UNIVERSITY OF NAIROBI

SCHOOL OF LAW

United Nations Security Council Resolution 1373: Anti-Terrorist Financing Regulation for the Financial Sector.

by

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G62/82391/2015

PRESENTED FOR THE PARTIAL FULFILMENT OF THE MASTERS OF LAW DEGREE, UNIVERSITY OF NAIROBI.

2019

DECLARATION

I, **Olivier Ciza Ndayishimiye,** declare accordingly that this is my original work and has not been presented for the award of any degree in any other university. Presented to the undersigned supervisor and has been approved.

Olivier Ciza Ndayishimiye

Sign……

Date…….

Supervisor: Dr. Constance Wangechi Gikonyo

Sign…….

Date……....

DEDICATION

This work is dedicated to my God and to my family especially my parents, for the support they have given me throughout the course and for always believing in me.

ACKNOWLEDGEMENT

First and foremost, I thank the Almighty God for the far He has brought me, for it is by His grace and mercies that I have reached this far.

Secondly, I thank my parents who have always been my pillar of strength, financial sponsors and source of encouragement. Thank you for your profound love.

Lots of appreciation to my supervisor, Dr. Constance Wangechi Gikonyo who has guided me through this research and has been patient with me. Your critical comments during the writing of this thesis is highly regarded. Thank you.

Finally, many thanks to all my dear friends and classmates who encouraged me throughout this period.

ABBREVIATIONS

AML	Anti-Money Laundering
ARS	Alternative Remittance Systems
AU	African Union
CDD	Customer Due Diligence
CFT	Countering against Financing of Terrorism
CTC	Counter Terrorism Committee
CTED	Counter Terrorism Executive Directive
DNFBPs	Designated Non-Financial Businesses and Professions
EFTs	Electronic Funds Transfers
EU	European Union
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
ICIJ	International Consortium of Investigative Journalists
ISP	Internet Service Providers
IVTS	Informal Value Transfer Systems
KYC	Know Your Customer
MFSs	Mobile Financial Services
ML	Money Laundering
MNOs	Mobile Network operators
MVTS	Money or Value Transfer Service
OECD	Organization for Economic Co-operation and Development
PEP	Politically Exposed Person
SARs	Suspicious Activities Reports
STRs	Suspicious Transaction Reports
TF	Terrorist Financing
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

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ABSTRACT

There has been a lot of debate within the academic field as well as among legislators over time regarding the financing of terrorism all around the world. This was especially intensified after the 11 September 2001 terror attacks in the United States of America which was subsequently followed by a series of attacks by terrorists in different parts of the world. Both local and international legislators and organizations in most countries around the world are of the opinion that there is need to undertake in depth changes in both national and international policies, standards and principles on anti-terrorism especially with regards to the financing of terrorism, its aftermath and prospective measures of preventive intervention on the same.

Some of the findings made in this study are inclusive of the fact that in as much as banks used to be the main players when it came to terrorist financing previously, there are other financial institutions that also play a significant role with regards to it being a platform for funding terrorism activities in today's world. It further established the different roles played by different aspects such as customer due diligence and the principle of banking secrecy among others.

This study therefore, seeks to look into the issue of the financing of terrorism and the different roles played by different actors within the financial sector alongside giving a proper description or evaluation of the outcomes of the joint attempts to curb the financing of terrorist operations that has been undertaken under the endorsement of the UN Security Council and its committees as well as individual member States.

CHAPTER ONE

1.1. Introduction and background

Derived from latin word *terrere* which means to frighten, terrorism is a persistent[1] global threat that knows no border, nationality or religion. It is a phenomenon of an elusive nature[2], and a topic of some dispute in international arena.[3] Scholars agree that terrorism is a controversial term[4], and very few of those labeled terrorists describe themselves as such.[5] In most instances, they tend to make use of other terms that are particularly linked to their state, such as "nationalist, freedom fighter, liberator, revolutionary, vigilante, militant, paramilitary, guerrilla, rebel, patriot", or any other word that can be used in place of the afore-mentioned words in other dialects and notions, such as "jihadi, mujaheddin, and fedayeen."[6]

That play on words was the central part of debate on the definition of terrorism, held at the United Nations (UN) forum.[7] Indeed based on the adage "one man's terrorist is another man's freedom fighter"[8], – which specifies similar actions (…) shall be defined rather distinctly by a variety of onlookers, depending on the place and time during which it took place and whose side the onlooker

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[1] The International Community has yet managed to completely root out terrorism. At the operational level, the war against terrorism has been fought on several fronts (military intervention; media campaign; legal framework; and anti-terrorist financing), but still the world is living to the beat of terror threat.

[2] Mercy Obado Ochieng, 'The Elusive Legal Definition of Terrorism at the United Nations: An Inhibition to the Criminal Justice Paradigm at the State Level' (2017) 3 Strathmore Law Journal 65, 72 <https://heinonline.org/HOL/Page?handle=hein.journals/strathlj3&id=77&div=&collection=>. See also Jodie Satterley, 'Terrorism in the Eye of the Beholder. The Imperative Quest for a Universally Agreed Definition of Terrorism' (2016) 2 Kent Student Law Review 2 <http://journals.kent.ac.uk/index.php/kslr/article/view/230> accessed 1 March 2019.

[3] There is an implicit concern among States that defining terrorism will change the requirements for normative behavior of States and State culpability especially during the conduct of armed conflict : See Boaz Ganor, *Global Alert: The Rationality of Modern Islamist Terrorism and the Challenge to the Liberal Democratic World* (Kindle, Columbia University Press 2015) 11.

[4] Adam Roberts, 'Terrorism Research: Past, Present, and Future' (2015) 38 Studies in Conflict & Terrorism 62, 63 <https://doi.org/10.1080/1057610X.2014.976011> accessed 1 March 2019. See also Ifeoma E. Okoye, 'The Theoretical and Conceptual Understanding of Terrorism: A Content Analysis Approach' (2017) 5 Journal of Law and Criminal Justice 36, 36 <https://doi.org/10.15640/jlcj.v5n1a5>. See also Anthony Richards, 'Conceptualizing Terrorism' (2014) 37 Studies in Conflict & Terrorism 213, 217 <https://doi.org/10.1080/1057610X.2014.872023> accessed 1 March 2019.

[5] Chris Millington, 'Were We Terrorists? History, Terrorism, and the French Resistance' (2018) 16 History Compass e12440, 6 <https://onlinelibrary.wiley.com/doi/abs/10.1111/hic3.12440> accessed 2 March 2019.

[6] Libbie Tillery, *Essence of Counter-Terrorism* (World Technologies 2012) 27.

[7] See the debates in U.N. Ad Hoc Committee Report (1937), U.N. Doc. A/9028; or U.N. Ad Hoc Committee Report (1977), U.N. Doc.A/34/39.

[8] Pamela Kleinot, 'One Man's Freedom Fighter Is Another Man's Terrorist: A Selected Overview of the Psychoanalytic and Group Analytic Study of Terrorism' (2017) 31 Psychoanalytic Psychotherapy 272, 273 <https://doi.org/10.1080/02668734.2017.1348979> accessed 2 March 2019.

is on,[9] – some parts of the world – mainly African and Arab nations – emphasized on the exclusion from the scope of definition of terrorism, any act of violence carried out as part of the fight for national liberation or resistance against a foreign occupation[10]. In this regard, it is not surprising that the same aforementioned nations, legitimized in their regional anti-terrorist Conventions harmful acts which, when committed outside a liberation war would be regarded as criminal[11].

That controversy on what a terrorist is and what it is not, is not without obstructing the fight against terrorism and its financing. Indeed, it is challenging trying to fight against a phenomenon that still doesn't have a universal definition[12], let alone an international one.[13] As a result of not having an International Convention at the UN availing a proven and all-inclusive meaning of terrorism, it has turned out to be rather difficult or if not almost impossible to combat terrorism both nationally and globally.[14] A number of States within the global realm have diverse perceptions on how terrorism can generally be defined [15]. Yet, without defining ''terrorism,'' ''terrorist offenses,'' or ''terrorist groups,'' it is impossible to address terrorist financing[16]. However, for the purpose of

[9] Jenny Teichman, 'How to Define Terrorism' (1989) 64 Philosophy 505, 507 <https://www.cambridge.org/core/journals/philosophy/article/how-to-define-terrorism/C1178DA4990BFA8A2DA3DA48F6960BF0> accessed 2 March 2019.

[10] Kimberley N Trapp, 'The Potentialities and Limitations of Reactive Law Making: A Case Study in International Terrorism Suppression' (2016) 39 University of New South Wales Law Journal, 1191, 1200 <https://search.informit.com.au/documentSummary;dn=383055067351672;res=IELAPA> accessed 2 March 2019.

[11] Organization of African Unity, Article (3), (1) where the OAU Convention on the Prevention and Combating of Terrorism, exempts ''the struggle waged by peoples ... for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and dominion by foreign forces'' from being labeled as terrorist' acts. See also League of Arab States, Arab Convention on the Suppression of Terrorism, Article 2(a) of Organization of the Islamic Conference, Convention of the Organization of the Islamic Conference on Combating International Terrorism

[12]Gilbert Ramsay, 'Why Terrorism Can, but Should Not Be Defined' (2015) 8 Critical Studies on Terrorism 211, 213 <https://doi.org/10.1080/17539153.2014.988452> accessed 2 March 2019.. See also Jennifer Breedon, 'Redefining Terrorism: The Danger of Misunderstanding the Modern World's Gravest Threat' (2015) 12 Brazilian Journal of International Law 464, 465 <https://heinonline.org/HOL/Page?handle=hein.journals/brazintl12&id=929&div=&collection=>.

[13]Alan Greene, 'The Quest for a Satisfactory Definition of Terrorism: R v Gul' (2014) 77 The Modern Law Review 780, 784 <https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2230.12090> accessed 2 March 2019.. See also Sital Dhillon and Adam Mama-Rudd, 'Human Rights and Counter-Terrorism' (2016) 4 Research Process, International Journal of Social Research Foundation 1, 3 <http://shura.shu.ac.uk/14529/> accessed 2 March 2019.

[14]Mohammed Salman Mahmood and Ahmad Masum, 'A Quest for Defining Terrorism in International Law: The Emerging Consensus' (2014) 10 Journal of International Studies 77, 78.

[15] ibid.

[16]Hamed Tofangsaz, 'Criminalization of Terrorist Financing: From Theory to Practice' (2018) 21 New Criminal Law Review: In International and Interdisciplinary Journal 57, 61 <http://nclr.ucpress.edu/content/21/1/57> accessed 2 March 2019.

this study which deals with terrorist financing, terrorism will be regarded as any use of violence by non-State entities to attain political or ideological goals.

The violence referred to in this working definition must be of utmost gravity, that the emotional and psychological effect generated will lead the targeted entity (State or group of States) to perform or refrain from an act just to suit terrorists' wish. To attain such goal, the attack must be thoroughly prepared, which implies cash to cover financial needs from the planning to the carrying out of the attack.

The above working definition builds on the very essence and nature of terrorism, notably violence. According to Randall D. Law, the first act of historical terrorism occurred in 647 BCE when Assyrian emperor Assurnasirpla II terrorized the city of Susa[17]. The Assyrians' brutal murder of the Susa rebels was, if we are to believe law, the first time in recorded history that violence was used to send a message; the communicative function of this violence thus marks it out as terrorist[18]. Since then terrorism has evolved, shifting from traditional "old terrorism", secular (left wing, right wing, ethnic-separatist) to religiously motivated terrorism[19]by extremist radical groups[20]. These terrorist groups just like the multi-national organization Al Qaeda; Boko Haram in Nigeria; Al-Shabaab in Somalia; Islamic State of Iraq and Syria (ISIS) also known as Islamic State of Iraq and the Levant (ISIL) or as the Arab acronym Daesh; Hezbollah in Lebanon; and many others operate at the global level, and have accomplished to their credit numerous terrorist attacks[21]. It goes without saying that those attacks claimed lives of thousands of victims. For instance, the most devastating terrorist attack alone of September 11, 2001 in New York cost lives of more than 2600 people[22]. That tragic event of an unprecedented level of violence confirmed the belief that terrorism is indeed a threat to mankind.

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[17] Randall D Law, *Terrorism: A History* (1 edition, Polity 2009) xi.

[18] ibid 12.

[19] Monica Meruțiu, 'Religious Justifications for Terorrism' (2017) 6 Redefining Community in Intercultural Context 199, 200 <https://www.ceeol.com/search/article-detail?id=571893> accessed 3 April 2019.

[20] For more details on traditional terrorism, and its difference from religious terrorism, see Heather S Gregg, 'Defining and Distinguishing Secular and Religious Terrorism' (2014) 8 Perspectives on Terrorism 36, 37–38 <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/336> accessed 2 March 2019.

[21] The World Trade Center attacks in New York in 1993 by Al-Qaeda,; Khobar Tower attacks in Saudi Arabia in 1996 by Hezbollah; US Embassy bombings in Kenya and Tanzania in 1998 by Al-Qaeda; Westgate shopping mall shooting in Nairobi in 2013 by Al-Shabaab; Chibok schoolgirls kidnapping in 2014 in Nigeria by Boko Haram; Bardo National Museum attack in Tunisia, and shooting down of the Metrojet , respectively on March and October 2015 by ISIS.

[22] National Commission on Terrorist Attacks upon the United States., 'The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States: Executive Summary' (US GPO 2004) 1 <https://catalog.hathitrust.org/Record/011334443> accessed 2 March 2019.

It is against that background that the United Nations Security Council (UNSC), as an underwriter of global armistice and safekeeping sought after addressing the issue of terrorism. It was embraced as a repercussion of 11 September attacks, on 28 September, 2001 Resolution 1373 - S/RES/1373 (2001) 28 September 2001, which sets out the framework for the anti-terrorism. The first paragraph of the said Resolution deals with terrorist financing, with special emphasis on prevention and suppression of the same, the second paragraph concerns the criminalization of all acts of terrorism, and the third paragraph is about cooperation between States whereby it urges States to exchange information, and to become parties as soon as possible to the relevant International Conventions and Protocols relating to terrorism.

Building upon S/RES/1373 (2001) 28 September 2001– specifically on its provisions on the fight against financing of terrorism –, the Financial Action Task Force (FATF)[23] – whose initial mission was to counter money laundering – has seen its mandate extended to the fight against terrorist financing in October 2001.[24]Accordingly, on the pre-existing forty anti-money laundering (AML) Recommendations, the FATF also developed in October 2001 eight Special Recommendations on countering terrorist financing[25], and added in a ninth in October 2004. These Recommendations brought in a new actor in the fight against financing of terrorism, namely the financial sector.

The rational for involving the financial industry in the financial war against terrorism is quite simple. It should be remembered that the conspiracy of 11 September, 2001 made extensive use of bank network in the designing, planning, and carrying out of attacks[26]. Thus, the FATF – in its eight – later nine – Special Recommendations on anti-terrorist financing – did not find better ally than the financial sector in its new mandate of countering terrorist financing. These FATF nine special Recommendations on CFT, together with the 40 Recommendations on AML, set out the

[23] The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. Available at http://www.fatf-gafi.org/about/whoweare/ , accessed on 19 May, 2018.

[24] 'FATF 40 Recommendations, (Incorporating All Subsequent Amendments until October 2004)' (FATF 2003) 2 <http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf>.

[25] 'IX Special Recommendations, (Incorporating All Subsequent Amendments until February 2008)' (FATF 2001) FATF Standards <https://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>.

[26] National Commission on Terrorist Attacks upon the United States. (n 22) 14.

basic framework to detect, prevent and suppress the financing of terrorism and terrorist acts[27]. They were expressly endorsed by Resolution 1617 - S/RES/1617 (2005) 29 July 2005, which underscored their importance[28].

From the above, this study aims at critically analyzing the effectiveness of anti-terrorist financing regime as laid out in one of the objectives of S/RES/1373 (2001) 28 September 2001 which recognizes the need for nations to complement international cooperation by putting up the necessary supplementary measures to "prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism." The paper helps to look into the above-mentioned objective through confining itself to looking at measures adopted by the financial sector, in light of new financing methods of non-State terrorist groups, which nowadays turned to underground financial systems to avoid detective tools of suspicious transactions by financial institutions. Such underground financial system also referred to as Informal Value Transfer Systems (IVTS) or alternative remittance systems (ARS), are known under different terms in different countries: Hundi in India; Feichi'ien in China; Phoekuah in Thailand; Padala in Philippines; Hui Kuan in Hong Kong; and Hawala in Muslim countries.[29] They gained prominence in terrorist organizations as a bypass to circumvent measures to counter the financing of terrorism by financial sector[30].These measures that can be summed up into two obligations – Customer Due Diligence (CDD) and Suspicious Transaction Report (STR) – , call upon financial institutions to set profile of their customers based on risk of terrorist financing they pose, and to report to relevant authorities any abnormal financial behavior of the same.

However, it has turned out that the current amount of legal measures on CFT which mainly focus on financial sector – did not, or if they did, slightly address methods of transferring money that operate outside of the banking system. That loophole paved a way to the abuse by terrorists of

[27] 'IX Special Recommendations, (Incorporating All Subsequent Amendments until February 2008)' (n 25).

[28] S.C. Res. 1617, 7, U.N. Doc. S/RES/1617, pp. 3-4.

[29] Mohammed El Qorchi, 'Hawala. Finance and Development' (2002) 39 *Quarterly magazine of the IMF* <https://www.imf.org/external/pubs/ft/fandd/2002/12/elqorchi.htm>.. Nikos Passas, 'Informal Value Transfer Systems and Criminal Organizations; A Study into So-Called Underground Banking Networks' (Research and Documentation Centre of the Ministry of Justice on the advice of the Advisory Committee for Research on Organized Crime 1999) Research Paper 11–12 <https://papers.ssrn.com/abstract=1327756> accessed 3 April 2019.

[30] 'Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion' (FATF 2013) FATF Guidance 16 <http://www.fatf-gafi.org/media/fatf/documents/reports/AML_CFT_Measures_and_Financial_Inclusion_2013.pdf>.

informal mechanisms to move money around the world and new payments methods. Terrorists found in those financial arrangements a sanctuary to transfer their money worry-free, away from the watchful eye of banks. They are usually readily used since they are not linked to a name[31], and under a certain threshold, do not require a bank account, which complicates the investigation of such attacks[32].

The above facts made it difficult for States to curb terrorism financing, and consequently the fight against terrorism in general. Thus, one of the biggest challenges of the current body of CFT measures would be to deal with the evolving financial dynamism of terrorist groups. The flexibility and resourcefulness displayed by terrorist groups suggests that all the approaches that have been put into place for purposes of moving cash around the world have been jeopardized to some degree.[33]

1.2. Statement of the problem

With the new impetus provided by S/RES/1373 (2001) 28 September 2001, the fight against financing of terrorism has gained prominence in international arena.[34] In that financial war against terrorism, the financial sector has taken the lead, in that it can detect and disrupt financial transactions for terrorist purposes.

Therefore, the problem arising with respect to S/RES/1373 (2001) 28 September 2001 is that the statutory environment on CFT it spells out did not anticipate the evolution of terrorist groups in responding to counter-terrorist financing. Thus, measures to track terrorist financing in the financial sector did not evolve to adapt to new financing models of terrorist groups. These groups have since been self-financing and resorted to alternative money transfer methods other than the banking system, where obligations related to CFT are either less restrictive or almost nonexistent.

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[31] Agnès Levallois, Jean-Claude Cousseran and Lionel Kerrello, 'The Financing of the "Islamic State" in Iraq and Syria (ISIS)' (European Parliament 2017) In-Depth Analysis EP/EXPO/B/AFET/FWC/2013-08/LOT6/13 19 <http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/603835/EXPO_IDA(2017)603835_EN.pdf>.

[32] ibid.

[33] 'Terrorist Financing' (2008) 4 <https://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Terrorist%20Financing%20Typologies%20Report.pdf>.

[34] There are other United Nations (UN) Resolutions addressing the issue of financing terrorism which have been adopted after Resolution 1373, inter-alia: S/RES/2178 (2014) 29 September 2014 on financing activities of foreign terrorist fighters (FTFs) especially their travel and S/RES/2253 (2015) 17 December 2015 on efforts to suppress terrorist financing.

Accordingly, this research will focus on evaluating the adequacy of the banking sector's responses to S/RES/1373 (2001) 28 September 2001.

1.3. Research questions

i. Is the current international regulatory framework against terrorist financing efficient?
ii. What risk factors and other challenges do financial institutions face in implementing S/RES/1373 (2001) 28 September 2001 on the financial war against terrorism?
iii. What are the challenges posed by various money transfer methods in effecting S/RES/1373 (2001) 28 September 2001?
iv. What recommendations can be made to make more effective the fight against terrorist financing?

