism⁷² (see Chapter 4, page 51 for a discussion of the intentional element in the offense);
- If it is permissible under the jurisdiction’s legal system, the offense of financing of terrorism should extend to legal entities⁷³ (see Chapter 4, page 53 for a discussion of this point);
- Laws should provide for effective, proportionate, and dissuasive criminal, civil, or administrative sanctions for financing of terrorism,⁷⁴ and legal means and resources should be adequate to enable an effective implementation of laws on the financing of terrorism.⁷⁵

⁷⁰ The *Guidance Notes* state that the terms “financing of terrorism” or “financing of terrorist acts” refer to the activities described in the Convention. *Guidance Notes, supra* note 66, para. 8.

⁷¹ Methodology, *supra* note 68, Criterion 3.1.

⁷² *Id.* Criterion 4.

⁷³ *Id.* Criterion 4.1.

⁷⁴ *Id.* Criterion 5.

⁷⁵ *Id.* Criterion 6.

28 SOURCES OF INTERNATIONAL NORMS AND STANDARDS

Special Recommendation II also establishes as a standard that each country should ensure that terrorism financing offenses are designated as money laundering predicate offenses. (See Box 3.) Implementation is discussed in Chapter 4, page 49.

Box 3. Freezing, Seizure, Confiscation, and Forfeiture

The *Guidance Notes* (paragraphs 14–16) contain a useful definition of the three terms in the context of Special Recommendation II:

Freezing: In the context of this Recommendation, a competent government or judicial authority must be able to freeze, to block, or to restrain specific funds or assets and thus prevent them from being moved or disposed of. The assets/funds remain the property of the original owner and may continue to be administered by the financial institution or other management arrangement designated by the owner.

Seizure: As with freezing, competent government or judicial authorities must be able to take action or to issue an order that allows them to take control of specified funds or assets. The assets/funds remain the property of the original owner, although the competent authority will often take over possession, administration, or management of the assets/funds.

Confiscation (or forfeiture): Confiscation or forfeiture takes place when competent government or judicial authorities order that the ownership of specified funds or assets be transferred to the state. In this case, the original owner loses all rights to the property. Confiscation or forfeiture orders are usually linked to a criminal conviction and a court decision whereby the property is determined to have been derived from or intended for use in a criminal offense.

SR III: Freezing, seizure, and confiscation of terrorist assets

Freezing, seizure, and confiscation are dealt with in different ways in the Convention, the Resolution, and the Special Recommendations. The Convention requires states parties to “take appropriate measures, in accordance with [their] domestic legal principles, for the identification, detection and freezing or seizure” of terrorist funds, and “for the forfeiture” of such funds.⁷⁶ For its part, the Resolution also contains a wide-ranging obligation for states to freeze terrorist assets, and Resolutions No. 1267 (1999) and 1390 (2002) require the actual freezing of the assets of terrorist and terrorist organizations listed by the “1267 Committee.” However, these resolutions require only the freezing of these assets; they do not require their

⁷⁶ Convention, *supra* note 12, Art. 8, paras. 1 and 2.

seizure or confiscation. Special Recommendation III brings the three elements of freezing, seizure, and confiscation together.

Possible legislative responses to this standard (and the relevant provisions of the Convention and the UN resolutions) are discussed in Chapter 4, page 55.

SR IV: Reporting transactions related to terrorism

Special Recommendation IV sets as a standard the extension of the scope of suspicious transaction reports required of financial institutions to include transactions suspected of being related to terrorism. This would normally be accomplished through an amendment to the anti-money laundering law. The *Guidance Notes* state that countries have the choice of using a subjective criterion on which reports would be based (a financial institution “suspects” that a transaction is related to terrorism), or a more objective one (a financial institution “has reasonable grounds to suspect that a transaction is related to terrorism”).⁷⁷

This standard, which is part of the preventive measures called for in the Convention, is discussed in Chapter 4, page 63.