1.4. Statement of Objectives

The study's specific objectives are:

i. To analyze the current international regulatory framework against terrorist financing.
ii. To evaluate the risk factors and other challenges that financial institutions face in implementing S/RES/1373 (2001) 28 September 2001 on the financial war against terrorism.
iii. To examine the challenges posed by various money transfer methods in effecting S/RES/1373 (2001) 28 September 2001.
iv. Formulate recommendations on how to make more effective the fight against terrorist financing.

1.5. Hypotheses

The study is based on the following assumptions:

i. Measures to fight against terrorist financing are outdated and need to be in tandem with the new mechanisms of terrorist financing.

ii. Channels of terrorist financing are very dynamic. Those who support terrorism always show adaptability and responsiveness. This explains why terrorist groups are always one step ahead of States and measures taken to go after their money.

iii. The fight against terrorist financing is a complex struggle that involves skills and resources that many countries do not have.

1.6. Justification of the study

The fight against terrorist financing is at crossroads between several fields: law; finance; politics; and international relations. A combination of all these areas makes more complex any analysis of measures against the financing of terrorism.

This research aims at being a continuation of the significant contribution made by scholars on issues of terrorist financing, by highlighting aspects where additional efforts need to be done. Thus, it hopes to contribute in developing solutions since it will make recommendations based on gaps identified in the existing legal framework on CFT.

1.7. Theoretical framework

This study is based on two schools of thoughts namely natural law and social contract theories. First it relies on natural law espoused by Saint Thomas Aquinas. He looked at the initial standard of natural law as: "good is to be done and promoted, and evil is to be avoided".[35] Simply put, natural law asserts that what is good is natural, and what is natural is good.[36] The spirit behind this legal reasoning was that the law ought to be comprehended as a concrete submission of morality; therefore law and morality are linked very well.[37]

Because of the natural proclivity in the direction of doing well, Aquinas viewed morality as a widespread set of privileges and harms that are common among cultures.[38] To put it another way, what is moral to one, is applicable to all; and what appears to be immoral to one, it does for all.

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[35].ST Thomas Aquinas, 'The Summa Theologica, First Part of the Second Part, Question XCIV : The Natural Law' <http://web2.uwindsor.ca/courses/philosophy/pinto/34-110-02/aquinas.PDF>.

[36] Steve McCartney and Rick Parent, *Ethics in Law Enforcement* (Victoria, BC: BCcampus 2015) 29 <https://opentextbc.ca/ethicsinlawenforcement/> accessed 3 March 2019.

[37] Stephen Guest and others, 'Jurisprudence and Legal Theory' 61 <https://www.researchgate.net/publication/265107859_Jurisprudence_and_legal_theory/download>.

[38] McCartney and Parent (n 36) 29.

Accepting that, a decision is said to be moral if it advances the lives or preserves a person's individual life.[39] Should it go against the lives of human beings or safeguarding one's own life, the resolution will be deemed decadent.[40]

The whole point with natural law theory is that it creates two types of duties: one positive, and another negative. The positive duty consists to induce an individual to live – i.e.to act – in harmony with his fellows, while the negative duty devotes the restraint of any act that negates the law of nature. One example of negative duty in essence is to abstain from providing one's support to terrorism. It is wrong to finance terrorism and those who finance terror are as guilty as those who commit it. As result, this calls upon the positive duty which is the prosecution of terrorist financiers.

The natural law theory acknowledges the legal and moral right to punish against those who act contrary to the law of nature. Within the context of this research, those breaching the law of nature, and thereby transgressing the morality, are those who flourish terrorism through their active support. They financing an act which is a total violation of human rights and fundamental freedom, hence the criminalization of terrorism financing.

This study also endorses the social contract school of thought which is the view that human beings give up certain rights they have in a state of nature in order to obtain these securities and rights provided by civilization.[41] Contracarianism and Contractualism are in most instances commonly used as terms tantamount for social contract theories [42], the fundamental notion of which is that "the legitimacy of the state and/or the principles of sound justice derive their legitimacy from a societal agreement or social contract"[43]. It is an explicit or implicit agreement among citizens which justifies the formation of government and emphasizes the rights of citizens in their relationship to government.[44] The theory posits that rights of citizens are prior to and more

[39]ibid.
[40] ibid.
[41]Celeste Friend, 'Social Contract Theory', *Internet Encyclopedia of Philosophy* <https://www.iep.utm.edu/soc-cont/> accessed 4 April 2019.
[42]Alubabari Desmond Nbete, 'The Social Contract Theory: A Model for Reconstructing a True Nigerian Nation-State' (2012) 2 International Journal of Humanities and Social Science 267, 268.
[43]Brooke Noel Moore and Kenneth Bruder, *Philosophy: The Power of Ideas* (ideas, McGraw-Hill Higher Education 1990) 274.
[44] Naomi Zack, 'Philosophy and Disaster' (2006) 2 Homeland Security Affairs 13, 2 <https://scholarsbank.uoregon.edu/xmlui/handle/1794/2639> accessed 3 March 2019.

fundamental than the organization of society under the government.[45] The governed, in essence, should be the governors.[46]

The main purpose of the State is to establish external peace and preserve internal order.[47] But terrorism runs counter to all of these premises and explicitly denies the "rule of game".[48] The terrorist breaks the social contract and positions himself outside of the community while at the same time threatening the community.[49] He who endangers the social contract is not only the terrorist, but also his sponsors. As such, the best way of dealing with social contract breakers – i.e. terrorists – would be to first run after those providing them a lifeline, i.e. terrorist financiers, because without their active support, terrorist groups cannot survive.

The natural law and social contract schools of thought underpinned in this study have a crossing point. The common ground is their dedication to human rights as a basic need. Natural law theory recognizes that human rights are inherent to the human nature, and are granted by the mere fact we are born human and not by the government. As to the social contract theory, it calls the State – which is the outcome of the free will of people entering into an agreement between themselves – to protect those human rights by all means.

1.8. Literature review

This study takes as its starting point the existing publications on countering against financing of terrorism (CFT). Views expressed in the literature therein will be subject to analysis in this section. This is after new creative ways of terrorists to raise and move their money gave rise to a number of writings by publicists, who assessed the potential effectiveness of current CFT regime in financial services industry, while considering new financing patterns of terrorist groups.

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[45] ibid.
[46] Daudi Mwita Nyamaka, 'Social Contract Theory of John Locke (1932-1704) in the Contemporary World' (2011) 1 St. Augustine University Law Journal 14, 2 <https://works.bepress.com/dmnyamaka/5/> accessed 3 March 2019.
[47] Jorg Brechtefeld, 'Domestic Implications of Terrorism in the United States: 1972-1990', *Handbook of Global Legal Policy* (1st edn, CRC / Marcel Dekker 2000) 471 <https://www.amazon.com/Handbook-Global-Policy-Public-Administration/dp/0824778928>.
[48] ibid.
[49] ibid.

Indeed, since banks have tightened their due diligence to check who among their customer's funds or is engaged in terrorism, terrorists and their financiers have embraced informal remittance sector and electronic payment methods, – widely dominated by the use of virtual currency –. These two alternatives provide terrorists with the anonymity they need to move their money around the world, without fear of being tracked. Such a move led to some in the CFT community to question the relevance of CFT measures, which placed financial sector on the first line of the global financial warfare against terrorism. Among the skeptics there is Vijay Balasubramaniyan. He posits that static counter terrorism measures such as freezing resources, limiting the right to use the official financial structure, shall have no important effect on stanching the fiscal movements of lesser groups, as the monies are less and acquired locally primarily through unlawful and criminal means.[50] The bases of income from theft and violence, so adds Balasubramaniyan, is not in need of homebased groups to make use of the official value transfer system which, in a majority of cases, is undertaken through informal cash economy.[51]

Other views challenging the contribution of financial sector in the fight against terrorist financing can be found in Nicholas Gilmour et al.'s publication. They specifically, at some point in their work, raise the issue of financial institutions' ability to effectively taking part in CFT, by actually detecting and disrupting terrorists' financial transactions. For them, such a task is all but an impossible mission, given the ease with which terrorists effortlessly blend their funds into formal – and legitimate – appearing routine practices.[52] The same authors further explain that terrorists distract banks' attention from detecting their funds by splitting them into smaller values, and using transfer methods which are typically aligned to smaller amounts such as the use of prepaid value/store cards.[53] This makes it difficult for banks to identify terrorists' money in the spectrum of financial flows that are daily routed through conventional financial system. In this regard, Peter R. Neumann somehow echoes the views of Nicholas Gilmour et.al., as he argues that in case banks were to decide and carry out an investigation on each specific transaction and how the money was

[50] V Balasubramaniyan, 'Understanding the Costing Decisions behind Terror Attacks – an Analytical Study' (2015) 18 Journal of Money Laundering Control 475, 484 <https://www.emeraldinsight.com/doi/abs/10.1108/JMLC-03-2014-0009> accessed 2 March 2019.
[51] ibid.
[52] .Nicholas Gilmour, Tristram Hicks and Simon Dilloway, 'Examining the Practical Viability of Internationally Recognised Standards in Preventing the Movement of Money for the Purposes of Terrorism: A Crime Script Approach' (2017) 24 Journal of Financial Crime 260, 264–265 <https://www.emeraldinsight.com/doi/full/10.1108/JFC-04-2016-0027> accessed 2 March 2019.
[53] ibid 265.

moved from one place to another they would not be in a position to see a genuine financial justification, they would be forced to analyze tens of millions of dealings on a daily basis[54], which will be tedious and then nearly impossible.

To some extent, the above limitations of financial sector in CFT can be attributed to the flexibility and ability of terrorists to circumvent CFT measures adopted by financial institutions. In point of fact, there is some consensus in the literature on terrorist financing that, as moving terrorists' money via formal banking system has become too risky – due to an increased financial surveillance –, terrorists did not have no option other than to resort to, admittedly cumbersome alternative money transfer methods, but not subject to CFT regime. That in any case, is what can be inferred from the FATF. In its website, it states that the approaches used to launder earnings of criminal undertakings and fund illicit activities are continuously evolving: as the global economic area realizes the FATF standards, offenders ought to find substitute means.[55]

With such a mixed observation from the global standards setter in CFT, we can then understand those who, like Stephen Kingah and Marieke Zwartjes, feel uncertain with CFT regulations and contend that terrorists and launders often tend to be ahead of the curve and counter-networks[56], and therefore view the fight against terrorist financing as a continuous struggle, whereby regulatory and policy-based need ample resources to be able to respond to the new dark alleys used by terrorists.[57] In other words, CFT legal framework, especially those that were adopted by financial services industry need to constantly get updated to deal with the financial dynamism of terrorists. In that process of reviewing CFT regulations, one needs to emphasize on those money transfer methods which are CFT obligations free or lightly regulated when it comes to their involvement in the financial war against terrorism. As Michael Brzoska points out, this is

[54] Peter R Neumann, 'Don't Follow the Money: The Problem with the War on Terrorist Financing' (2017) 96 Foreign Affairs 93, 95 <https://heinonline.org/HOL/Page?handle=hein.journals/fora96&id=751&div=&collection=>.
[55]FATF, Topic: Methods and Trends, available on http://www.fatfgafi.org/publications/methodsandtrends/?hf=10&b=0&s=desc(fatf_releasedate) , accessed on 25 August, 2018.
[56] Stephen Kingah and Marieke Zwartjes, 'Regulating Money Laundering for Terrorism Financing: EU–US Transnational Policy Networks and the Financial Action Task Force' (2015) 21 Contemporary Politics 341, 351 <https://vpn.uonbi.ac.ke/proxy/74e7fd98/https/www.tandfonline.com/doi/full/10.1080/13569775.2015.1061240> accessed 2 March 2019.
[57]ibid.

significant to rational terrorists as they can choose the jurisdiction with the weakest CTF provisions to conduct their financial operations .[58]

Michael Brzoska's point reflects the remarks of Osama bin Laden – former Al-Qaeda leader – who had asserted in an interview in October 2001 with a Pakistani newspaper that Al-Qaeda's funds were structured and controlled by sponsors who were as 'aware of the cracks inside the Western financial system as they are aware of lines on their hands'.[59] He further stated that "these are the very flaws of the Western financial system, which are becoming a noose for it."[60] The words of Osama amply illustrate the vulnerability of financial sector to serve as a conduit to move terrorists' funds, should a dynamic CFT regime that reflects the evolving nature of financing scheme of terrorists not be adopted to preserve the integrity of financial system, undermined by terrorists and their financiers using services and resources of financial institutions.

Needless to say, the presence of terrorists' funds in the financial system reshaped the allocation of the daunting task of controlling the customer's financial behavior. On this point, it turns out from the reading of a scholarly essay by Anja P. Jakobi, that banks and other related financial professions carried out a large part of the work monitoring the financial system on the subnational level[61], as they expanded the scope of surveillance over their customers' financial activity. This put the financial institutions in position to know better their customers with whom they engaged in a business relationship, and enabled them to collect and provide to law enforcement financial information on customers suspected of terrorist financing. With that sharing of financial intelligence between financial institutions and law enforcement, it is therefore hardly surprising that Gauri Sinha went as far as to describe the fight against terrorist finance as an intelligence exercise.[62]

[58]Michael Brzoska, 'Consequences of Assessments of Effectiveness for Counterterrorist Financing Policy' (2016) 48 Administration & Society 911, 922 <https://doi.org/10.1177/0095399714532272> accessed 2 March 2019.
[59] Paul S. Sarbanes and others, Hawala and Underground Terrorist Financing Mechanisms: Informal International Financing Networks That Can Serve as a Pipeline of Funds for Terrorist 2001 [S. HRG. 107–660] 49 1.
[60] ibid.
[61]Anja P Jakobi, 'Global Networks against Crime: Using the Financial Action Task Force as a Model?' (2015) 70 International Journal 391, 401 <https://doi.org/10.1177/0020702015587662> accessed 2 March 2019.
[62]Gauri Sinha, 'AML-CTF: A Forced Marriage Post 9/11 and Its Effect on Financial Institutions' (2013) 16 Journal of Money Laundering Control 142, 153 <https://www.emeraldinsight.com/doi/abs/10.1108/13685201311318494> accessed 2 March 2019.

To some degree, Gauri Sinha's argument is not without some logical and evidentiary underpinnings. Indeed, with the wealth of data financial institutions hold on their customers, and the record-keeping of their financial transactions, one can confidently assert that financial institutions constitute a repository of credible financial intelligence which can be relied on by law enforcement or Financial Intelligence Units (FIUs) in their investigations for financial crimes. This is so if we are to give credit to Norman Mugarura's opinion. In his article discussing issues and stakes underlying banks' enforcement of anti-money laundering (AML) and CFT norms, he came to the conclusion that as an essential interface for the prevention of financial crimes, banks have utilized their mandate to prevent money laundering and financing of terrorism by liaising with law enforcement authorities (…), which have earned them the title of heroes for the job well done.[63]

That engagement of financial sector with law enforcement in efforts to hunt terrorist finance is what is commonly referred to as public-private partnership by many in the CFT community.[64] Such collaboration is indicative of the prevailing assumption in the CFT. The one that since financial war against terrorism implies above all going after terrorists' money, the "following money trail" strategy has become a tool to track down terrorists and their financiers. Thus, who else, but the financial sector – whose core mission is to enable the flow of money – is more suited to trace the money trail back to terrorist financiers? Hence, Aimen Dean's remarks that financial services industry has been at the frontline of CFT.[65] Javier Argomaniz, et al. also feel the same, but in different wordings. They note that private financial institutions (FIs) have actually shouldered the bulk of the day-to-day CFT burden when it comes to monitoring the billions of

[63] Norman Mugarura, 'The Jeopardy of the Bank in Enforcement of Normative Anti-Money Laundering and Countering Financing of Terrorism Regimes' (2015) 18 Journal of Money Laundering Control 352, 366 <https://www.emeraldinsight.com/doi/abs/10.1108/JMLC-01-2014-0007> accessed 2 March 2019.

[64]Oldrich Bures, 'Public-Private Partnerships in the Fight against Terrorism?' (2013) 60 Crime, Law and Social Change 429, 429 <https://doi.org/10.1007/s10611-013-9457-7> accessed 2 March 2019. Leonardo Sergio Borlini and Francesco Montanaro, 'The Evolution of the EU Law Against Criminal Finance: The "Hardening" of FATF Standards within the EU' (2017) 48 Georgetown Journal of International Law 1009, 1020 <https://www.ssrn.com/abstract=3010099> accessed 2 March 2019.; Louis De Koker, Supriya Singh and Jonathan Capal, 'Closure of Bank Accounts of Remittance Service Providers: Global Challenges and Community Perspectives in Australia' (2017) 36 University of Queensland Law Journal 119, 150.; and Nicholas Alan McTaggart, 'Follow the Money to Achieve Success: Achievable or Aspirational' (2017) 24 Journal of Financial Crime 425, 432 <https://www.emeraldinsight.com/doi/abs/10.1108/JFC-03-2017-0022> accessed 2 March 2019.

[65]Aimen Dean, Edwina Thompson and Tom Keatinge, 'Draining the Ocean to Catch One Type of Fish: Evaluating the Effectiveness of the Global Counter-Terrorism Financing Regime' (2013) 7 Perspectives on Terrorism 62, 66 <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/282> accessed 2 March 2019.

daily financial transactions and reporting the suspicious ones to public authorities for further investigation.[66] As to Leonardo Borlini, he goes further to provide the merits of the heavy workload of CFT entrusted to formal banking sector. Investigations mainly target financial institutions through which criminal and terroristic groups move and deploy their resources, does he explain.[67]

What appears to be evident from the current trend of war against terrorist finance, which conditions the effectiveness of CFT legal framework on the cooperation with the financial sector, is the turning of financial institutions into the custodian of the financial system's integrity, or as Norman Mugarura could say it much better, into de facto policemen[68] to enforce the mandate of CFT, a task that S/RES/1373 (2001) 28 September 2001 assigns to States.[69]

Though effective in the first days, that relocation of CFT duty within financial sector functions has generated some unintended consequences that could not be expected by CFT framers, as terrorists changed the operating mode of moving their funds. Kingah and Marieke Zwartjes claim that while networks and tools to deal with money laundering (ML) for terrorist financing (TF) have been formal and public, it is worth noting that the manner in which terrorists fund their activities has been increasingly informal and through back door networks that elude the formal banking channels.[70] That informal method of performing financial transactions may, as posited by William Vlcek, not be as convenient as a bank, nonetheless it offers the means to avoid the mechanisms of financial surveillance[71], which is the overarching goal of terrorists, i.e. going unnoticed. To that end, the virtual world provides also, if we are to believe Angela S.M. Irwin, et al., a breeding ground for terrorists and their financiers to stay under the radar of formal banking system, in that virtual money laundering and terrorism financing offer high levels of anonymity,

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[66]Javier Argomaniz, Oldrich Bures and Christian Kaunert, 'A Decade of EU Counter-Terrorism and Intelligence: A Critical Assessment' (2015) 30 Intelligence and National Security 191, 202 <https://doi.org/10.1080/02684527.2014.988445> accessed 2 March 2019.

[67] Leonardo Borlini, 'Regulating Criminal Finance in the EU in the Light of the International Instruments' (2017) 36 Yearbook of European Law 553, 581–582 <https://academic.oup.com/yel/article/doi/10.1093/yel/yew030/2866360> accessed 2 March 2019.

[68]Norman Mugarura, 'Customer Due Diligence (CDD) Mandate and the Propensity of Its Application as a Global AML Paradigm' (2014) 17 Journal of Money Laundering Control 76, 82 <https://www.emeraldinsight.com/doi/abs/10.1108/JMLC-07-2013-0024> accessed 2 March 2019. See also Mugarura (n 63) 365.

[69]S/RES/1373 (2001), article 1 (b)

[70]Kingah and Zwartjes (n 56) 348.

[71]William Vlcek, 'Global Financial Governance and the Informal: Limits to the Regulation of Money' (2018) 69 Crime, Law and Social Change 249, 257 <https://doi.org/10.1007/s10611-017-9754-7> accessed 2 March 2019.

low levels of detection and removes many of the risks associated with real-world money laundering and terrorism financing activity.[72]

With that current trend of terrorists to resort to underground banking system that bypasses the scrutiny of conventional banking system, it could be said that the CFT regime in the formal financial sector was met with success, in that it managed to keep financial institutions from terrorists' abuse. Iwa Salami who came to such an observation suggests that, due to regulations around financial institutions' responsibility to know their customers, the organization of a terrorist activity, financed through the formal banking sector is increasingly difficult and is more than likely to be flagged up by banks and financial institutions when suspicious activities are carried out.[73] Burke Ugur Basaranel embraced Iwa Salami's position by submitting that improving financial sector regulations and measures set by FATF and other related international institutions have been making the formal financial sector a riskier place for terrorists to use.[74] In the same line of thought, Lauren C. O'Leary has for his part stated that terrorists are still able to use traditional intermediaries to some degree, but the level of scrutiny now applied by at least Western institutions to customer activity writ large makes them increasingly inhospitable for bad actors.[75]

However, that general opinion that notes the effectiveness of CFT scheme in the financial services industry does not match the words of those who closely monitor the evolution of funding mechanisms of terrorists, and who observe their great adaptability to the CFT measures. One of them Vivek Chadha reported how terrorists circumvent the existing norms by keeping their transactions below the threshold of the reporting process, as result of conducting their operations through multiple accounts.[76] As to Muhamet Aliu, et al., they opined that although security measures in the formal banking system is currently high; nonetheless, terrorists have used and

[72] Lin Lui and others, 'Money Laundering and Terrorism Financing in Virtual Environments: A Feasibility Study' (2014) 17 Journal of Money Laundering Control 50, 71 <https://www.emeraldinsight.com/doi/abs/10.1108/JMLC-06-2013-0019> accessed 2 March 2019.
[73]Iwa Salami, 'Terrorism Financing with Virtual Currencies: Can Regulatory Technology Solutions Combat This?' (2018) 41 Studies in Conflict & Terrorism 968, 969 <https://doi.org/10.1080/1057610X.2017.1365464> accessed 2 March 2019.
[74] Burke Basaranel, 'Online Terrorism Financing', *Terrorists' Use of the Internet: Assessment and Response* (IOS Press 2017) 105.
[75]Lauren C O'Leary, 'Targeting Detached Corporate Intermediaries in the Terrorist Supply Chain: Dial 2339/13224 for Assistance?' (2017) 103 Virginia Law Review 525, 572..
[76]Vivek Chadha, *Lifeblood of Terrorism: Countering Terrorism Finance in India* (Bloomsbury 2016) 35.

continue to use the defects in the system.[77] An example of the defect would possibly be the current CFT regime which is geared towards detecting terrorists' large-scale financial transactions, whereas, as just posited above by Vivek Chadha, their funds are split into small amounts barely detectable, especially in the noise of legitimate business. This is all the more true if one bears in mind the widely held argument in the current literature on terrorist financing, which points at the low-cost terrorist attacks whose financing does not necessarily require the movement of large amounts that may raise suspicion of financial institutions.

Indeed, according to Peter Romaniuk, there is some consensus that terrorist attacks themselves are cheap to undertake[78], which from the CFT standpoint is not a failure, but a success, as it reflects the financial constraints posed to terrorists by the global campaign against terrorist finance. As such, one can claim victory over the financial war against terror. However, it has occurred that the victory was temporary as it arose a new type of terrorism – referred to as lone wolf terrorism – whose financing line is particularly challenging the progress already made in terms of CFT. By definition, lone wolf terrorists are individuals who plan, organize, and execute their attacks in the absence of a financially or physically supportive terrorist organization.[79] A report by Tom Keatinge and Florence Keen found that the financial patterns of lone actors (…) are often indistinguishable from legitimate financial behavior[80], and proactive identification of these individuals through financial reporting remains challenging.[81] Michael Tierney sets the origin of that challenge in the ability of lone actors to hold several accounts within various financial institutions to conduct their banking activity.[82]

[77]Muhamet Aliu and others, 'A Review of Sources on Terrorist Financing' (2017) 13 Acta Universitatis Danubius 97, 103 <http://journals.univ-danubius.ro/index.php/juridica/article/view/3756> accessed 2 March 2019.

[78] Peter Romaniuk, 'The State of the Art on the Financing of Terrorism' (2014) 159 The RUSI Journal 6, 8 <https://doi.org/10.1080/03071847.2014.912794> accessed 2 March 2019.

[79]Burcu Pinar Alakoc, 'Competing to Kill: Terrorist Organizations Versus Lone Wolf Terrorists' (2017) 29 Terrorism and Political Violence 509, 514 <https://doi.org/10.1080/09546553.2015.1050489> accessed 2 March 2019.

[80]Tom Keatinge and Florence Keen, 'Lone-Actor and Small Cell Terrorist Attacks: A New Front in Counter-Terrorist Finance?' [2017] Royal United Services Institute for Defence and Security Studies 25, vii <https://rusi.org/publication/occasional-papers/lone-actor-and-small-cell-terrorist-attacks-new-front-counter> accessed 3 March 2019.

[81] ibid.

[82] Michael Tierney, 'Spotting the Lone Actor: Combating Lone Wolf Terrorism through Financial Investigations' (2017) 24 Journal of Financial Crime 637, 638 <https://www.emeraldinsight.com/doi/abs/10.1108/JFC-08-2016-0052> accessed 3 March 2019.

Thus, in the light of the preceding, and taking into account various points of practitioners and scholars who discussed on the state of progress of CFT, it would be prudent, at the very least, to take with caution any conclusion talking about success or failure of CFT agenda in the financial sector. Obviously, CFT architects did not anticipate that terrorists were, – as result of intense regulatory pressure on formal banking sector –, going to show some imagination by coming up with more secretive methods to move money that can circumvent the increased financial control of financial institutions. That adaptive behavior is the unintended consequence of CFT measures, and has meant that the fight against terrorist finance became a continuous battle. Terrorists and their financiers against whom CFT laws were adopted have been very resourceful in financing their violence, so said Brigitte L Nacos[83], a finding highlighted by Adam Fenton and David Price who, meanwhile, informed that terrorist cells have shown remarkable resilience and ingenuity, in respect of their funding efforts.[84]

That being said, this creates a need to constantly readjust CFT regulations, with this time special emphasis on terrorists' small amounts which easily blends in the noise of legitimate business, and then go undetected by the formal financial system, which is rather busy with spotting abnormal patterns in large-scale financial transactions. This, as indicated by Nicholas Gilmour, et al., does not stop the movement of funds for the purpose of terrorism – which are typically discreet, unrecognizable and frequently feature in financial transactions[85].

In sum, in consideration of the evolutionary scale of terrorists' methods to raise and move their funds, it would be wrong to conclude that CFT has been futile with terrorists resorting to much more underground and unsecure methods of banking, which is time consuming and slows down the flow of their funds. In this regard, Juan Zarate in his book recounted the case of documents found in Osama Bin Laden's compound which revealed how the global efforts to restrict terrorist funding had made it frustratingly more difficult for al Qaeda to raise and transfer money around the world.[86] However, the side effect of that success should not be overlooked, since at the same

[83]Brigitte L Nacos, *Terrorism and Counterterrorism* (5th edn, Routledge 2016) 226.
[84] Adam Fenton and David Price, 'Forbidden Funds - Indonesia's New Legislation for Countering the Financing of Terrorism' (2014) 11 Indonesian Journal of International Law 363, 365–366 <http://ijil.ui.ac.id/index.php/home/article/view/503> accessed 13 May 2019.
[85]Gilmour, Hicks and Dilloway (n 52) 274.
[86]Juan Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (1st edition, PublicAffairs 2013) ix.

time, terrorists were pushed to turn to less or none regulated money transfer channels that provide for them a safe harbor to move their funds worry-free.

1.9. Research Methodology

This study is qualitative in nature as it is a desk-top research. To that end, it relies on secondary data. They will be collected by reviewing insights contained in books, scholarly articles, journals, reports and other authoritative materials related to the issues at hand. This will help to get perception and understanding of various authors on different issues arising within the fight against terrorist financing in particular.

1.10. Delimitations

The main focus of this research is to look into the anti-terrorist financing regulations for the financial sector, especially in light of observing the principles set out under S/RES/1373 (2001) 28 September 2001, which were afterwards reiterated in the FATF Recommendations. In as much as there are numerous international laws, conventions and treaties that have been put in place in order to combat the financing of terrorism, this research mainly focuses on the principles of anti-terrorist financing set out in S/RES/1373 (2001) 28 September 2001, whose implementation by financial sector is guided by FATF Recommendations.

Against all expectations, this research is not focused on looking at pre-existing anti-terrorism legal arsenal that S/RES/1373 (2001) 28 September 2001 itself sought to substantiate, but rather emphasizes on emotional impact engendered by 9/11 events, which meant that UNSC unanimously adopted S/RES/1373 (2001) 28 September 2001 that stood out both in language, scope, and time frame compared to other anti-terrorism resolutions which went unnoticed. It is those aforementioned features of S/RES/1373 (2001) 28 September 2001 that made it the founding Resolution of anti-terrorism whose principles were echoed in FATF Recommendations.

1.11. Chapter breakdown

This research will be divided into five chapters:

The first chapter is essentially a research project. It consists of the introduction and background; the statement of the problem; research questions, objectives; hypotheses; justification of the study;

theoretical framework; literature review; research methodology; delimitation; and chapter breakdown.

The second chapter will focus on the S/RES/1373 (2001) 28 September 2001 itself, i.e. its historical background, purpose, and the spirit of its letter. It specifically looks into the manner in which S/RES/1373 (2001) 28 September 2001 came into being, alongside how terrorism was combated prior to and post the 9/11.

The third chapter will be devoted to the regulations set on countering terrorist financing by the banking industry. A critical analysis of obligations imposed on banks will form the main body of this chapter partitioned into two sections, notably the standards of customer due diligence (CDD) and the duty to report suspicious financial transactions.

The fourth chapter will present an overview of anti-terrorist financing regulations for non-banking institutions offering financial services. Such institutions which include mobile financial services (MFSs) and alternative remittance system (ARS) – such as Western Union and Hawala amongst others – will be extensively discussed, with special emphasize on risk of terrorist financing they pose

Finally, **the fifth chapter** will provide all the findings made in this research, the conclusions reached at the end, and the various recommendations provided on how to make the fight against the financing of terrorism more effective.

CHAPTER TWO

Overview of the United Nations Security Council (UNSC)'s Resolution 1373 on Terrorism

2.1 Introduction and background

The current status of international legal framework of anti-terrorism suggests that there is yet another anti- terrorism Resolution that can compete with S/RES/1373 (2001) 28 September 2001 in terms of its prominence in the fight against terrorism. Yet, since 2001 the year of adoption of S/RES/1373 (2001) 28 September 2001 the world has recorded a number of terror attacks that were condemned by UNSC through a series of Resolutions, but still S/RES/1373 (2001) 28 September 2001 remains unique in that it institutionalized the fight against terrorism.

Adopted unanimously on 28 September, 2001 by the United Nations Security Council (UNSC) at its 4385th meeting, and acting under Chapter VII of the UN Charter which provides for binding character to decisions of the Security Council, S/RES/1373 (2001) 28 September 2001[87] is the cornerstone of the United Nations' counterterrorism effort.[88] It was described by Turkey as a "ground breaking Resolution"[89], by Singapore as a "landmark decision"[90], by the United Kingdom as "an historic event"[91] and by Russia as "a major historic document"[92] in the Council's history.

While the impetus for S/RES/1373 (2001) 28 September 2001 was the terrorist attacks of 9/11[93], its reach is far beyond that.[94] It has – by addressing to all States[95] regardless their membership to the UN – globalized the fight against terrorism, which was hitherto fought separately by individual

[87] S/RES/1373 (2001)
[88]Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism' (2003) 97 The American Journal of International Law 333, 333 <https://www.jstor.org/stable/3100110> accessed 4 March 2019..
[89]UNGA, 56th session, 48th Plenary Meeting, UN Doc.A/56/PV.48, 12 November, 2001, p.9.
[90]UNGA, 56th session, 25th Plenary Meeting, UN Doc.A/56/PV, 15 October, 2001, p.10
[91]UNSC, 4413th meeting, UN Doc. S/PV. 4413, 12 November, 2001, p.15
[92]UNSC, 4453rd meeting, UN Doc. S/PV.4453, 12 January, 2002, p. 7.
[93]S/RES/1373 (2001), paragraph 2 of the preamble.
[94]Wondwossen D Kassa, 'Rethinking the No Definition Consensus and the Would Have Been Binding Assumption Pertaining to Security Council Resolution 1373' (2015) 17 Flinders Law Journal 127, 128 <https://heinonline.org/HOL/Page?handle=hein.journals/flinlj17&id=135&div=&collection=>.
[95] S/RES/1373 (2001), paragraph 1.

States as an ordinary crime.[96] For that, it is treated as a global counter-terrorism code.[97] It has served both as an international legal template for an effective combating of terrorism and a stimulating prompt to all States' legal jurisdiction to diversify their efforts in the fight against terrorism.[98] States spontaneously implemented the Resolution[99], and went even further to adhere to the then twelve International Conventions related to terrorism.[100]

To ensure effective implementation of obligations it contains, S/RES/1373 (2001) 28 September 2001 set up a Counter-Terrorism Committee (CTC) to which States report on measures taken as part of the global campaign of counter-terrorism.[101] The CTC is a centerpiece of global counterterrorism capacity-building efforts[102]. It monitors status of implementation of the Resolution by States, and brings also its assistance to upgrade the capacity of each nation's legislation and executive machinery to fight terrorism[103]. It does all that with complete fidelity to S/RES/1373 (2001) 28 September 2001, which it regards as its bible.[104] That legal – i.e. S/RES/1373 (2001) 28 September 2001 itself –, and institutional –, i.e. its Counter-Terrorism Committee – framework provided for States a new boost to the fight against terrorism. Thus, to further understand S/RES/1373 (2001) 28 September 2001, its goals and the spirit of its letter, one needs to look at the pre and post S/RES/1373 (2001) 28 September 2001 period, and the context that surrounds the adoption of the same.

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[96] James Renwick and Gregory F Treverton, 'The Challenges of Trying Terrorists as Criminals' (RAND Corporation 2008) CF-249-CGRS 11 <https://www.rand.org/pubs/conf_proceedings/CF249.html> accessed 4 March 2019.

[97]Walter Gehr, 'The Universal Legal Framework Against Nuclear Terrorism' (2012) 2007 Nuclear Law Bulletin 5, 5 <https://read.oecd-ilibrary.org/nuclear-energy/the-universal-legal-framework-against-nuclear-terrorism_nuclear_law-2007-5k9gvsb20b6j> accessed 4 April 2019.

[98]N Okeke G., 'The United Nations Security Council Resolution 1373: An Appraisal of Lawfare in the Fight against Terrorism' (2014) 6 Journal of Law and Conflict Resolution 39, 46 <http://academicjournals.org/journal/JLCR/article-abstract/D63473A44728> accessed 4 March 2019.

[99]UN Security Council Counter-Terrorism Committee, Global survey of the implementation of Security Council Resolution 1373 (2001) by Member States, UN Document S/2011/463, p.5.

[100] Resolution 1373 does not mention terrorism treaties promulgated before its adoption, which the remaining non-signatory States must become parties to. However, it explicitly refers to the 1999 International Convention for the Suppression of the Financing of Terrorism as one of them. See S/RES/1373 (2001), article 3(d), UN Doc. S/RES/1373 of 28 September 2001.

[101]S/RES/1373 (2001), paragraph 6.

[102]Jane E Stromseth, 'Imperial Security Council - Implementing Security Council Resolutions 1373 and 1390' (2003) 97 American Society of International Law Proceedings 41, 43 <https://heinonline.org/HOL/Page?handle=hein.journals/asilp97&id=53&div=&collection=>.

[103]UNSC, 4453rd meeting, UN Doc. S/PV.4453, 18 January, 2002, p. 4.

[104] Nicholas Rostow, 'Before and after: The Changed UN Response to Terrorism Since September 11th' (2002) 35 Cornell International Law Journal 475, 483 <https://scholarship.law.cornell.edu/cilj/vol35/iss3/3>.

2.2 Pre-Resolution 1373

Before 11 September, 2001 attacks, terrorism was already a great concern in the international arena. There had been, under the auspices of UN General Assembly (UNGA), considerable efforts to suppress it which resulted in the elaboration of several Conventions addressing specific offences committed by terrorists: sabotage of aircrafts[105]; hijacking[106]; aggression against protected persons[107]; attacks on nuclear facilities[108]; hostage-taking[109]; and maritime piracy[110].

Surprisingly, none of the Conventions criminalizing the aforementioned offenses does refer to "terrorism" in its wording[111]. This reveals the reluctance of UNGA to use a term which is not subject to a common understanding between subjects of international law, and in particular States. To circumvent that definition deadlock, States opted to address terrorism by making it a well-defined offence, thus limiting the scope of material competence of Conventions adopted. It is therefore that move of dealing with terrorism, not in its comprehensiveness, but by tackling its various forms of manifestation, that we refer to as sectoral approach.[112]

[105] Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September, 1971, 24 U.S.T. 564, I.I.A.S. No. 7570, 974 U.N.T.S.178; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 24 February, 1988, reprinted in 27 1.L.M. 627 (1988).

[106] Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December, 1970, 22 U.S.T.1641, 1973 U.N.T.S.106.

[107] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December, 1973, 28 U.S.T. 1975, 1035 U.N.T.S.167.

[108]Convention on the Physical Protection of Nuclear Material, 28 October, 1979, 1456 U.N.T.S. 24631.

[109] International Convention against the Taking of Hostages, 17 December, 1979, 1316 U.N.T.S.206.

[110] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March, 1988, S. Treaty Doc. No. 101-1 (1988), reprinted in 27 I.L.M.672 (1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March, 1988, 1678 U.N.T.S. 304, reprinted in 27 I.L.M 685 (1988).

[111] It was not until 1997 and 1999 that the concept of terrorism appeared in the elaboration of legal norms by the UN, retrospectively the International Convention for the Suppression of Terrorist Bombings, 2149 U.N.T.S. 256 and the International Convention for the Suppression of the Financing of Terrorism, 2178 U.N.T.S. 197

[112] Giuseppe Nesi, 'The UN Convention on the Prevention and Suppression of International Terrorism', *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism* (Ashgate Publishing, Ltd 2006) 4.; Ridarson Galingging, 'Problems and Progress in Defining Terrorism in International Law' (2009) 21 Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada 442, 445 <https://journal.ugm.ac.id/jmh/article/view/16272> accessed 5 March 2019. Ben Saul, *Terrorism* (Bloomsbury Publishing 2012) lxxi.

Despite a relatively impressive number of sectoral counter-terrorism Conventions, terrorist attacks – though less spectacular than those of 9/11 but lethal – took place in different parts of world, thus triggering a wave of international condemnation, at the top level of which, that by the UNSC. It took action each time an incident of international terrorism occurred, acting under Chapter VII of UN Charter to address a specific situation that was found to be a threat to international peace and security[113]. For instance, in Resolution 883 - S/RES/883 (1993) 11 November 1993 UNSC deals specifically with the Libyan government, and demands him to comply with Resolution 731 - S/RES/731 (1992) 21 January 1992 [114] and Resolution 748 - S/RES/748 (1992) 31 March 1992 [115] which sought the cooperation of Libya in surrendering its nationals suspected in the bombing of Pan Am flight, known as Lockerbie bombing[116]. Similarly, Resolution 1267 - S/RES/1267 (1999) 15 October 1999 directed to the Taliban Afghan regime aimed cessation of its support to international terrorism – through the provision of sanctuary and training for international terrorists and their organizations –, and particularly demanded the Taliban regime to hand over the late Osama Bin Laden for his prosecution following the 1998 bombings of US embassies in Nairobi and Dar es Salaam[117]. The same move was observed with Resolution 1054 - S/RES/1054 (1996) 26 April 1996, addressing to the government of Sudan in regard to the extradition request of suspects in a failed assassination attempt against the Egyptian President Hosni Mubarak in 1995[118]. In each of the above- mentioned cases, the Security Council (SC) reaffirmed that suppression of international terrorism was essential for the maintenance of international peace and security, but only acted in response to a particular situation[119], while at the same time being specific, by going so far as to quote by name the addressee of Resolutions it adopted.

[113] Monika Heupel, 'Adapting to Transnational Terrorism: The UN Security Council's Evolving Approach to Terrorism' (2007) 38 Security Dialogue 477, 482 <https://www.jstor.org/stable/26299639> accessed 7 March 2019.
[114] S/RES/731 (1992)
[115] S/RES/748 (1992)
[116] S/RES/883 (1993)
[117] S/RES/1267 (1999)
[118] S/RES/1054 (1996)
[119] Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 Leiden Journal of International Law; Cambridge 593, 595 <https://search.proquest.com/docview/219608392/abstract/906B72D705B74023PQ/1> accessed 7 March 2019.