SR V: International cooperation

Special Recommendation V establishes as a standard that countries afford each other the greatest possible measure of assistance in connection with criminal and civil enforcement, and administrative investigations, inquiries, and proceedings relating to the financing of terrorism, terrorist acts, and terrorist organizations. The *Guidance Notes* indicate that this recommendation covers the following types of assistance:⁷⁸

- (1) Exchanges of information through mutual legal assistance mechanisms, including the taking of evidence, the production of documents for investigations or as evidence, the search and seizure of documents or things relevant to criminal proceedings or investigations, the ability to enforce a foreign restraint, seizure, forfeiture, or confiscation order in a criminal matter;
- (2) Exchanges of information by means other than mutual legal assistance mechanisms, such as exchanges of information between FIUs and other regulatory or supervisory agencies;
- (3) Measures to ensure denial of “safe haven” to individuals involved in terrorist financing;

⁷⁷ *Guidance Notes*, *supra* note 66, para. 21.

⁷⁸ *Id.* para. 22.

30 SOURCES OF INTERNATIONAL NORMS AND STANDARDS

- (4) Procedures for extradition of such individuals; and
- (5) Provisions and procedures to ensure that claims of political motivations for committing the offense are not grounds for denial of extradition requests.

The Methodology assesses compliance with this criterion by stating that “there should be laws and procedures allowing the provision of the widest possible range of mutual legal assistance in AML/CFT matters, whether requiring the use of compulsory measures or not, and including the production of records by financial institutions and other persons, the search of persons and premises, seizure and obtaining of evidence for use in AML/CFT investigations and prosecutions and in related actions in foreign jurisdictions.”⁷⁹ Criteria 34.1–42 of the Methodology elaborate on a number of these points.

Possible legislative responses to this standard and the related provisions of the Convention and the Resolution are discussed in Chapter 4, page 60.

SR VI: Alternative remittance services

Special Recommendation VI sets as a standard that countries impose anti-money laundering requirements on alternative remittance systems—that is, remittance systems that do not use formal financial sector institutions, such as banks, to effect transfers of funds from one country to another.⁸⁰ (See Box 4.) According to the *Guidance Notes*, the effect of this recommendation is to require (i) that alternative remittance or transfer services be either licensed or registered; (ii) that FATF Recommendations 10 and 11 (customer identification), 12 (record keeping), and 15 (suspicious transaction reporting) be extended to alternative money remittance systems; and (iii) that sanctions be available in cases of failure to comply with these requirements.⁸¹ Possible legislative responses to this recommendation are discussed in Chapter 4, page 65.

⁷⁹ Methodology, *supra* note 68, Criterion. 42.

⁸⁰ The forthcoming IMF/World Bank *hawala* study uses the term “informal funds transfer systems,” which the authors prefer in view of their observation that in some jurisdictions, these systems are the dominant means by which financial transfers are conducted, a situation that is not consistent with the word “alternative.” This handbook uses the term “alternative remittance systems” in deference to the FATF terminology.

⁸¹ *Guidance Notes*, *supra* note 66, para. 28.

Box 4. Alternative Remittance Systems

There is no established or even generally agreed definition for “alternative remittance systems.” Nevertheless, law enforcement authorities generally describe such systems on the basis of certain common characteristics. Alternative remittance systems “generally have developed based on specific ethnic, cultural or historical factors and, in some cases, are a traditional method for moving money that pre-date the spread of Western banking systems in the 19th and 20th centuries.” A key characteristic of alternative remittance systems is that they largely operate on the basis of “correspondent” relationships—that is, value is moved from one location to another often without the physical movement of currency. While most frequently viewed as “parallel” or “shadow” systems operating outside of the established national and international payments mechanisms, alternative remittance systems may rely on the formal systems as a means of movement of funds.

Another key characteristic of alternative remittance systems is their reliance on some form of “netting” to transmit value and settle balances among dealers. Often, offsetting debits and credits are employed on a large scale and involve more than two parties. Agents, *hawaladar*, or brokers usually receive a commission or payment for their services and make a profit by exploiting exchange rate differentials. Brokers are understood to be scrupulous in settling balances, and because the most important component to continuing viability within the network is trust, transactions rarely break down and payment is virtually guaranteed.

There is evidence that alternative remittance systems operate even in the advanced economies where formal financial institutions operate efficiently. While the reasons for the existence of alternative remittance systems are varied, the lack of access to more formal banking systems, higher costs, lack of experience, or discomfort with institutions outside of known cultural traditions may be factors. Repatriation of emigrant income has frequently been the basis for the increase in the use of alternative remittance systems in Western countries in recent decades. Remittance through alternative remittance systems may be less expensive, more secure and may circumvent restrictive currency exchange regulations. Such systems can service remote areas that are not accessed by traditional or formal financial institutions.