Dealing with a specific event, SC's anti-terrorism Resolutions adopted prior 9/11 were explicitly or implicitly temporarily limited[120], as their deadline expired with the end of situation – i.e. a concrete security threat – they sought to address[121]. Thus, Libya saw the sanctions which were taken against him lifted[122], soon after it handed over the two suspects involved the Lockerbie bombing[123], pursuant to S/RES/883 (1993). In the same way, SC – noting the steps taken by the Government of Sudan to comply with provisions of its Resolutions, and welcoming the country's accession to the pertinent international Conventions for the purpose of getting rid of terrorism –, decided to dismiss, with instantaneous effect, with those reference has been made in paragraphs 3 and 4 of Resolution 1054 - S/RES/1054 (1996) 26 April 1996 and paragraph 3 of Resolution 1070 - S/RES/1070 (1996) 16 August 1996 [124]. However, it should be noted that Sudan has so far yet extradited suspects of the failed assassination attempt on the Egyptian President, who are said to be no longer in its territory, hence the abstention of US in the Resolution lifting the sanctions[125]. As to S/RES/1267 (1999) 15 October 1999 establishing a sanctions regime against the Taliban, its paragraph 14 makes provision for the end of sanctions once the Taliban comply with paragraph 2 of the same Resolution, i.e. after the handing over of Osama bin Laden[126].

With regard to the language used in SC's Resolutions addressing international terrorism, the formula adopted calls for a due consideration when assessing the action by SC against terrorism before 9/11. Though acting under chapter VII of UN Charter – which renders mandatory SC's measures –, its terminology was much less binding with wording like: Security Council

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[120] Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 American Journal of International Law 175, 176 <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/security-council-as-world-legislature/0014D3FFBCCD4A8A2F6E1651866F438F> accessed 7 March 2019.

[121]Paul C Szasz, 'The Security Council Starts Legislating' (2002) 96 American Journal of International Law 901, 902 <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/security-council-starts-legislating/EAFA70BAD7D5924746BE828EC4753DC7> accessed 7 March 2019.

[122] Security Council, Press Release SC/6490: Security Council Discusses Sanctions Imposed on Libya Following Bombing of Pan Am Flight 103, UTA Flight 772, 20 March, 1998, available at <https://www.un.org/press/en/1998/19980320.SC6490.html,> accessed on 2 November, 2018.

[123]Marlise Simons, '2 Libyan Suspects Handed to Court in Pan Am Bombing' *The New York Times* (New York, 6 April 1999) <https://www.nytimes.com/1999/04/06/world/2-libyan-suspects-handed-to-court-in-pan-am-bombing.html> accessed 7 March 2019.

[124] Security Council, Press Release SC/7157: Security Council Lifts Sanctions against Sudan, 28 September, 2001, available at: <https://www.un.org/press/en/2001/sc7157.doc.htm,> accessed on 2 November, 2018.

[125]SC/7157, Press Release: Security Council Lifts Sanctions against Sudan, 28 September, 2001, available at https://www.un.org/press/en/2001/sc7157.doc.htm , accessed on 2 November, 2018.

[126]S/RES/1267 (1999), paragraph14.

"demands"[127], "urges"[128], "calls upon"[129]. Admittedly, we can find in previous chapter VII Resolutions States' obligations phrased in mandatory language, but when read in conjunction with other provisions in non-binding terms, – which actually outnumber binding obligations –, their legal enforceability goes down, though invoking chapter VII.

That being so, the soft law style widely used by SC prior 9/11 implies in the legalese a request and not a mandate[130], and Resolutions that used such formulation served more as lofty statements of principle than legal obligations for all UN members[131]. This may explain the disregarding by non-directly concerned States of those Resolutions which, as abovementioned, only relate to a specific situation which constitutes a security threat, i.e. Resolutions subsequent to the commission of terrorist attacks that are condemned by the Security Council.

Those Resolutions fall under the first group in the classification of Resolutions established by Daniel Garcia –San José. He analyzed the Security Council antiterrorist Resolutions and came up with three categories of the same[132]. The first category is specifically devoted to condemn terrorist attacks committed worldwide, the second category addresses itself to the adoption by States of general executive measures to combat terrorism, and finally, a third group sees the Security Council directly legislating measures on behalf of the international community of States as a whole in combating terrorism.

Still according to the same author, these three categories of Resolutions differ in content and in language alike. For instance, Resolutions of the first kind adopted in the aftermath of terrorist attacks, only invoke the UN Charter as legal basis in combating terrorism but make no reference

[127]S/RES/1333 (2000) with regard to the situation in Afghanistan. In that Resolution, SC "**demands"** that the Taliban comply with Resolution 1267 (1999) (…).
[128] SC adopted S/RES/1363 (2001) whereby it "**urges**" all States to enforce and strengthen their domestic legislation to reinforce measures contained in Resolutions 1267 (1999) and 1333 (2000).
[129]S/RES/1192 (1998) on the call to the Government of Libya to extradite suspects of Lockerbie bombing. SC "**calls upon**" the Governments of Netherlands and United Kingdom to take necessary steps to implement their initiative to try the two persons charged with the bombing of Pan Am flight 103.
[130]Edward Grodin, '"Making the World Safe for Democracy": UN Security Council Resolution 1373, the International Imposition of Counterterrorism Policies, and the "Arenas of Power" Model :' (2012) 2 The Cornell Policy Review <https://blogs.cornell.edu/policyreview/2012/03/15/making-the-world-safe-for-democracy-un-security-council-resolution-1373-the-international-imposition-of-counterterrorism-policies-and-the-arenas-of-power-model/> accessed 7 March 2019.
[131]ibid.
[132] Daniel García-San José, 'The Legislative Dynamics Of International Law In Combating Terrorism, A Case-Study', *International Legal Dimension of Terrorism* (Brill 2009) 138–139.

to international law. On the contrary Resolutions of second kind, that is, those promoting adoption of measures to combat terrorism, are concerned with supporting their legality by referring to Chapter VII, as well as their legitimacy by recalling States' obligations under general international law, along with reference to humanity and to the whole membership of the UN. The third category of Resolutions is the result of SC legislating directly on measures to combat terrorism on behalf of humanity and the whole membership of the UN.[133]

Of the foregoing, it's easy to understand why SC's antiterrorist Resolutions adopted before 2001 – which, in most cases were not binding by their formulation, or in exceptional circumstances, merely recalled preexisting obligations on States – went almost unnoticed, compared with S/RES/1373 (2001) 28 September 2001 that appeared as a response to the events of 9/11, attacks of such an unbridled violence that the shock wave was felt worldwide.

2.3 Post Resolution 1373

With the adoption of Resolution 1373, SC has somehow raised the voice towards UN member States, by working on its wording. From now on, it neither demands nor urges or calls upon anymore, but **"decides".** Despite the fact that at some point in the course of Resolution SC used a less categorical formulation, by actually calling upon States[134], the substantive obligations – i.e. obligation to prevent and suppress financing of terrorist acts, obligation to freeze terrorists' assets, and obligation to establish terrorism and its financing as serious criminal offences – are expressed in an authoritative language: "SC decides that all States shall (…)"[135]. That change in wording has had an immediate legal effect: The legislative nature of Resolution 1373. By imposing a general international obligation – of combating terrorism – on all States without their prior consent, S/RES/1373 (2001) 28 September 2001 marked a shift in international law-making process by redefining how States can be duty bound by a treaty. According to the 1969 Vienna Convention on the Law of Treaties, a State has to voluntarily sign the treaty in question for it to be bound, a rule that S/RES/1373 (2001) 28 September 2001 blatantly disregarded it.

[133] ibid.
[134] S/RES/1373 (2001), paragraph 3
[135] S/RES/1373 (2001), paragraphs 1 and 2.

With such a revolutionary character[136], States are now dealing with a Resolution accompanied by a binding obligation to which they are obliged to satisfy, hence the pace with which they responded to the call of SC. Indeed, in the months that followed the adoption of S/RES/1373 (2001) 28 September 2001, the approval of anti-terrorist legislation has spread over the world like wildfire. On 26 October, 2001 the United States adopted the USA-Patriot –Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism – Act; on 14 December 14, England voted the Anti-terrorism, Crime and Security Act; while on the same month Canada passed the Anti-terrorism Act. Similarly, Japan on 29 October, 2001, passed the Anti-Terrorism Special Measures Law. In Africa, the African Union (AU) convened the first high level inter-governmental meeting on the prevention and combating of terrorism, held in Algiers, from 11 to 14 September 2002. The meeting ended up with the adoption of the Plan of Action on the Prevention and Combating Terrorism[137], which gives concrete expression of S/RES/1373 (2001) 28 September 2001[138]. Overall, the Plan sought to strengthen AU's legal framework against terrorism, and to address the weakness of the then existing implementation mechanisms.[139]

Thus, S/RES/1373 (2001) 28 September 2001 has as abovementioned the merit of having made the fight against terrorism a global struggle, in which States must stand together and unite their efforts to free the world from the scourge of terrorism. It has significantly enhanced the nations' ability to combat this menace, above all increasing the capacity of those that were formerly less sensitive to their duty in this field.[140] On that point, one could say that S/RES/1373 (2001) 28 September 2001 succeeded the mission in that the UN Member States 'reaction demonstrates the level of mutual understanding of the significance of the matter, and approval of, and backing for, the Resolution and the CTC .[141]It is above all, through adherence of States in existing terrorism treaties that such acceptance and support have truly materialized, as the number of ratifications of

[136] Luis Miguel Hinojosa Martinez, 'A Critical Assessment of the Implementation of Security Council Resolution 1373' 1 <http://digibug.ugr.es/bitstream/handle/10481/31650/SC%20Res%201373%20Chapter.pdf?sequence=1> accessed 4 April 2019. ; Anette Ahrnens, *A Quest for Legitimacy: Debating UN Security Council Rules on Terrorism and Non-Proliferation* (Lund Univ Press 2007) 16.
[137] Plan of Action of the African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa (Mtg/HLIG/Conv.Terror/Plan.(I)), Algiers, 11-14 September 2002.
[138] ibid, p.2.
[139] Ibrahim J. Wani, 'The African Union Role in Global Counterterrorism', *African Counterterrorism Cooperation: Assessing Regional and Subregional Initiatives* (1st edn, Potomac Books, Inc 2007) 48.
[140] Hinojosa Martinez (n 136) 14.
[141]Rostow (n 104) 482.

anti-terrorism Conventions increased following adoption of S/RES/1373 (2001) 28 September 2001.[142] For instance, on the eve of 9/11 attacks, – events which led to the adoption of S/RES/1373 (2001) 28 September 2001 –, only two States (Botswana and United Kingdom) were parties to all twelve of the International Conventions and Protocols related to terrorism[143]. By October 2002 twenty-four States had ratified the said Conventions[144]. Today, some two-thirds of UN Member States have either ratified or acceded to at least 10 of the current 19 instruments, and there is no longer any country that has neither signed nor become a party to at least one of them.[145]

That domino effect of S/RES/1373 (2001) 28 September 2001 ever seen in previous SC's Resolutions dealing with terrorism, calls one to enquire about its peculiarity vis-à-vis its predecessors. Indeed, in many respects S/RES/1373 (2001) 28 September 2001 distinguishes itself from the range of SC's counter-terrorism activities. First, it stands out by its binding terms compared to past Resolutions. Eleven out of eighteen directives in S/RES/1373 (2001) 28 September 2001 begin with the verb "decides", thus making them legally binding[146]. The language used by the Council ("decides that all States shall") indicates that various provisions contain mandatory directions in a style characteristic of legislation[147]. Secondly, unlike earlier anti-terrorism Resolutions which were situation based, and therefore more specific as to whom is the addressee, S/RES/1373 (2001) 28 September 2001 is general and abstract in nature. It does not address any event or circumstance, nor is it directed to a particular State or individual. Even though it refers to 9/11 attacks in the preamble[148], it still remains general by not addressing a case of imminent security threat that arises out of a specific situation. The threat to the peace identified in

[142]Saeid Mirzaei Yengejeh, 'Law-Making by the Security Council in Areas of Counter-Terrorism and Non-Proliferation of Weapons of Mass-Destruction' (Thesis, Université d'Ottawa / University of Ottawa 2016) 206 <http://ruor.uottawa.ca/handle/10393/35536> accessed 13 March 2019.

[143]UN Security Council, 57th session, 4618th meeting, supra note 15, S/PV.4618, p.6.

[144]UN Security Council, 57th session, 4618th meeting, supra note 15, S/PV.4618, p.6.

[145] Security Council: Counter-Terrorism Committee, International Legal Instruments, available at: <https://www.un.org/sc/ctc/resources/international-legal-instruments/> , accessed on 22 October, 2018.

[146] Ahrnens (n 136) 121.

[147]Fionnuala Ní Aoláin, 'Report of Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (UN 2018) Advanced Unedited Version A/73/45453 9 <https://www.un-ilibrary.org/international-law-and-justice/international-instruments-related-to-the-prevention-and-suppression-of-international-terrorism_c73670ea-en> accessed 13 March 2019.

[148]S/RES/1373 (2001), paragraph 2 of the preamble

the Resolution is not associated with any specific situation or conduct[149], but rather a form of behavior: "terrorist acts"[150]. It is indeed a form of behavior that the Resolution leaves undefined[151].

By doing so, SC for the first time ever declared an abstract phenomenon, i.e. international terrorism, to be per se a threat to international peace and security, since the notion of a threat to peace had in the past been related to the existence of a specific situation, located in a territorial area[152]. That general and abstract character has caused many scholars in counter-terrorism field to label S/RES/1373 (2001) 28 September 2001 as an act of international legislation on the part of SC[153]. That is, SC on its own initiative made a new international legal norm binding on all States, irrespective their consent[154]. Thirdly, S/RES/1373 (2001) 28 September 2001 is also distinctive in that legal obligations it spells out are temporarily and spatially unlimited[155]. It provides neither that it will cease to remain in force following a fixed period absent a positive vote of the Council, nor that it will continue in force until a contrary vote[156]. The implication must be that S/RES/1373 (2001) 28 September 2001 is intended to remain in force indefinitely[157]. In this regard, the United States has explicitly stated that "[i]t is important to remember that Resolution 1373 (2001) and the Committee established to monitor it have no time limits. They will continue until the Security Council is satisfied with the implementation of the Resolution"[158]. It is noteworthy to mention that the unlimited nature of S/RES/1373 (2001) 28 September 2001 set a precedent for Resolutions that

[149]Happold (n 119) 598.
[150] ibid.
[151]ibid.
[152] Nicolas Angelet, 'Vers un renforcement de la prévention et la répression du terrorisme par de moyens financiers et économiques?', *Le droit international face au terrorisme : Après le 11 septembre 2001* (Editions A Pedone 2002) 219. Happold (n 119) 593.
[153]Károly Végh, 'A Legislative Power of the UN Security Council?' (2008) 49 Acta Juridica Hungarica 275, 276 <http://www.akademiai.com/doi/abs/10.1556/AJur.49.2008.3.2> accessed 13 March 2019.See also Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17 European Journal of International Law 881, 883 <https://academic.oup.com/ejil/article-lookup/doi/10.1093/ejil/chl032> accessed 13 March 2019.; Nouf Abdalla Al Jasmi, 'The Criminal Liability of the Terrorist Crimes in the International Law' (2018) 56 European Journal of Social Sciences 348, 356.
[154] Végh (n 153) 276.
[155] Ahrnens (n 136) 16.; Mirko Sossai, 'UN SC Res.1373 (2001) and International Law-Making: A Transformation in the Nature of the Legal Obligations for the Fight against Terrorism?', *Agora on Terrorism and International Law* (2004) 1.
[156]Happold (n 119) 599.; Rosand (n 88) 335.
[157]Happold (n 119) 599.
[158]UN Security Council, 57th session, 4561st meeting, S/PV.4561, p.6.

followed 9/11, as they too legally bind all States unbound by time limitations or defined geographical area .[159]

In short, the undeniable fact attributable to S/RES/1373 (2001) 28 September 2001 is that it has made terrorism a worldwide concern, fight of which is no longer seen as an option but regarded as a requirement. Before the adoption of the Resolution, the fight against terrorism had fallen into oblivion – especially in countries that had never experienced terror attacks –, or simply depended on the goodwill of States. But with S/RES/1373 (2001) 28 September 2001, anti-terrorism has become the credo of international community[160], and it is rare that such a topic eludes major international meetings even though it is not officially part of the agenda. In that context, rare are States which would still dare associating with terrorism by providing support of any kind, out of fear of being sidelined in the concert with other nations. At the time of writing this study, four States remain on the US blacklist of State sponsors of terrorism: Democratic People's Republic of Korea (North Korea), Iran, Sudan, and Syria[161].

2.4 The spirit and letter of Resolution 1373

S/RES/1373 (2001) 28 September 2001, the first in the history of international law by its mandatory nature, is a 9 paragraphs text contained in a four pages document. But it is the first three paragraphs which form the focal point of the Resolution. The first paragraph deals with terrorist financing, with special emphasis on prevention and suppression of the same, the second paragraph concerns the criminalization of all acts of terrorism, and the third paragraph is about cooperation between States through information exchange and ratification of relevant international conventions and protocols relating to terrorism.

As above-mentioned, S/RES/1373 (2001) 28 September 2001 stands out by its authoritative tone which translates in the use of the verb "decide" in its operative paragraph 1 and 2. However, paragraph 3 which also happens to be an operative one is drafted not in a constraining, but a soft

[159]Müge Kinacioğlu, 'War on Terror' and Hegemony: International Law-Making Regarding Terrorism After 9/1' (2012) 8 Uluslararası İlişkiler 67, 77.

[160] There have been over forty UNSC Resolutions with a principal focus on terrorism since 9/11. See Cian Murphy, 'Islamic State, The United Nations & the Fragility of the Rule of Law' (University of Bristol - School of Law 2016) 12 <https://research-information.bristol.ac.uk/en/publications/islamic-state-the-united-nations--the-fragility-of-the-rule-of-law(2f0a9abf-669d-4524-8291-80a67f963ece).html> accessed 13 May 2019.

[161] US Department of State, State Sponsors of Terrorism, available at: <https://www.state.gov/j/ct/list/c14151.htm,> accessed on 12 November, 2018.

language: SC "calls upon States to (…)"[162], a terminology that is understood as not implying compulsion[163]. In that sense, a purely literary interpretation would imply that provisions of paragraph 3 are not binding on States called upon, and therefore subparagraph 3 (d) which appealing States to become parties to anti-terrorism treaties would have no legal enforceability. Nevertheless, this does not make it any less compelling. SC in its subsequent anti-terror Resolutions repeatedly called on States to ratify, as matter of urgency, international anti-terror agreements[164]. The Council recognized that States' adherence to existing anti-terrorism Conventions is a top priority[165] in the fight against international terrorism. Moreover, it is in the field of adoption and ratification where S/RES/1373 (2001) 28 September 2001 recorded the highest level of implementation[166] in a very short period of time. By way of example, the number of ratifications of the 1997 Convention for the Suppression of Terrorist Bombings has almost quadrupled since September 2001 from 28 countries to 115, while ratification of the 1999 Convention for the Suppression of the Financing of Terrorism has grown twentyfold from five nations to 117.[167] It is reasonable to speculate that such a steady increase in the participation of States in the two treaties is the product of the call by the SC to join the treaty regimes as well as of States' awareness of the importance of enhancing the effectiveness of anti-terror Conventions.[168]

Thus, though appearing in a less categorical language, subparagraph 3 (d) of S/RES/1373 (2001) 28 September 2001 proved nonetheless effective as States voluntarily complied to express their political will to take part in the war against terror. Accordingly, it will be misleading to conclude that just because a directive is expressed in a non-prescriptive formulation, its implementation is doomed to fail, or simply has little practical relevance. Illustratively, paragraph 3 sounds less restrictive by its wording, and yet is among substantive provisions of S/RES/1373 (2001) 28

[162]S/RES/1373 (2001), paragraph 3.
[163]Szasz (n 121) 902.
[164]S /RES/1566 (2004), paragraph 4; S /RES/1624 (2005), paragraph 11 of the preamble; S /RES/2395 (2017), paragraph 10 of the preamble, to mention only a few.
[165]'Human Rights, Terrorism and Counter-Terrorism' (Office of the United Nations, High Commissioner for Human Rights) Fact Sheet 32 14 <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>..
[166] Supra note 145
[167] Counter-Terrorism Executive Directorate, 'Countering Terrorism - Progress and Challenges' <https://www.un.org/News/dh/infocus/terrorism/CTED_progress_and_challenges.pdf>.
[168]Andrea Bianchi, 'Security Council's Anti-Terror Resolutions and Their Implementation by Member States: An Overview' (2006) 4 Journal of International Criminal Justice 1044, 1056 <https://academic.oup.com/jicj/article/4/5/1044/835052> accessed 14 March 2019.

September 2001. Its relevance is even further compounded when attached to paragraph 2. Indeed subparagraph 2 (e)[169] and subparagraph 3 (g)[170] together lay out the obligation of *autdedereautjudicare*– either prosecute or extradite –enshrined in international criminal law. That obligation was later on expressly reiterated in the Declaration attached to Resolution 1456 - S/RES/1456 (2003) 20 January 2003[171], where the SC stated that "States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe heavens, in accordance with international law, in particular on the basis of the principle to extradite or to prosecute."[172]

Obviously, the obligation to either prosecute or extradite is an effective tool to ensure that those wanted for terrorism charges are denied safe refuge – whether in their home or host countries – to escape prosecution. In this respect, international judicial cooperation and domestic prosecution are but two sides of the same coin, of which the principle *autdedereautjudicare* is its most obvious demonstration[173].

Also reviewed, is paragraph 6 whereby SC returned to its mandatory language to decide the establishment of a CTC, whose mandate is to monitor the implementation of the Resolution[174]. The CTC thus serves as the compliance board for S/RES/1373 (2001) 28 September 2001's novel imposition of international law upon sovereign States[175]. However, this does not mean that it operates as a tribunal to judge and take action against States for their lack of compliance of the Resolution,[176] but does nevertheless expect every State to implement expeditiously the far-reaching obligations it spells out[177].

[169]S/RES/1373 (2001), paragraph 2 (e) provides for the obligation to prosecute suspected terrorists.
[170]S/RES/1373 (2001), paragraph 3 (g) contains an obligation to extradite alleged terrorists.
[171] See the Declaration attached to S/RES/1456 (2003), paragraph 3.
[172] Security Council, Press Release SC/7638: Ministerial-Level Security Council Meeting Calls for Urgent Action to Prevent, Suppress All Support for Terrorism, Declaration in Resolution 1456 (2003) Adopted Unanimously; Highlights Counter-Terrorism Committee's Role in Implementation, 21 January, 2003, available at http://www.unis.unvienna.org/unis/en/pressrels/2003/sc7638.html , accessed on 27 April, 2019.
[173]Bianchi (n 168) 1055.
[174]S/RES/1373 (2001), paragraph 6.
[175]Grodin (n 130).
[176] Ambassador Jeremy Greenstock, then Chairman of the Counter-Terrorism Committee, speaking at the Security Council on 4 October, 2002. See UN Security Council, 57th session, 4618th meeting, S/PV.4618, p.5.
[177] ibid

The CTC does not have enforcement mechanisms against reluctant States, and does not even need it. Moreover, SC in S/RES/1373 (2001) 28 September 2001 says very little on its functions, except that tasking it to monitor implementation of the Resolution, with the assistance of appropriate expertise[178]. Just as significant is the way CTC managed to give a boost in the implementation of the Resolution, by actually gambling on the cooperation with States in order to help them meeting their S/RES/1373 (2001) 28 September 2001 obligations[179]. Thus, a degree of relativity has been injected into the process[180].

By not singling out individual States, not condemning States, and focusing instead on technical capacity building, CTC under the leadership of its first chair Jeremy Greenstock was thus able to garner the support from virtually all then 191 UN members[181]. Instead of focusing on particular States, the CTC has sought to engage in dialogue with all member States concerning their implementation of S/RES/1373 (2001) 28 September 2001, and intends to continue with such dialogue until it is confident that each has taken effective action on issues covered by the Resolution[182].The first step in this dialogue was for each State to submit a report to the CTC detailing the steps it has taken to implement S/RES/1373 (2001) 28 September 2001[183]. By 30 September, 2003, CTC had received initial reports from all 191UN member States[184]. The reports have varied in both quality and length, largely reflecting the different levels of capacity among States to implement S/RES/1373 (2001) 28 September 2001 and different levels of resources States have to prepare a report under S/RES/1373 (2001) 28 September 2001[185].

[178]S/RES/1373 (2001), paragraph 6.

[179] Until now, implementation of Resolution 1373 has been based on a promotional strategy, far from the threat of sanctions (…). This constructive methodology has had a general positive effect on the States' attitude as they have cooperated with unprecedented energy with the CTC's information demands. See Hinojosa Martinez (n 136) 12.

[180]Rosand (n 88) 335.

[181] ibid.

[182] ibid.

[183] ibid.

[184]Chantal de Jonge Oudraat, 'The United Nations and the Campaign against Terrorism' (2004) Disarmament Forum 36 <https://www.peacepalacelibrary.nl/ebooks/files/UNIDIR_pdf-art2017.pdf>. See also Department of State and U.S. Agency for International Development, FY 2007 Joint Performance Summary, Strategic Goal Chapter 2: Counter-terrorism, p.53.

[185] Rosand (n 88) 335.

More generally speaking, a complete and effective implementation of S/RES/1373 (2001) 28 September 2001 reflects nearly more idealism than reality. If some aspects of Resolution – such as ratification of anti- terrorism agreements[186] and enactment of anti-terrorism legislation under domestic law at national levels[187] – have had a very favorable reception by States[188], others however – notably provisions related to countering terrorism-financing, denial of safe haven to terrorists, effective border control, and control on issuance of identity papers and travel documents,[189] – proved rather difficult to materialize, as compliance requires monitoring and enforcement capabilities that most countries do not possess and may be too expensive for them to acquire.[190]

The CTC is well aware of barriers encountered by States and for that sake it has shown flexibility by not setting the deadline for compliance[191]. On that note, the Counter-Terrorism Executive Directorate (CTED) – an organ established by Resolution 1535 - S/RES/1535 (2004) 26 March 2004 to supplement CTC's mandate to monitor the implementation of S/RES/1373 (2001) 28 September 2001 – recognizes that implementation is an ongoing process, and performance will vary according to individual country capacity and determination[192]. In point of fact, the information gathered by the CTED shows that a full implementation of S/RES/1373 (2001) 28 September 2001 will take much time[193]. Global harmonization of laws against money laundering or on preventing abuse of the non-profit sector for the purposes of terrorist financing, or the general

[186]Since 2003, when Terrorism Prevention Branch (TPB) began its technical assistance efforts, 688 new ratifications of the universal legal instruments against terrorism have been undertaken by countries assisted by the Branch. See United Nations Office on Drugs and Crime, Promoting Ratification, available at <https://www.unodc.org/unodc/en/terrorism/news-and-events/ratification-and-legislative-incorporation.html,> accessed on 24 November, 2018.

[187]The number of counterterrorism laws passed largely in response to the Security Council's post-11 September Resolutions was unprecedented. See Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011) 45.

[188] Hinojosa Martinez (n 136) 14.

[189]de Jonge Oudraat (n 184) 34–35.

[190] ibid 35.

[191]For the avoidance of doubt, the 90 days provided for in paragraph 6 of Resolution 1373 are not the deadline for the general implementation of the Resolution, but rather a time line for the submission to the CTC of the first report on anti-terrorism measures taken by States.

[192] Counter-Terrorism Executive Directorate, 'Frequently Asked Questions about UN Efforts to Combat Terrorism' 3 <https://www.un.org/News/dh/infocus/terrorism/CTED_FAQs.pdf>.

[193] Hinojosa Martinez (n 136) 13.

sealing of frontiers, to mention just a few examples, are objectives almost unattainable even in the medium term[194].

That continuous nature of implementation has meant that no country has been so far declared by CTC/CTED to be in full conformity with S/RES/1373 (2001) 28 September 2001, or subject to the sanctions measures for failure to comply with the Resolution. One of the main problems that the adoption of sanctions would pose would be the determination of the threshold of breach that would entail the application of coercive measures[195] and who is entitled to do so[196]. In addition, the adoption of sanctions would create a delicate environment in which any practice suspicious of discrimination would provoke the discredit of the SC's counter-terrorist policies and would severely undermine the legitimacy of the CTC/CTED[197], which until now have enjoyed a wide international consensus[198].

Lastly and not least is the content of paragraph 8 of S/RES/1373 (2001) 28 September 2001 which provides for enforcement actions for the Resolution. The wording used in the paragraph differs from that we are accustomed to in past SC anti-terrorism Resolutions. The council pledges to take "all necessary steps" as opposed to "all necessary means" in order to ensure the full implementation of the Resolution. Having in mind the authority of chapter VII of UN Charter that S/RES/1373 (2001) 28 September 2001 is referring to in its preamble; such a wording may provide a legal basis for the use of force against a non-compliant State, especially if it deliberately engages in support of international terrorism, which goes well beyond breaching the Resolution's obligations,[199] as it is contrary to the purposes and principles of the UN.[200]

[194] ibid.
[195] ibid.
[196] United States and the Russian Federation have been the most outspoken in stating that the UN Security Council does not have an exclusive right to determine policy on this issue. They have argued that they can unilaterally decide whether other States are complying with Resolution 1373, and that a unilateral determination of non-compliance would allow them to exercise their right to self-defense. See de Jonge Oudraat (n 184) 34..
[197] Hinojosa Martinez (n 136) 13.
[198] ibid.
[199] ibid.
[200]S/RES/1373 (2001), paragraph 5.

2.5 Goal of Resolution 1373

When looking at S/RES/1373 (2001) 28 September 2001, the first thing that leaps to the eyes is that the anti-terrorist financing component has been given due consideration in the substantive provisions of the Resolution. First, States are expected to "prevent and suppress the financing of terrorist acts"[201]. Second, States have to criminalize the willful financing of terrorism[202]. Third, States are compelled to freeze without delay terrorists' assets, as well as their financiers'[203]. Fourth, States are obliged to prohibit persons and entities within their territories from making their support available to terrorists and their financiers[204]. Fifth, States are under the obligation to prosecute any person who participates in the financing of terrorist acts[205]. And sixth, States are called to become parties to the 1999 International Convention for the Suppression of the Financing of Terrorism[206]. Thus, one commentator analyzing S/RES/1373 (2001) 28 September 2001 would hardly resist the temptation to assume that the Resolution is mainly directed to the fight against terrorism financing, but it's not. The Resolution also addresses various areas and places other obligations on States such as the inter-State cooperation through information exchange in order to prevent terrorist acts[207]; international judicial cooperation within the principle *autdedereautjudicare*[208]; prevention from the use of States' territories for terrorist purposes[209]; and denial of safe haven[210], asylum or refugee status to terrorists[211].

All these obligations laid out in S/RES/1373 (2001) 28 September 2001 were not new in the international environment. They already existed in other international legal instruments related to the fight against terrorism. For instance, paragraph 1 (b) of S/RES/1373 (2001) 28 September 2001 requiring States to criminalize the willful support to terrorism is a mere paraphrase of article 2 (1) of the International Convention for Suppression of Financing Terrorism adopted in 1999. Similarly, the obligation imposed in paragraph 2(e) of S/RES/1373 (2001) 28 September 2001 to

[201]S/RES/1373 (2001), paragraph 1 (a).
[202]S/RES/1373 (2001), paragraph 1 (b).
[203]S/RES/1373 (2001), paragraph 1 (c).
[204]S/RES/1373 (2001), paragraph 1 (d).
[205]S/RES/1373 (2001), paragraph 2 (e).
[206]S/RES/1373 (2001), paragraph 3 (d).
[207]S/RES/1373 (2001), paragraph 2 (b) and paragraph 3 (a)
[208]S/RES/1373 (2001), paragraph 2 (e), read in conjunction with paragraph 3 (g).
[209]S/RES/1373 (2001), paragraph 2 (d)
[210]S/RES/1373 (2001), paragraph 2 (c)
[211]S/RES/1373 (2001), paragraph 3 (f)

qualify terrorist financing as a serious criminal offense is also enshrined in article 4 of the anti-terrorist financing Convention. As to paragraph 1 (c) of S/RES/1373 (2001) 28 September 2001 dealing with freezing of terrorist assets, it is a duplication of article 8 (1) and (2) of the counter-terrorist financing Convention. Also copied, is the obligation to either prosecute or extradite (*autdedereautjudicare*) contained in the joint-reading of paragraph 2 (e) and paragraph 3 (g) of S/RES/1373 (2001) 28 September 2001, which was taken from article 10 of the anti-terrorist financing Convention. This adds paragraph 2 (d) of S/RES/1373 (2001) 28 September 2001 requiring States to prevent the use of their territories by terrorists which was picked up from article 18 (1) (a) of the Terrorist Financing Convention, not to mention paragraph 2 (b) and paragraph 3 (a) of the same Resolution that institutionalizes States cooperation, which are the reflection of article 18 (3) (a) of the Convention against terrorism financing.

Other obligations restated by S/RES/1373 (2001) 28 September 2001 include the denial of safe haven and refugee or asylum status to terrorists, respectively paragraph 2 (c) and paragraph 3 (f). Such obligations can be found in General Assembly Resolution 49/60 (A/RES/49/60 (1994)), more specifically in the paragraph 5 (f) of its annex. But overall, S/RES/1373 (2001) 28 September 2001 is said to have replicated all the obligations related to the fight against terrorism by the mere fact it called on States to become parties to relevant international Conventions and protocols relating to terrorism[212], which likewise embodied the same obligations.

Thus, by reiterating existing obligations and integrating them in legally binding terms, – while at the same time calling up States to ratify the then existing terrorism Conventions by recalling in its preamble Resolutions S/RES/1189 (1998) 13 August 1998, S/RES/1269 (1999) 19 October 1999 and S/RES/1368 (2001) 12 September 2001[213], all of which backed up by the authority of chapter VII of the UN Charter[214] which provides for the binding nature of the decisions made by the SC – , S/RES/1373 (2001) 28 September 2001 purposed to fill the gap in the existing legal framework on counter-terrorism by first of all reminding and extending the obligation to fight against terrorism to all States (regardless their membership to UN) and not only to those that had signed existing anti-terrorism agreements. Secondly, through the binding wording it used, the Resolution

[212]S/RES/1373 (2001), paragraph 3 (d)
[213]S/RES/1373 (2001), paragraph 1 of the preamble.
[214]S/RES/1373 (2001), paragraph 10 of the preamble.

meant to leave a message to States that the obligations it spells out must be enforced, if needed by using coercive measures (that are referred to in the Resolution under the term "necessary steps")[215]against non-compliant States.

2.6 Critique of Resolution

As a reference tool in the war against terror, S/RES/1373 (2001) 28 September 2001 has not been without critics from scholars and practitioners of anti-terrorism, who apart from merits have also identified deficiencies. The critics leveled against S/RES/1373 (2001) 28 September 2001 are threefold, and among them two are substantive and one is procedural.

From a substantive point of view, S/RES/1373 (2001) 28 September 2001 has been first criticized for its lack of definition of terrorism[216]. Indeed, the Resolution imposes on States a general obligation to fight against terrorism without providing a definition of that concept, thus giving states the autonomy to determine on their own what they do refer by the act in question. In this regard, many expressed their concerns that the discretion granted to States to expand the scope of definition of terrorism could be exploited as they will seek to use anti-terrorism legislation to persecute their political opponents.[217]

When one looks at the history of the international normative framework on the fight against terrorism, it appears that SC deliberately omitted to define the concept in the S/RES/1373 (2001) 28 September 2001, given the amount of difficulties that was experienced in previous efforts to adopt a comprehensive Convention against terrorism in which all States agree on an all-purpose definition of that act. On that subject, we take it from Walter Gehr, a former expert of the CTC, that even the CTC didn't want to take part in the fruitless debate on the definition of terrorism and consequently considers as terrorism what States unanimously describe as such[218].

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[215] See on this regard comments on S/RES/1373 (2001), paragraph 8 at page 36.

[216]Wondwossen D Kassa, 'Rethinking the "No Definition" Consensus and the "Would Have Been" Binding Assumption Pertaining to Security Council Resolution 1373' (2015) 17 Flinders Law Journal 127, 129 <http://search.informit.com.au/documentSummary;dn=470002197432568;res=IELHSS> accessed 29 March 2019..

[217] Shibley Telhami, 'Conflicting Views of Terrorism' (2002) 35 Cornell International Law Journal 581, 584.

[218] Walter Gehr, "Le Comité contre le terrorisme et la résolution 1373 (2001) du Conseil de Sécurité,"Actualité et Droit International, Revue d'analyse juridique de l'actualité internationale, (January 2003), p.5, available at http://www.ridi.org/adi/articles/2003/200301geh.pdf , accessed on 27 January, 2019.

Given the context of adoption of S/RES/1373 (2001) 28 September 2001 – i.e. emotional pressure caused by 9/11 attacks and how swiftly the Council unanimously passed the Resolution despite the traditional and inevitable substantive disagreement between States, notably on the highly sensitive issue of recourse to violence in national liberation wars by people fighting against foreign occupation –, discussions on definition of terrorism could have delayed the adoption of the Resolution. Thus, SC which was still in shock of 9/11 events saw fit not to bring on table such debate.

However, despite the above highlighted critic, it could be said that S/RES/1373 (2001) 28 September 2001 indirectly and tacitly addressed the definitional problem of terrorism, by calling upon all States to become parties to the 1999 anti-terrorist financing Convention, which provides a more or less acceptable definition of the concept in its article 2(b). In fact, a number of scholars and international institutions call for States to refer to the definition provided by the same anti-terrorist financing Convention when drafting their own[219].

The second substantive critic of S/RES/1373 (2001) 28 September 2001 focuses on its weak reference of human right. Indeed S/RES/1373 (2001) 28 September 2001 did not refer explicitly to the importance of respecting human rights during combating terrorism[220]. It is only in paragraph 3 (f) where mention of human rights was made in connection to the grating of refugee status[221]. This underestimation of human rights aspect in the text of S/RES/1373 (2001) 28 September 2001 led Martin Scheinin – the then Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism – to draw the international community's attention on the unintended consequences of human rights abuses in the name of combating terrorism, should human rights not be given due consideration[222]. It should be noted however that this nearly disregard of human rights in S/RES/1373 (2001) 28 September 2001 was later on addressed with the adoption of Resolution 1624 - S/RES/1624 (2005) 14 September 2005

[219] Kassa (n 216) 136.
[220] Ali Ahmed Shaglah, 'Security Council Response to Human Rights Violation in Term of Combating Terrorism: Retrospect and Prospect' (2016) 07 Beijing Law Review 114, 116 <https://www.scirp.org/journal/PaperInformation.aspx?PaperID=67097&#abstract> accessed 29 March 2019.
[221] S/RES/1373 (2001), paragraph 3 (f).
[222] Martin Scheinin, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (United Nations 2005) E/CN.4/2006/98 8 <https://undocs.org/E/CN.4/2006/98>.

which instructed all States to comply with human rights obligations while implementing S/RES/1373 (2001) 28 September 2001 mandates.

As to the procedural critic, the legislative nature of S/RES/1373 (2001) 28 September 2001 has been questioned by those arguing that, as guarantor of international peace and security, the SC – which adopted the said Resolution – only enjoys executive and not legislative power.[223] Consequently, it should only act to confront specific cases that threaten international peace and security[224]. The question whether SC can act as a global legislator has been at the core of the criticism of the legislative character of S/RES/1373 (2001) 28 September 2001. The reference by SC to Chapter VII of the UN Charter – which makes its decisions mandatory – is certainly enough for S/RES/1373 (2001) 28 September 2001 to appear as a global code of anti-terrorism. But for things to be this way, SC may only do so in discrete cases, involving a specific threat to peace and security.[225]

2.7 Conclusion

To sum up briefly, S/RES/1373 (2001) 28 September 2001 fully retains its topicality and remains a key UN document in the field of counter-terrorism[226]. It is intended to be the genuine founding Resolution of anti-terrorism. In many respects, it stands out by both its substance and form. As to its effectiveness, if some provisions – notably those related to ratification of terrorism treaties and inter-States cooperation were met with success, others addressing the financial war against

[223]Cathleen Powell, 'A Fullerian Analysis of Security Council Legislation' (2011) 8 International Organizations Law Review 205, 205 <https://brill.com/view/journals/iolr/8/1/article-p205_7.xml> accessed 30 March 2019. Marco Alberto Velásquez-Ruiz, 'In the Name of International Peace and Security: Reflections on the United Nations Security Council´s Legislative Action' (2011) 18 International Law: Revista Colombiana de Derecho Internacional 13, 33–37 <http://www.scielo.org.co/pdf/ilrdi/n18/n18a02.pdf>.;Evelyne Lagrange, 'Conseil de Securite Des Nations Unies Peut-Il Violer Le Droit International, Le' (2004) 37 Revue Belge de Droit International / Belgian Review of International Law 568, 577 <https://heinonline.org/HOL/Page?handle=hein.journals/belgeint37&id=572&div=&collection=>.;Happold (n 119) 600.