Alternative remittance systems are attractive to launderers and those who finance terrorism because there is little or no record of the communications whereby the transfers are made. The lack of a record trail impedes law enforcement tracing the movement of funds. In addition, they are generally not subject to external auditing, control, or supervision by regulatory authorities.

The IMF and the World Bank have recently completed a study of the *hawala* system in Asia, the conclusions of which are summarized in Box 5.

Sources: David Marshall Nissman, *Money Laundering*; Lisa C. Carroll, *Alternative Remittance Systems Distinguishing Sub-Systems of Ethnic Money Laundering in Interpol Member Countries of the Asian Continent*; Mohammed El-Qorchi, “Hawala,” *Finance & Development*, December 2002, Vol. 39, No. 4; and IMF/World Bank, *Informal Funds Transfer Systems: An Analysis of the Hawala System*, April 2003.

SR VII: Originator information in wire transfers

Special Recommendation VII addresses the issue of customer identification in international and domestic wire transfers. As elaborated in the *Guidance Notes*, the standard is that (i) originator information be specified on domestic and international funds transfers; (ii) financial institutions retain the information at each stage of the transfer process; and that (iii) countries require financial institutions to examine more closely or to monitor funds transfers for which complete originator information is not available.⁸² The requirement extends to financial institutions, *bureaux de change*, and remittance/transfer services.⁸³ It may be noted that the problem of lack of originator information on wire transfers is related to money laundering as a whole, and should be dealt with by an appropriate amendment to the FATF recommendations on money laundering. However, without waiting for a revision of the 40 Recommendations on this point, the Special Recommendations take an initial step in addressing the issue.

These matters would normally be dealt with through amendments to the anti-money laundering law or the laws regulating financial institutions, and secondary legislation issued under such laws. The FATF has issued an Interpretative Note to this recommendation.⁸⁴ Possible legislative responses are discussed in Chapter 4, page 63.

SR VIII: Nonprofit organizations

Special Recommendation VIII states that countries should review their laws and regulations that relate to entities that can be used for the financing of terrorism, leaving the decision as to which type of organization is particularly vulnerable to each country, on the basis of an evaluation of local conditions. Nevertheless, the Recommendation draws particular attention to nonprofit organizations, and requires countries to ensure that nonprofit organizations cannot be misused (i) by terrorist organizations posing as legitimate entities, (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organizations.

⁸² *Id.* para. 34.

⁸³ *Id.* para. 35.

⁸⁴ FATF Secretariat, *Interpretative Note to FATF Special Recommendation VII: Wire Transfers* (February 14, 2003), http://www.fatf-gafi.org/pdf/INSR7_en.PDF.

In view of its nature, this Recommendation does not lend itself to an immediate and comprehensive legislative response. The first part of the Recommendation requires a review of the legal regime of these entities to prevent their misuse for terrorist financing. Only after such a review is completed can the authorities decide on the measures best suited to deal with the risks identified. The questionnaire issued by the FATF on the Special Recommendations⁸⁵ and its *Guidance Notes* provide information as to the intended scope of the review.

The second part of the recommendation deals more specifically with “non-profit organizations.” The *Guidance Notes* state that “jurisdictions should ensure that such entities may not be used to disguise or facilitate terrorist financing activities, to escape asset freezing measures or to conceal diversions of legitimate funds to terrorist organizations.”⁸⁶ The use of non-profit organizations to channel funds to finance terrorist activities is a worrying trend, since it is difficult to separate these funds from other funds managed by the same nonprofit entity. In effect, the only difference between a legal and an illegal donation to, or by, a nonprofit organization is the intention leading to the transaction. In addition, in some cases, the management of the entity may not be aware that the entity is being used for illegal purposes. The FATF has issued a document on international best practices in combating the abuse of nonprofit organizations, which may serve as a guide for the review of the sector in a particular country.⁸⁷ Possible legislative responses to this recommendation with respect to nonprofit organizations are discussed in Chapter 4, page 70.

⁸⁵ FATF Secretariat, *Self-Assessment Questionnaire*, *supra* note 65.

⁸⁶ *Guidance Notes*, *supra* note 66, para. 38.

⁸⁷ FATF Secretariat, *Combating the Abuse of Non-Profit Organisations: International Best Practices* (October 11, 2002), http://www.fatf-gafi.org/TerFinance_en.htm.