[224] Happold (n 119) 600.

[225]ibid 599; Roberto Lavalle, 'A Novel, If Awkward, Exercise in International Law-Making: Security Council Resolution 1540 (2004)' (2004) 51 Netherlands International Law Review 411, 421 <https://www.cambridge.org/core/journals/netherlands-international-law-review/article/novel-if-awkward-exercise-in-international-lawmaking-security-council-resolution-1540-2004/0A194036D20D8482B71DCA75F31C0E3E> accessed 30 March 2019.; Nicolas Angelet, 'International Law Limits to the Security Council', *United Nations Sanctions and International Law* (Kluwer Law International 2001) 77 <https://www.worldcat.org/title/united-nations-sanctions-and-international-law/oclc/472569990>.

[226] UN Security Council Counter-Terrorism Committee, Global survey of the implementation of Security Council Resolution 1373 (2001) by Member States, UN Document S/2011/463, p.5.

terrorism, a lot still need to be done, especially when it comes to involve the financial sector in the fight against terrorism financing. The following chapter will illuminate the aforementioned observation.

CHAPTER THREE

Combating Terrorist Financing in the Financial Sector: Critical Analysis of the Regulations Taken by the Financial Institutions.

3.1. Introduction

With new impetus provided by the Resolution 1373, the fight against terrorist financing has had such a magnitude that the whole financial world has been in turmoil, in particular banks. The international banking community responded promptly[227]. Banks proceeded to introduce rules on terrorist financing in the same manner they had voluntarily adopted anti-money laundering guidelines in their operations[228].

On 30 October 2000, eleven of the world's largest banks, later followed by two others, established anti-money-laundering guidelines applicable to private international banks[229]. The group promulgated these principles, namely 'Wolfsberg Anti-Money Laundering Principles'[230]. As a result of the 11 September events, the group met again in January 2002 to discuss terrorist financing, and updated the principles to make reference to the role of financial institutions in preventing the global flow of such funds[231]. The meeting resulted in the adoption of a new document; whose preamble shows the unequivocal expression of will of banks to take part in the crusade against terrorist financing. Indeed, the said document clearly states that funding of terrorism can only be conquered through an exceptional degree of global cooperation between State entities and financial institutions such as banks[232].

For its parts, as far as it is concerned, the banking industry went even further in its effort to guard itself against a possible misuse. Multinational financial institutions have united to form alliances. This is because they had realized that in the face of financial flows of terrorist networks which

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[227] Ben Saul, *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing 2014) 133.
[228]ibid.
[229]Ilias Bantekas, 'The International Law of Terrorist Financing' (2003) 97 American Journal of International Law 315, 331 <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/international-law-of-terrorist-financing/92839FB46DFEFC8ACBAAEB1C2A09F7CF> accessed 30 March 2019.
[230]ibid.
[231] ibid.
[232] 'Wolfsberg Statement on the Suppression of the Financing of Terrorism' 1 <https://www.wolfsberg-principles.com/sites/default/files/wb/pdfs/wolfsberg-standards/16.%20Wolfsberg_Statement_on_the_Suppression_of_the_Financing_of_Terrorism_%282002%29.pdf>.

pass through the banking channel, the only way to stem that phenomenon is to work hand in hand. The first to forge an alliance were Europeans who, via the European Banking Federation (EBF), drafted seven recommendations aiming to improve the implementation of the European Union (EU) anti-terrorist financing sanctions regime[233]. The recommendations grew out of a meeting of experts held by the EBF on 15 October 2001[234]. The second to form an alliance were the banking supervisors gathered in the Basel Committee on Banking Supervision, a committee which was established by the central-bank governors of a group of ten (G10) countries in 1974[235]. On 14 December 2001, supervisors and legal experts of the G1O central banks and other supervisory authorities met to discuss ways to prevent abuse of the financial system when it is used to finance terrorism and, specifically, the sharing of financial records by different jurisdictions[236]. The participants noted that these goals cannot be achieved unless financial services providers implement effective Know Your Customer (KYC) and customer due diligence procedures[237].

Thus, the guiding principles being provided, banks joined with States in the campaign to choke off financial flows of terrorists and terrorist organizations. In that exercise, FATF in extension of S/RES/1373 (2001) 28 September 2001 has been instrumental as it provided much detailed guidelines together with their interpretative notes, in the so called FATF Recommendations. This chapter will therefore analyze each and every measure taken by the banking industry to comply with the anti-terrorist financing regime emanating from S/RES/1373 (2001) 28 September 2001. We will start with a brief overview of the banking sector's involvement in starving terrorists of their funds, and then will follow banks 'obligations in the financial war against terrorism. Next, the famous principle of banking secrecy, in the context of combating banking-related crimes, will receive due consideration.

[233] European Banking Federation, *Recommendations for Drafting, Interpreting and Implementing Financial Sanctions Regulations* (21 December, 2001), <http://www.fbe.be/pdf/y1077aey.pdf.>
[234] Bantekas (n 229) 331.
[235] ibid 332.
[236] ibid.
[237] Basel Committee on Banking Supervision, 'Customer Due Diligence for Banks' (Bank for International Settlements 2001) BIS Paper 2–5 <https://www.bis.org/publ/bcbs85.pdf>.

Lastly, given that the digital platform is making significant inroads at a fast pace and gaining more fields including the banking sector, the electronic banking will be extensively discussed with special emphasis on opportunities and challenges it presents when it comes to the fight against terrorist financing.

3.2. Role of the banking sector in the fight against terrorist financing

The contribution of the world of finance in the financial aspect of counter-terrorism is well established in International Law[238]. Its role was on several occasions reiterated at major international meetings such as those of G7[239] and G20[240], during which States have repeatedly affirmed that banks have a large role to play in countering terrorist financing. But it is in one of the FATF publications entitled 'Guidance for A Risk-Based Approach, The Banking Sector'[241] that the role of banks in drying up terrorist financing is clearly defined.

Indeed, whether it is before or after the commission of a terror attack, banks take pride of place in the fight against terrorist financing, in that they detect and prevent terrorists' financial flows to reach their destination. And even after the occurrence of an attack, banks play key role as they get involved in tracking funds used to finance terrorist activities. Such an intervention helps to understand terrorist financing circuits, and therefore taking measures to prevent further misuse of financial services for terrorist purposes.

Additionally, thanks to their ability to track terrorist funds passing through their services, banks can be of a credible source of information to law enforcement agencies in their bid to trace back and dismantle terrorist networks to prevent further attacks. The banks' intervention falls within the

[238] United Nations International Convention for the Suppression of the Financing of Terrorism 1999, Article 18 (1) (b)

[239] 'G7 Action Plan on Combatting the Financing of Terrorism' <https://www.mof.go.jp/english/international_policy/convention/g7/g7_160521.pdf> accessed 30 March 2019. 'G7 Finance Ministers and Central Banks' Governors Meeting' <http://www.g7italy.it/en/summit/finance-meeting/>.

[240] 'G20 Finance Ministers and Central Bank Governors Meeting' 3 <http://g20.org.tr/wp-content/uploads/2015/11/Communique-G20-Finance-Ministers-and-Central-Bank-Governors-Meeting-Ankara.pdf>. See also 'G20 Leaders' Communique Hangzhou Summit' <https://www.consilium.europa.eu/media/23621/leaders_communiquehangzhousummit-final.pdf>.

[241] 'Guidance for A Risk-Based Approach, The Banking Sector' (FATF 2014) Guidance Paper <http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-Based-Approach-Banking-Sector.pdf>.

scope of obligations the financial sector is subject to when it comes to involve banks in the fight against terrorist financing.

3.2.1. Obligation of Customer Due Diligence

The Customer Due Diligence (CDD) referred to in this section is the mainstay of the fight against terrorist financing by the financial institutions. It is at the center of the banker's business activity in the financial war against terrorism. The obligation of CDD is a corollary of the Know Your Customer (KYC) rule,[242] a universally recognized principle that calls upon financial institutions, in particular banks, to know as much as possible on their customers and to be vigilant with their financial behavior.

Thus, upon the very outset of their business relationship with their customers, banks are required to collect and update personal details on their customers. These include among others, the full name and address, profession, source of income, origin and destination of funds, and, if necessary, family ties. All this information enables the bank to establish the customer profiling, on basis of which it will assess the risk of terrorist financing posed by each customer. That's the case for example of a business relationship with a customer based in a geographic area affected by terrorism.

3.2.1.1 International standards of CDD

CDD was first recognized as a principle in 1997. At that time, it was part of the Basel Committee's Core Principles for Effective Banking Supervision[243]. But with the 1999 anti-terrorist financing Convention, it gained prominence in international law as it was enshrined in an international treaty.[244] Later on, in October 2001, the Basel Committee adopted new standards of CDD[245] which came to reinforce the principle 15 of Effective Banking Supervision that addresses CDD[246].

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[242] 'Digital Financial Services, Basic Terminology' (Alliance for Financial Inclusion (AFI) 2016) Guideline Note No. 19 8 <https://www.afi-global.org/sites/default/files/publications/2016-08/Guideline%20Note-19%20DFS-Terminology.pdf>. Claire Alexandre and Lynn Chang Eisenhart, 'Mobile Money as an Engine of Financial Inclusion and Lynchpin of Financial Integrity' (2013) 8 Washington Journal of Law, Technology & Arts 285, 299 <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1200/8WJLTA285.pdf?sequence=4&isAllowed=y>.

[243] Basel Committee on Banking Supervision, 'Core Principles for Effective Banking Supervision (Basel Core Principles)' (Bank for International Settlements 1997) Principle 15, 6 <https://www.bis.org/publ/bcbsc102.pdf>.

[244] Article 18 (1) (b) (i) (ii) (iv)

[245] Basel Committee on Banking Supervision, 'Customer Due Diligence for Banks' (n 237).

[246] Supra note 243

After 9/11 attacks, CDD more than ever was given great emphasis in the international arena with the FATF's 40 Recommendations which were revised[247] in October 2003.[248] Among these 40 Recommendations 8 (from Recommendation 5 to 12) are devoted to the CDD. Recommendation 5 aims at deterring financial institutions from keeping anonymous accounts for individuals and/or organizations that are identified by means of fictitious names.[249] It urges financial institutions to take steps towards CDD arrangements which should be inclusive of pointing out and ascertaining the identity of the customers in instances provided by the Recommendation itself.[250] The measures have thereafter been distinctively laid out in a bid to ensure that banks and other financial institutions are careful when it comes to undertaking their CDD.

Recommendation 6 makes provisions for banks and other financial institutions in conjunction with politically exposed persons (PEP), to always ensure that additional CDD measures are undertaken vis-a-vis that category of customers.[251] As to Recommendation 7, it provides for CDD for financial institutions in context of cross-border correspondent banking relations and other related relationships,[252] while Recommendation 8 exhorts the utmost due diligence for non-face-to-face customers using emerging technologies in banking, which are associated with high degree of anonymity.[253]

Recommendation 9 lays down modalities for CDD exercise for financial institutions building upon intermediaries or other third parties to perform customer identification and verification.[254] In this regard, it is explicitly stated that in such scenario the CDD obligation lies on the part of financial

[247] For the record, FATF first issued its Forty Recommendations in 1990 which were provided for governments and financial institutions in bid to tackle money laundering. Since then FATF revised the Recommendations to make sure they remain up-to-date and reflect constantly changing financial crimes. They were first revised in 1996, 2003, and 2004. The changes to the FATF standards were adopted at the FATF plenary meeting in February 2012. See FATF, Review of the FATF Standards and Historical versions, available at http://www.fatf-gafi.org/publications/fatfrecommendations/documents/review-and-history-of-fatf-standards.html

[248] 'Financial Action Task Force on Money Laundering, The Forty Recommendations' (FATF 2003) <https://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf>.

[249] 'FATF 40 Recommendations, (Incorporating All Subsequent Amendments until October 2004)' (n 24) Recommendation 5, 4.

[250] ibid.

[251] ibid Recommendation 6, 5.

[252] ibid Recomendation 7, 6.

[253] ibid Recommendation 8, 6.

[254] ibid Recommendation 9, 6.

institution relying on a third party.[255] Recommendation 10 concerns the record-keeping for a minimum of 5 years, of all information collected on the customer as well as his/her transaction records.[256] The aim is to make it possible for financial institutions to comply swiftly with information requests from competent authorities.[257] Recommendation 11 is about unusual transactions for which financial institutions are called to pay special attention,[258] while Recommendation 12 extends the CDD and record-keeping requirements to designated non-financial businesses and professions.[259]

3.2.1.2 Rational of CDD

The due diligence requirement for banks goes beyond the fight against terrorist financing, as it mainly aims to preserve the reputation and integrity of financial institutions which are essential ingredients to gain the customer confidence and to participate in international banking. We venture that no bank would like to be known for accommodating terrorists 'funds. It is for this purpose before entering into a business relationship with a customer, the bank must check s/he is who s/he pretends to be. This is done by means of supporting evidence provided by the customer on his/her personal details.

The gathering of information on the customer will serve as the basis to detect suspicious transactions and prevent them to the extent possible. This is especially when for example a transaction involves an unusually high sum of amount, considering the bank's knowledge of the customer. In such circumstance, the bank must inquire from the customer on the origin and destination of money transferred and the beneficiary of the transaction.

However, the CDD requirement imposed on banks to have a thorough knowledge of their customers, and to scrutinize the financial behavior of the same is not without raising some legal issues. To what extent can the bank exercise its obligation of diligence? Is the obligation compatible with the right to privacy guaranteed by article 17 of International Covenant on Civil and Political Rights? These issues seem well-founded, especially since the bank has a lot of information on a customer and third party dealing with him/her (i.e. beneficial owner), and given

[255] ibid.
[256] ibid Recommendation 10, 7.
[257] ibid.
[258] ibid Recommendation 11, 7.
[259] ibid Recommendation 12, 7.

that this information concern various facets of life, the customer may end up thinking that the bank is interfering in his/her private life. This is where the principle of banking secrecy, – which aims at setting limits and striking a balance between banks obligation to exercise of CDD and customers' right to privacy (banking privacy) –, comes to play. But apart that principle, CDD is also being put to the test by other practices such as the numbered bank account and the non-face-to-face customer which are not likely to facilitate the bank's due diligence.

3.2.1.3 Limits of CDD

Despite the manifest merits of CDD requirement that calls upon banks to live up to their responsibilities in the fight against terrorist financing, that obligation suffers from some restrictions which will be discussed in the following section.

a. Principle of banking secrecy

Introduced in 1934 with the honorable intention to prevent Nazi spies from getting their hands on Jewish assets in Switzerland,[260] the principle of banking secrecy has since then developed and is nowadays regarded as a customer's right to privacy as well as the bank's obligation not to disclose information regarding a customer it engaged in business relations. The recognition of that principle in the banking industry is of a great importance for both the bank and customer.

Indeed, the banking secrecy is the foundation of the business relationship between a bank and the customer, a relationship based on the customer's confidence in the bank when s/he entrusts it his/her money and personal data. No customer will deal with a bank if there is no guarantee that the information s/he provides to the bank as part of the CDD won't be revealed to a third party, hence the sanctity of the principle.

Some of the elements of banking secrecy have clearly been brought out in the leading case on banking secrecy referred to as *Tournier v National Provincial and Union Bank of England ("Tournier")*[261]. Both this and other similar cases have given primacy to the contractual purpose and expectations of the parties to the banking relationship, which establish the foundation of the

[260] Robert U. Vogler, 'Swiss Banking Secrecy:Origins, Significance,Myth' (2006) 7 *Association for Financial History (Switzerland and Principality of Liechtenstein)* 106, 7 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.476.9935&rep=rep1&type=pdf>.

[261] *Tournier v National Provincial and Union Bank of England* [1923] Court of Appeal [1924] 1 KB 461., Bankes Scrutton Atkin LJJ 461.

bank secrecy requirement. Amidst other justifications, privacy and confidentiality are perhaps the most significant basic principles of bank secrecy. Both practical and contractual foundations for bank secrecy can eventually be related to issues regarding privacy and confidentiality. Where pragmatism is inclined towards the protection of bank secrecy for purposes of looking out for economic growth since people tend to prefer banks that uphold privacy and confidentiality. When it comes to implied terms, the bank's obligation to secrecy is founded on the contractual basis; but the intention behind making it a requirement to imply this term is to realize the aspect of confidentiality between the customer and the bank.[262]

The principle of bank secrecy is more acknowledged in most jurisdictions than those of the general privacy laws. This duty of secrecy by banks is however limited to some extent with regards to its applicability in that banks are allowed to reveal customer information in certain instances. Such curtailment emanates from the need for States to protect themselves from increasing incidences of terrorist financing, money laundering and the evasion of tax amongst many other reasons.[263]

The banking secrecy has been met with considerable criticism from those who regard it as an obstacle hampering effective investigation and prosecution of financial crimes also referred to as white-collar crimes.[264]In fact, many are banks which have been invoking the banking secrecy laws as a ground to refuse providing assistance sought by law enforcement agencies in criminal investigation[265], when their customers were suspected to have committed financial crimes. As result, this has brought terrorist groups and their financiers to target financial institutions of countries known for their long tradition of banking secrecy in order to transact funds designed to finance terrorism without hindrance. That is the case of the Swiss branch of the British bank HSBC

[262] Mzukisi Niven Njotini, 'Anti-Terrorism Measures in South Africa: Suspicious Transaction Reporting and Human Rights' (2015) 15 African Human Rights Law Journal 515, 531–534 <http://ref.scielo.org/crcf2k> accessed 30 March 2019.
[263] ibid 530.
[264] Ray Flores, 'Lifting Bank Secrecy: A Comparative Look at the Philippines, Switzerland, and Global Transparency' (2015) 14 Washington University Global Studies Law Review 779, 779 <http://openscholarship.wustl.edu/law_globalstudies/vol14/iss4/16>.
[265] 'RCBC Invokes Bank Secrecy in Stolen Fund Transfer' *ABS-CBN News* (Quezon City, Philippines, 15 March 2016) <https://news.abs-cbn.com/business/03/15/16/rcbc-invokes-bank-secrecy-in-stolen-fund-transfer> accessed 30 April 2019. See also Jamil Ddamulira Mujuzi, 'Bank Secrecy: Implementing the Relevant Provisions of the United Nations Convention against Corruption in South Africa' (University of the Western Cape 2016) 130 <http://repository.uwc.ac.za/xmlui/handle/10566/2328> accessed 30 April 2019.

which is said to have accommodated money of Al Qaeda financiers, whose names appeared on the famous Golden Chain list of people who finance terrorism.[266] That list of twenty individuals, key sponsors of Al Qaeda – a terrorist movement –, was drawn up in person by Osama Ben Laden, leader of the said movement.

The finding – by the newspaper *Le Monde* in collaboration with the International Consortium of Investigative Journalists (ICIJ) – that HSBC engaged in business relation with people on that list raised serious questions on its integrity. An investigation dubbed 'SwissLeaks' that was conducted by some 154 journalists from over 40 countries, showed that financiers of terrorist networks banked with HSBC and others were registered as managers of shell companies.[267]

The revelation of the outcome of that investigation has rekindled the debate over the strict and long-standing bank secrecy practiced in high proportion in Switzerland, and that, in spite of the overwhelming calls – by global great powers, joined by international major groups such as G20 and OECD[268] (Organization for Economic Co-operation and Development) – to restrict the scope of its banking secrecy to ensure financial accountability in the fight against international crime.[269] Switzerland was accused of abusing the banking secrecy through financial secrecy, which provides for a safe haven to terrorist financiers, tax evaders and money launderers.

That is, intense pressure applied on Switzerland and other jurisdictions known for their strict secrecy of banking may explain the ban, if not, the mitigation of the banking secrecy contained in the FATF Recommendation 9[270] and 37.[271] However, the question that still looming is whether Switzerland – , perhaps the most notorious pioneering country of bank account confidentiality [272],

[266] A raid conducted by a Bosnian Special Unit in Sarajevo in 2002 against a foundation that was actually a front for the financing of Islamic terrorism, allowed to get a hand on a hard disk with the very instructional content of a list of Al Qaeda financial benefactors. Osama Bin Laden had nicknamed that circle the "Golden Chain." See 'HSBC abritait (aussi) des financiers d'Al-Qaida' (10 February 2015) <https://www.lemonde.fr/evasion-fiscale/article/2015/02/10/hsbc-abritait-aussi-des-financiers-d-al-qaida_4573490_4862750.html> accessed 31 March 2019.

[267] ibid.

[268] 'The Era of Bank Secrecy Is Over, The G20/OECD Process Is Delivering Results' (G20/OECD 2011) <https://www.oecd.org/ctp/exchange-of-tax-information/48996146.pdf>.

[269] Flores (n 264) 779.

[270] 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, The FATF Recommendations' (FATF 2012) Recommendation 9 (Financial institution secrecy laws) 14 <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf>.

[271] ibid Recommendation 37 (d) (Mutual legal assistance) 27.

[272] Flores (n 264) 779. See also 'Financial Secrecy Index 2018, Narrative Report on Switzerland' (Tax Justice Network 2018) 1 <https://www.financialsecrecyindex.com/PDF/Switzerland.pdf>.

and where any change to the laws of the same would require a direct vote to be passed by a double majority both of the votes and of the States in an obligatory referenda vote[273] – will indeed reconsider the discretion of its banking industry. Its famed banking secrecy laws[274] remain firmly in place, though with exceptions permitted for some countries to obtain necessary information[275]. It is because of that robust legal framework governing the discretion of its financial institutions that Switzerland is today one of the world's biggest secrecy jurisdictions or tax havens[276], with CHF 6.65 trillion (or $6.5 trillion) in assets under management, of which 48 % originated from abroad[277]. This made Switzerland the world leader in global cross-border asset management, with a 25 percent share of that market.[278] It is also because of the same banking discretion that Switzerland is the center of financial criminality with a third of the world's 'offshore' money-crooks who patronized the State's policy of economic terrorism,[279] not to mention the considerable number of foreigner bank account holders who prefer to bank in Switzerland over in their countries with the intention of avoiding paying tax.[280][281]

One thing is sure when discussing Swiss 'banks secrecy. Its considerable restriction would amount compromising the country's position as a major international financial center, since it is the traditional discretion of Swiss banks that attract wealthy individuals seeking less government and

[273] Jolie Chow and others, 'Swiss Private Banking: Microeconomics of Competitiveness' 17 <https://www.isc.hbs.edu/resources/courses/moc-course-at-harvard/Documents/pdf/student-projects/Switzerland_Private_Banking_2010.pdf>.

[274] Federal Constitution of the Swiss Confederation 1999 (CHE) 82, article 13.; Swiss Federal Act on Banks and Savings Banks 1934 (SR) 38, Article 47. Swiss Criminal Code 1937 (SR) 194, Articles 162 and 320.; Swiss Civil Code 1907 (SR) 350, Article 28.; and Swiss Code of Obligations 1911 (SR) 494, Article 97.

[275] 'Financial Secrecy Index 2018, Narrative Report on Switzerland' (n 272) 1.

[276] ibid.

[277] Swiss Bankers 'Association, Key Figures, available at https://www.swissbanking.org/en/financial-centre/key-figures , accessed on 1 May, 2019

[278] ibid

[279] Taiwo Akinola, 'Terrorism: Lest We Forget Switzerland' 32 <http://www.arisenigeria.org/LestWeForget.pdf>.(n.d.).

[280] For instance, a large number of wealthy French people turn to Swiss banks to avoid paying tax. This has resulted in France requesting UBS (a Swiss Bank) to share French clients' account information. See Chad Bray and David Jolly, 'UBS Told to Share Clients' Account Information With France' *The New York Times* (New York, 21 December 2017) <https://www.nytimes.com/2016/07/06/business/dealbook/ubs-tax-france-switzerland.html> accessed 31 March 2019.

[281] On 18 February, 2009, a list of names of 250 US citizens was released by Union de Banques Suisses (UBS) to the US authorities. These customers held unreported bank accounts, thus avoiding to pay tax. See Sonja Maeder, 'Switzerland and United States Exchange of Info in Tax Matters – Where Do We Stand?' (2011) 4 International Bar Association – Legal Practice Division 12, 12 <https://www.lalive.law/data/publications/Article_IBA_Tax.pdf>..

tax authority scrutiny of their banking activities,[282] thus making Switzerland a destination of choice for offshore money. Therefore, Switzerland faces in this regard a big dilemma of choosing between maintaining its position as a global financial hub or fully complying with international standards that curtail the banking secrecy. Will it choose the latter? Time will tell.

b. Numbered bank accounts

Apart from the principle of banking secrecy, the CDD is also moderated by a growing need of some banks 'customers to expand the scope of their privacy through the practice of numbered bank account, which somehow appears as a relaxation of the ban of anonymous bank account, currently prohibited in the article 18 (1) (b) (i) of the 1999 International Convention for the Suppression of the Financing of Terrorism.

Indeed, as a matter of principle, no bank in the world would today accept to set up an account without knowing its holder's name, address, and beneficial order. However, the principle is not absolute as banks developed a practice known as numbered bank accounts which are not anonymous per say, and whereby the customer's business with the bank is carried out not under his/her name but under a number or a code.[283] That is a common practice in jurisdictions that subscribe to the principle of banking secrecy. In other words, the account holder identifies himself/herself to the bank by means of a code word which is kept secret and only known by the account holder and a restricted number of bank employees,[284] thus providing the account holder with a degree of bank privacy in his/her financial transactions[285], since the account holder's name will not appear in his/her transaction but instead, a code will be used in lieu of the name. With a numbered account, the relationship between client and bank differs from a normal account

[282] Flores (n 264) 789.

[283] SwissBanking, 'Opening a Bank Account' (2011) <https://www.swissbanking.org/en/topics/information-for-private-clients/useful-information>. See also 'The Practical International Banking Guide - 2015 Edition' (International Banking Alert 2008) The Q Wealth Report 16 <https://www.qwealthreport.com/offshore-banking-guide/> accessed 2 May 2019. See also S k Singh, *Bank Regulations* (Discovery Publishing House 2009) 148 <https://www.amazon.com/Bank-Regulations-S-K-Singh/dp/818356447X>.

[284] Andre Jacob, *And Then There Was Life!* (2nd edn, Jacob Deckard & Co 2011) 205 <https://www.amazon.com/Then-There-Was-Life-ebook/dp/B005ZGWTMQ?_encoding=UTF8&%2AVersion%2A=1&%2Aentries%2A=0>.

[285] Akash_Patel5, AML/KYC Glossary , available at https://quizlet.com/80557801/amlkyc-glossary-flash-cards/ , accessed on 27 October, 2016

in only one regard: the number of people responsible for looking after the client within the bank is reduced to the absolutely necessary minimum.[286]

There is uncertainty about the origins and introduction of numbered accounts[287]. They were probably fast-tracked into existence when the political situation of the 1930s in Switzerland created a need for additional protection and the banks began to introduce what could be called a second level of communication for certain clients[288]. For example, Swiss Bank Corporation (SBC), the biggest of the Swiss major banks at that time, responded to the activities of German spies in 1934 by taking 'measures to obscure the true ownership of client assets'[289].Prior to the French elections of April 1936, the banks feared a lurch to the left, which did indeed occur; so the SBC director Maurice Golay called on the bank's branches to run all foreign accounts as numbered accounts in such a way that all letters, statements, etc., as well as all other relevant documents are established under a number only, with the names of the clients only known to management[290].

Today, despite the end of situation that had triggered the creation of numbered bank accounts, they continue to exist in some banks' jurisdictions. However, that kind of bank account which aims to enhance the privacy of a customer is a real quagmire for banks –, other than that in business relationship with the numbered bank account holder –, in their exercise of CDD. Indeed, though the numbered bank account does not provide for full anonymity, in that the account holder's name is known by a bunch of bank employees, it embodies however a greater degree of protection from scrutiny while minimizing the exposure of account holder's name in public settings privacy.[291] Consequently, this significantly restricts the ability of other banks – processing transactions in connection with the numbered account holder – to identify the person behind the transaction, should they be on their guard (i.e. vigilant) for possible abuse of their services by

[286]U. Vogler (n 260) 55.
[287]ibid.
[288] ibid.
[289]UBS Archive, SBC Fund, executive board minutes, 15 May, 1934, p.137. See also ICE 15, p.118, '3.1.3. Anonymisierung der Kundendaten' (Anonymization of Client Data).
[290]UBS Archive, SBC Fund, 4.108.G.3 A, Dossier 347/1'Private Clients 1933–1971', SBC Director M.Golay, circular to all branches, 20 December, 1935.
[291] Jacob (n 284) 205.

terrorists. That would be the case, for instance, if they are to cross-check the name of the numbered account holder against the blacklist of terrorists for whom access to financial services is denied.

In addition, numbered bank accounts as designed are not conducive for the enforcement of some counter-terrorist financing measures such as the freezing of assets. Given that the whole point of numbered bank accounts is to avoid to the extent possible the disclosure of the account holder's name, in case of assets freezing, law enforcement will struggle to identify and target bank accounts of the subject whose name does not appear on any bank' s record or statements. Such a scenario can occur in case where the bank is reluctant to unveil the identity of their customer targeted by the freezing order, in which case it will take a court order to disclose the identity of the account holder, which is time consuming with the risk of alerting the subject who may have enough time to move his money.

Despite the fact that numbered banking accounts are illegal in most banking jurisdictions[292], they are still available in some countries but under heavy international regulations[293]. That is the case in Western European countries with a long tradition of specializing in international banking, such as Switzerland and Austria[294]. But it is Switzerland which is probably the most noted country with a great number of numbered bank accounts.[295] Other jurisdictions offering numbered bank accounts include Andorra, Gibraltar, Liechtenstein, Latvia, and Panama.[296]

Though there are no striking examples of misuse of numbered bank accounts for terrorist purposes, cases where terrorists relied on numbered accounts can be found in terrorists' recourse to the online banking. A number of websites were established from Europe to Africa by terrorists to ask supporters to assist the cause of jihad[297]. Like those sponsored by fighters in Chechenya, the websites displayed numbered bank accounts to which supporters contribute.[298]

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[292] ibid.
[293] ibid.
[294] ibid.
[295] Lee Ann Obringer, 'How Swiss Bank Accounts Work' (*How Stuff Works*, 8 June 2007) <https://money.howstuffworks.com/personal-finance/banking/swiss-bank-account4.htm>.
[296] Singh (n 283) 148.
[297] Raphael Cohen-Almagor, Jihad Online: How Do Terrorists Use the Internet? in Francisco Campos Freire and others, *Media and Metamedia Management*, vol 503 (1st edn, Springer International Publishing 2017) 59 <https://www.springer.com/gp/book/9783319460666>.
[298] Raphael Cohen-Almagor, 'Jihad Online: How Do Terrorists Use the Internet?' (Cham:Springer 2017) 59.

While it is not known whether the concerned banks – that maintained those numbered accounts – were aware of the misuse by terrorists, the risk that such abuse goes unnoticed is high on the part of a third-party bank performing a transaction involving a numbered bank account holder[299], since it cannot unmask the real identity of the person acting in incognito mode. This is all the more true with domestic financial transactions whereby numbered bank accounts can be condoned, unlike to international wire transfers. According to international regulations, the client's name, address and account number must be given when making international wire transfers[300].

c. Non-face-to-face customer

Non face-to-face customer is another test to the CDD. It derives its origins in the new technologies which enable the customer to remotely bank via mobile financial services and online banking. These forms of banking are particularly challenging a proper exercise of CDD as it allows the customer to open a bank account without physically showing up to the banker for an interview. Thus, the problem arising from that bank-customer business relationship without a face-to-face meeting is that information provided online, or remotely by a customer as part of the KYC exercise by the bank are difficult to verify and the bank runs risk to be given false personal details concerning its customer.

In addition, considering that the form to be filled out by new customers when opening an account online is already pre-set with specific questions, the bank will not, on account of non-face-to-face business relationship that characterizes online banking, get additional information from its new customer, in case the account owner actually poses a particular risk due to his/her business activities or other factors that would necessitate providing additional documents. Moreover, given that the very essence of CDD is to have an updated knowledge on the customer, in the case of non-face-to-face customer, the bank will only have to rely on the good will of the customer to get updated on the changes of his/her personal data that may have occurred since the period of the opening of bank account. Furthermore, as online banking implies above all operating and managing one's bank account on internet, the risk of account hacking makes a non-face-to-face

[299] The risk of abuse of numbered bank accounts is further heightened in banks which knowingly work in complicity with terrorists. If on one hand the holder of a numbered bank account – who happens to engage in terrorism – is well known to his bank (i.e. by a few senior managers within the bank.), on the other hand the third-party bank carrying out a financial dealing – to the order of its innocent customer – for the benefit of the numbered account holder has no inkling of terrorist ends behind the monetary transaction it facilitates.

[300] SwissBanking (n 283). See also Singh (n 283) 148.

customer (i.e. an online bank user) a possible victim of personal data theft by criminals masquerading as the genuine customer.

To mitigate all those greater risks posed by financial services provided remotely, whereby a bank customer does not need to appear in person to bank, and then can transact online on real time from the comfort of his/her own home at any time of day or night,[301] the FATF in its interpretive note to Recommendation 10 indicated that non-face-to-face customer constitutes circumstances where the risk of money laundering or terrorist financing is higher, and saw fit to subject transactions with customers identified without their physical presence before the banker, to the enhanced customer due diligence (enhanced CDD).[302] The FATF does not provide in its glossary a definition of enhanced CDD, but it generally consists in counterbalancing the difficulties in customer identification and verification – which are inherent in non-face-to-face bank customer – by taking additional measures to compensate heightened risks associated with not being able to have face-to-face contact when establishing business relationship.

Enhanced due diligence measures are applied at a various degree based on the identification and verification capacities of each financial institution. Some banks go as far as to identify their non-face-to-face customers by means of videoconference technology[303], while others especially in third world countries where information and communication technology (ICT) are not advanced, simply stick to the guidelines provided by the Basel Committee on Banking Supervision in its section dealing with non-face-to-face customer.[304]

That said, despite enhanced CDD applied for non-face-to-face customer, the risk of forging identity, or to impersonate someone else, however, remains challenging when a customer does not show up in person to bank. That faceless nature makes it harder for a bank to accurately verify the identity of a non-face-to-face customer. Therefore, it wouldn't be surprising that the identified

[301] 'The Challenges of Non-Face-to-Face Identity Verification' (*Trulioo*, 8 June 2016) <https://www.trulioo.com/blog/challenges-non-face-face-identity-verification/>.
[302]'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, The FATF Recommendations' (n 270) The FATF Recommendations, Interpretive Note To Recommendation 10 (Customer Due Diligence), pp. 64–65.
[303] Iván Nabalón and others, 'Online Client Identification, Customer Identification Process in the Finance Industry' (Association pour le commerce et les services en ligne (ACSEL) 2018) White Paper 18 <https://www.acsel.eu/wp-content/uploads/2018/03/OnlineClientIdentification_Whitepaper.pdf>. See also 'Digital Onboarding for Financial Services' <https://www.x-infotech.com/wp-content/uploads/2018/12/Digital-onboarding-for-financial-services.pdf>.
[304] Basel Committee on Banking Supervision, 'Customer Due Diligence for Banks' (n 237) 11–12.

constraints challenging the exercise of CDD for non-face-to-face customers constitute a source of attraction for terrorist financiers. This is especially so with the online banking – whereby non-face-to-face customers are the most recurrent –, for it is praised for its speed of transaction and borderless nature[305]; two features keenly looked at by terrorists when moving their funds.

d. Electronic banking

The term electronic banking has been defined by a number of scholars but the common definition comes from the Basel Committee on Banking Supervision which views it as the provision of retail and small value banking products and services through electronic channels as well as large vale electronic payments and other wholesale banking services delivered electronically[306]. In the context of countering terrorist financing, electronic banking is of a particular case in that it is a two-edged sword.

On one hand, given that electronic banking implies the transfer of money in form of virtual by means of electronic gadgetry, it always leaves a footprint[307] that enables to follow the money trail, from the source up to its final destination. With the new technologies that enable the geolocation based on devices, law enforcement can therefore easily get their hands on terrorist and their financiers when they used electronic devices to transfer money. The whole process is made possible based on some legal obligations put on Internet Service Providers (ISP) to record and keep log files for a long period of time.[308] They show which computer and when was connected to Internet, thus making law enforcement's work to trace somebody's activity easier.[309]

On the other hand, the flip side of electronic banking is that it is vulnerable to terrorist financing. The risks to resort to that type of banking for terrorist purposes result mainly from features that make the virtual world – through which electronic banking surfs – attractive to terrorists: i.e. its use of anonymous payment methods, use of multiple reputable service providers to layer transactions and the creation of multiple accounts through which to transit funds[310]. All that, makes

[305] ibid 11.
[306] Basel Committee on Banking Supervision, 'Risk Management Principles for Electronic Banking' (Bank for International Settlements 2003) 4 <https://www.bis.org/publ/bcbs98.pdf>.
[307] Alexandre and Eisenhart (n 242) 290.
[308] Wojciech Filipkowski, 'Cyber Laundering: An Analysis of Typology and Techniques' (2008) 3 International Journal of Criminal Justice Sciences 15, 16.
[309] ibid.
[310] Lui and others (n 72) 67.

it much more difficult for law enforcement agencies to trace the origin of funds[311]. In addition, the removal of face-to-face contact between the account holder and the virtual-world service provider makes it extremely difficult to know who is operating the account, especially when there is no reliable way to match the customer with the identity documentation that s/he has provided (if this has been requested).[312] Mostly, financial institution's server checks only two things the login (e.g. unique ID number) and the password – not the true identity of a customer.[313] If the information is correct (meaning the same as the one stored in server's memory), the access is granted.[314] As a result, it would be harder to detect and hold up transactions related to criminal activities.[315]

It is therefore the combination of labyrinths set above – in determining with certainty the customer running a bank account within electronic banking – that meant that terrorists took greatly advantage of the increasing digitalization of the banking services, which at the same time paved a way for criminals to disguise their identity and cover tracks of their money. In this regard, a FATF report on ISIS's financing noted the increasing risk of abuse of Electronic Funds Transfers (EFTs) via banking channels [316] in areas located near territories where ISIL operates[317]. Such a risk is further heightened for international electronic banking which can involve customers in locations not traditionally served by a bank to conduct instantaneous transactions with little oversight[318].

As it is, the embracement of new technologies in the banking industry has not only brought benefits. Terrorists took it over, thus making electronic banking a digital platform to meet their financial needs without fear to be tracked. Therefore, any effort to curb terrorist financing in the banking sector, which would not take into account the digitalization of the banking services and its widespread use by terrorist financiers, is doomed to fail.

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311 ibid.
312 ibid.
313 Filipkowski (n 308) 16.
314 ibid.
315 ibid.
316 FATF, 'Financing of the Terrorist Organisation Islamic State in Iraq and the Levant (ISIL)' (FATF 2015) 27 <http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf>.
317 ibid.
318 Gregory Husisian, 'Anti-Money Laundering and OFAC Compliance for Multinational Financial Institutions: Implementing a Risk-Based Approach' (*Financier Worldwide*, December 2014) <https://www.financierworldwide.com/anti-money-laundering-and-ofac-compliance-for-multinational-financial-institutions-implementing-a-risk-based-approach/#.WBdMn4N97IU>.

3.2.2 Obligation to report suspicious transaction

The role of banks in financially tackling terrorism is not restricted to monitor the financial behavior of their customers. It goes further as when they detect an abnormality in the transactions of their customers, and after having ascertained the doubtful nature inconsistent with their normal behavior, the next step will be to notify the competent authorities. This is what we refer to by Suspicious Transaction Reports (STRs).

Thus, STRs also known as Suspicious Activities Reports (SARs) are reports financial institutions produce and submit to the Financial Intelligence Units (FIUs) – where they exist – when they have detected a transaction, they feel could be linked to a criminal offence[319]. This means reporting entities must have reasonable grounds – which rules out a mere hunch or intuition – to suspect that the financial transaction(s) is assisting a terrorist or terrorist group or both, or in the case of ML, is being used to convert the proceeds of crime into the appearance of a legitimate activity.[320]

STRs must be detailed and of high quality[321], as they provide invaluable financial intelligence (…) such as individuals or entities' names, accounts, locations and relationships that may ultimately be disclosed to law enforcement, intelligence agencies, and/or other disclosure recipients.[322] They also provide context and make connections that disclosure recipients may not otherwise have known about[323].

[319] 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, The FATF Recommendations' (n 270) Recommendation 20, 19.
[320] 'What Is a Suspicious Transaction Report?' (Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) 2019) Guidance <http://www.fintrac-canafe.gc.ca/guidance-directives/transaction-operation/Guide2/2-eng.asp>.
[321] Reporting entities assess the suspicion according to a risk-based approach for customer due diligence, real-time payment screening, transaction monitoring and behavioral monitoring, to identify changes in the respondent's transaction risk profile. See JX Low, 'Suspicious Transaction Report (STR) / Suspicious Activity Report (SAR)' (*AML-CFT*, 6 September 2017) <https://aml-cft.net/library/suspicious-transaction-report-str-suspicious-activity-report-sar/>.
[322] 'What Is a Suspicious Transaction Report?' (n 320).
[323] ibid.

3.2.2.1. International Arrangements of STRs

The international standard on reporting transactions dates back in the late 1980s and early 1990s, and has evolved over time.[324] It began with the adoption of the first FATF Recommendations issued in 1990. Recommendation 15 and 21 called upon financial institutions to pay special attention to suspicious transactions; enquire on their background and purpose; and have the findings available for supervisors, auditors, and law-enforcement agencies.[325] As to Recommendation 16, it devoted the obligation itself to report suspicious transactions, but in a less constraining language. Indeed, it states that "if financial institutions suspect that funds stem from a criminal activity, they should be permitted or required to report promptly their suspicions to the competent authorities",[326] thus suggesting an arrangement between the reporting entity and the supervisor or regulator. It was then until 1996 when FATF Recommendations were first revised that the STR obligation was expressed as a requirement as such, without implying an option. As it stands in Recommendation 15, it reads "if financial institutions suspect that funds stem from a criminal activity, they should be required to report promptly their suspicions to the competent authorities".[327]

It is worth noting that the STR discussed above addressed the crime of money laundering. The STR obligation related to terrorist financing emerged later on in October 2001, – right after the 9/11 attacks –, when FATF added the fight against terrorist financing in its workload. That is when it adopted the IX Special Recommendations on terrorist financing,[328] among them Special Recommendation IV specifically invokes STR[329]. With time, STR obligation evolved and retained its significance in subsequent revisions of FATF Recommendations that occurred in later

[324] Louis Forget and Vida Šeme Hočevar, *Financial Intelligence Units: An Overview, Manuals & Guides* (illustrated, International Monetary Fund 2004) 41 <https://www.imf.org/external/pubs/ft/FIU/fiu.pdf>.
[325] 'The Forty Recommendations of the Financial Action Task Force on Money Laundering' (FATF 1990) Recommendation 15 and 21 <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf>.
[326] ibid Recommendation 16, 3.
[327] 'Financial Action Task Force on Money Laundering, The Forty Recommendations' (FATF 1996) Recommendation 15, 4 <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201996.pdf>.
[328] Supra note 25
[329] 'IX Special Recommendations, (Incorporating All Subsequent Amendments until February 2008)' (n 25) Special Recommendation IV, 2.

years[330] in 2003[331] and 2004[332]. Thus, in its current state, STR is well established in FATF international standards governing the fight against terrorist financing within the financial sector. But it is in the 1999 anti-terrorist financing Convention where STR derives its most substantial legal basis[333], the one drawn from FATF standards being watered down due to the soft law nature of FATF Recommendations. The following section will address some of the issues the applicability of STR raises, notably discretion and immunity.

3.2.2.2. Discretion

According to the wording of FATF Recommendation 20, if a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, by law, to report promptly its suspicions to the financial intelligence unit (FIU).[334] From the reading of that Recommendation, the first thing that leaps off is the significant discretion accorded to financial institutions in labelling a financial transaction as suspicious. Such a discretion is mainly the result of a lack or ambiguous indicators of what a suspicious transaction looks like.

Indeed, in many countries, the law requires that "suspicious" transactions be reported but does not define "suspicious."[335] This results in situation where banking staff face challenges in determining whether a transaction is suspicious or not[336]. Many legitimate business transactions will generate red flags for elements of their transaction and the differences between a complex, but legitimate transaction and a criminal money settlement may not be that noticeable initially.[337] As such, in considering a transaction to be suspicious, a banker cannot be expected to know the exact nature of the criminal offence or that the particular funds were definitely those arising from or intended

[330] Supra note 247
[331] 'Financial Action Task Force on Money Laundering, The Forty Recommendations' (n 248) Recommendation 13, 5.
[332] 'FATF 40 Recommendations, (Incorporating All Subsequent Amendments until October 2004)' (n 24) Recommendation 13, 8.
[333] United Nations International Convention for the Suppression of the Financing of Terrorism 1999, Article 18 (1) (b) (iii)
[334] 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, The FATF Recommendations' (n 270) Recommendation 20, 19.
[335] Forget and Šeme Hočevar (n 324) 43.
[336] Mohammed Ahmad Naheem, 'Suspicious Alerts in Money Laundering – The Crédit Agricole Case' (2017) 24 Journal of Financial Crime 691, 698 <https://doi.org/10.1108/JFC-12-2015-0074>.
[337] ibid.

for a crime.[338] The bank clerk will use his/her own appreciation based on the knowledge the bank develops on the customer and his/her usual transactions. That is exactly where lies the problem underpinning the discretion enjoyed by banks in reporting suspicious transactions. Such a process involving above all a personal and subjective assessment on the part of a reporting entity[339], it would not come as a surprise a scenario of two transactions with same patterns, but being given different connotation by reporting entities: What appears usual for one observer can turn out to be unusual in the eye of his counterpart. The presumption is that each reporting entity will have its own segues from unusual activity to investigation to the decision to report to law enforcement[340].

The above situation, though hypothetical, highlights the need to come up with clearly objective criteria of what constitutes a suspicious transaction[341]. Those criteria, not only need to be based on international standards, but also encompass specific issues pertinent to the local context and environment[342]. Such move if effective, will definitely help to address challenges associated with subjective assessment of unusual transactions, which resulted in two opposing situations with different implications on ground.

On one hand, there has been the phenomenon of "defensive reporting"[343]which consists in reporting entities to overreport suspicious financial transactions out of fear of strict sanctions for non-compliance with obligation to report. The case of Georgia is the typical example of defensive reporting. In 2010, the number of STRs more than doubled compared to 2009. However according to financial institutions interviewed by the assessors, such an increase of STRs is not a sign of effective identification of suspicion, but rather a result of stricter regulatory pressure by the

[338] Aspalella A. Rahman, 'The Impact of Reporting Suspicious Transactions Regime on Banks: Malaysian Experience' (2013) 16 Journal of Money Laundering Control 159, 161 <https:// doi.org/10.1108/13685201311318502>.
[339] ibid.
[340] Robert Michael Axelrod, 'Criminality and Suspicious Activity Reports' (2017) 24 Journal of Financial Crime 461, 462 <https://doi.org/10.1108/JFC-03-2017-0019>.
[341] Lack of objective criteria has meant that reporting entities merely stick to gather basic facts necessary to establish the suspiciousness of a transaction such as the disproportionately high amount from an unexplained activity. It is thus expected that a large proportion of reports will be found, upon analysis by the FIUs, not to be linked to criminal activity. See Forget and Šeme Hočevar (n 324) 42.
[342] Ahmad Naheem, (n 336) 648.
[343] Julia Braun and others, 'Drivers of Suspicious Transaction Reporting Levels: Evidence from a Legal and Economic Perspective' (2016) 2 Journal of Tax Administration 95, 102 <http://jota.website/article/view/72>. A. Rahman (n 338) 162. Michael Axelrod, (n 340) 468.

National Bank of Georgia on the financial sector, following inspections it carried out and penalties it imposed on non-compliant banks.[344]

Needless to say, the high levels of STRs, or defensive report phenomenon, far from to be a sign of compliance with or effective AML/CFT scheme[345], undermines the quality of STR by overwhelming the recipient of STR with a flood of irrelevant data that will cost time and resources to analyze[346]. Accordingly, that amount of unfounded STRs with no evidence of a possible crime not only divert attention of FIUs called upon to collect, analyze, and disseminate the contents of the said reports, but also provide biased record that AML/CFT regime is delivering intended outcome and yet it is not the case.

On the other hand, the subjective assessment of unusual transactions by reporting entities led in situation where some other financial institutions, – facing a lack of hard evidence to support a suspicion of a transaction, or that the customer involved is part of a criminal operation or organization –, deferred to report suspicious transactions to law enforcement, out of a concern that their suspicion may become an accusation that could be based on a wrong interpretation of facts[347].

Thus, what can be deducted from the discretionary power underpinning the obligation of STR, is that it is at the core in the determination of the threshold of a suspicion of a transaction. This inevitably implies a certain degree of subjectivism on the part of reporting entities, which may explain the varying criteria in identifying a suspicious transaction.

3.2.2.3. Immunity

The immunity enjoyed by reporting entities is granted by the FATF Recommendation 21 (a), which provides that financial institutions, their directors, officers and employees should be protected by legal provisions from criminal and civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if

[344] Moneyval, Anti-Money Laundering and Combating the Financing of Terrorism, Council of Europe, 2012, pp.195-196.
[345] Braun and others (n 343) 103.
[346] Experience of the assessors in the Georgia case has shown that the number of STRs could range from hundreds a year to thousands a day. See ibid 96.
[347] Forget and Šeme Hočevar (n 324) 10.

they report their suspicions in good faith to the FIU (…)[348]. Banks can also be protected under common law under the exceptions provided in the case of *Tournier v National Provincial & Union Bank of England*[349] where the court looked into the bank's duty of confidentiality owed to their clients. It further stated that the bank's duty of confidentiality arises out of contract and the duty is not "absolute but qualified." There are however certain instances where the bank may be immune to its duty of secrecy. These instances have been listed in the above-mentioned case as follows: "(a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer."[350]

The whole merit of immunity granted to reporting entities lies in the fact that it aims to provide legal protection to financial institutions after they have fulfilled their legal duty to file a STR, provided that they have acted in good faith, even if they are mistaken as to their suspicions.[351] Recommendation 21 (a) would protect a financial institution in a civil claim for breach of confidentiality, in circumstances where a STR concerning the customer has been filed in good faith[352]. It would also prevent a financial institution from being criminally prosecuted under bank secrecy laws for disclosure of customer information in a STR[353]. This legal protection should encourage financial institutions to report suspicious transactions without fear of civil or criminal liability under contractual or legislative provisions[354].

From the wording of Recommendation 21 (a), we can derive that good faith is the sine qua non precondition for reporting entities to get covered by the immunity. The good faith being a presumption for reporting entities in the exercise of STR, it would be up to the customer subject of a STR to prove otherwise. This is not an easy task given that the concept of good or bad faith is deep down inside the human being (inner self of an individual). Thus, with that presumption of good faith for reporting entities almost impossible to challenge, one could legitimately wonder

[348] 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, The FATF Recommendations' (n 270) Recommendation 21 (a), 19.
[349] *Tournier v. National Provincial and Union Bank of England.* (n 261).
[350] ibid.
[351] David Chaikin, 'How Effective Are Suspicious Transaction Reporting Systems' (2009) 12 Journal of Money Laundering Control 238, 241 <https://doi.org/10.1108/13685200910973628>.
[352] ibid.
[353] ibid.
[354] ibid.

the room for maneuver for a bank customer dragged in a STR, when after investigation by law enforcement and criminal proceedings it turns out that the customer has no link with terrorism or other financial crime, or simply the STR appears to be a false alarm. Indeed, the customer would not turn on his/her banker for breach of confidentiality, or false accusation since it is covered by the immunity. That scenario is more likely to occur if we bear in mind the above discussed phenomenon of defensive over-reporting. The absence of a legal action by a customer against a possible abusive exercise of reporting obligation – motivated purely by some contextual elements such as a financial transaction to and from a geographic area exposed to terrorism, or a customer attitude change – puts him/her at the whim of the reporting entity.

In the end, the obligation to report suspicious transactions has its merits in the fight against terrorist financing[355]. However, the lack of guard rails against a possible abuse of STRs could obviously throw discredit upon that obligation. This may explain the reason why before landing before the judge for criminal prosecution, STRs must go through a deep analysis by FIUs which will either substantiate the suspicion or close the file without further action due to lack of evidence.

3.3. Conclusion

In conclusion, it is clear that the banking sector is a much-needed player in the fight against terrorist financing in that it has the largest volume of financial flow. Those resorting to the services provided by banks do not always use them in a responsible manner, and that sector has been targeted by financial crimes offenders, chief among them terrorists who, at multiple times have moved their money using banking channel. To guard against that misuse of the banking industry, financial regulators have developed a whole bunch of measures in order to restore the integrity of the financial system undermined by terrorists and their financiers.

Thus, if the anti-terrorist campaign undertaken by the banking community has not managed to completely keep its services away from terrorists 'use, it has at least succeeded in rendering misuse of banks for terrorist purposes more complicated. This led terrorists to turn to other funding mechanisms which will be the subject of the next chapter.

[355] Braun and others (n 343) 98.

CHAPTER FOUR

The Fight against Terrorist Financing: Non-Banking Institutions.

4.1. Introduction

The banks 'obligations discussed in the previous chapter to have a thorough knowledge of their customers and to report their unusual financial behavior certainly form the epicenter of the financial sector involvement in the fight against terrorism. Still this chapter wants to explore if the same CDD and STR obligations are observed by other non-banking institutions with the same diligence. Indeed, the very fierce competition in the financial industry has meant that the exercise of financial activity is no more the only monopoly of financial institutions, as designated non-financial businesses and professions (DNFBPs) embraced financial dealings, thus creating the need for FATF to issue anti-terrorist financing recommendations designed to those newcomers in the financial sector.

By covering DNFBPs and calling States to give effect to Recommendations thereto, FATF materialized the first operative paragraph of S/RES/1373 (2001) 28 September 2001 which aims to prevent and suppress terrorist financing acts. That involvement of DNFBPs in the rhythmic of anti-terrorist financing lies on the observation that apart from the banking channel which is the most used way to transfer money, terrorists have at their disposal a variety of means to move their money around the world. Just like banks, those money transfer methods are in essence legitimate, but pose different level of risk of misuse for terrorist ends. These include among other things, Mobile Financial Services (MFSs) and Alternative Remittance System (ARS).

Measures to contain the risks of abuse have been taken by different actors, each acting within its field of competence – Mobile Network Operators (MNOs) for MFSs and Remittance companies for ARS –, thus making the financial warfare against terrorist financing a multidimensional fight, whereby each actor is subject to CFT regulations based on risk of terrorist financing posed by the services it provides for. It is therefore that CFT regime that will be the subject of the present chapter.

4.2. Institutions Offering Financial Services

One thing for terrorists is to get money; another thing is to move it, i.e. transferring it across the world. The ability of terrorists to transfer their money has been a key factor in the success of their operations. For that, they have been using different money transfer methods, from Mobile Financial Services (MFSs), to Alternative Remittance System (ARS). Those means of transferring money will be discussed in this section with special focus on the risks they pose for terrorist financing and the mitigating measures which have been put in place.

4.2.1. Mobile Financial Services

In a very simple way, and as the term itself suggests, MFSs consists in using mobile phone as a mean to provide a wide range of financial services traditionally reserved for financial institutions in particular banks. This includes both transactional services, such as transferring funds to make a mobile payment, and non-transactional services, such as viewing financial information[356]. MFSs have been praised for their ability to reach out low- income and remote populations[357] in areas where banking services are either weak or non-existent, or are simply too expensive to be afforded by poor people, thus rendering access to financial services a real fact, which is today cherished as the financial inclusion.[358]

[356] 'Digital Financial Services, Basic Terminology' (n 242) 3.

[357] Cross Gombiro, Mmaki Jantjies and Nehemiah Mavetera, 'A Conceptual Framework for Detecting Financial Crime in Mobile Money Transactions' (2015) 4 Journal of Governance and Regulation 727, 727 <https://www.researchgate.net/publication/286579915_A_conceptual_framework_for_detecting_financial_crime_in_mobile_money_transactions>.; Pierre-Laurent Chatain and others, 'Integrity in Mobile Phone Financial Services, Measures for Mitigating Risks from Money Laundering and Terrorist Financing' (The World Bank 2008) Working Paper No. 146 xiii <http://documents.worldbank.org/curated/en/316191468338512619/Integrity-in-mobile-phone-financial-services-measures-for-mitigating-risks-from-money-laundering-and-terrorist-financing> accessed 3 April 2019. and Miriam Goldby, 'Reporting of Suspicious Activity by Mobile Money Service Providers in Accordance with International Standards: How Does It Impact on Financial Inclusion?' (2013) 8 Washington Journal of Law, Technology & Arts 401, 403 <http://digital.law.washington.edu/dspace-law/handle/1773.1/1205>.

[358] Chatain and others (n 357) 2 and 9. M Kersop and Sf Du Toit, 'Anti-Money Laundering Regulations and the Effective Use of Mobile Money in South Africa – Part 1*' (2016) 18 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 1602, 1614 <http://www.ajol.info/index.php/pelj/article/view/130759> accessed 7 May 2019.

Money transfer via mobile phone has been growing at a dizzying rate over the past few years and MNOs have played a key role in its development[359]. By the end of 2018, there were 866 million registered mobile-money accounts worldwide[360], a real revolution that changed the way people access to financial services, by actually turning mobile phone in a mobile wallet without having to open a bank account.

From that transformation of financial sector – whereby non-financial entities engage in regulated financial activities –, arise two main questions with regard to the CFT: What are the risks of terrorist financing posed by MFSs? Are they subject to the same strict AML/CFT obligations applicable to financial institutions? The relevance of this line of questioning is to be found in the very anatomy of MFSs.

4.2.1.1 Risks of Terrorist Financing posed by Mobile Financial Services

The mode of operation of MFSs has meant that mobile-money transfer has brought many new players to the formerly exclusive financial services sector[361]. Quite rapidly, multiple actors including banks, TelCos, payment companies, and money transfer operators engaged mobile phones to expand their financial products and meet their customers' needs[362] at the same time. This multiparty transaction environment,[363] whereby each party views its responsibilities and liabilities differently,[364] is conducive to exploitation by fraudsters using attacks from both a technological and sociological angle if appropriate protection mechanisms and accountability are not established throughout the mobile payment ecosystem[365].That is all the more true as several parties are involved in performing jointly a transaction through mobile phone[366], and that the lines

[359] Claire Scharwatt and others, 'State of the Industry, Mobile Financial Services for the Unbanked' (Global System Mobile Association (GSMA) 2014) 5 <https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2015/03/SOTIR_2014.pdf>. 'Guidance for A Risk-Based-Approach, Prepaid Cards, Mobile Payments and Internet-Based Payment Services' (FATF 2013) paragraph 11, 6 <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-RBA-NPPS.pdf>.

[360] 'State of the Industry, Report on Mobile Money, 2018' (Global System Mobile Association (GSMA) 2019) 3 <https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2019/02/2018-State-of-the-Industry-Report-on-Mobile-Money.pdf>.

[361] Chatain and others (n 357) 18.

[362]ibid..

[363] 'Mobile Payments: Risk, Security and Assurance Issues' (Information Systems Audit and Control Association (ISACA) 2011) White Paper 12 <https://www.isaca.org/Groups/Professional-English/pci-compliance/GroupDocuments/MobilePaymentsWP.pdf>.

[364] ibid 10.

[365]ibid 12.

[366]ibid.

that divide bank from TelCo, retail agent from teller, and financial and non-financial services have been blurred both in and around the MFSs context[367]. This further exposes MFSs to the risk of serving as a platform for the commission of financial crimes. Current literature has classified those threats into four risk-factors, notably, anonymity, elusiveness, rapidity, and lack of oversight.

Anonymity: In the context of MFSs, it is well accepted that the relaxation of KYC and CDD requirements provide for users the ability to uphold some form of anonymity through false identification or not disclosing their identity to the money service business[368]. This concern is further exacerbated by the non-face-to-face customer acquisition underpinning MFSs, which has been identified as one of the greatest vulnerabilities of offering financial services through mobile phones[369].

Elusiveness: This one relates to the ability of an individual to disguise mobile transaction totals, origins and destinations[370], with an aim to escape detection by MFSs provider or law enforcement. Basically, it consists in a practice known as smurfing which involves splitting the total amount into small value transactions, well below to arise suspicion of MFSs provider[371]. In doing so, the transaction value becomes low enough to comply with legal reporting limit in most jurisdictions, evades detection and is used to fund illegal and terrorist activities[372]. Such an activity is well known to CFT practionners who have henceforth increased detection of smurfing activities[373], but in retaliation criminal syndicates have further lowered the values in an attempt to evade detection.[374] They do so by opening multiple mobile-money accounts to make transactions less detectable[375].

Rapidity: As money transfer via mobile phone runs very fast, with cash being converted in virtual, then sent and received in a very short time frame, mobile money providers may not timely detect suspicious activity to suspend a transaction. Due to the speed of transaction, the remittance of

[367]Chatain and others (n 357) 18..
[368] James Whisker, 'Anti-Money Laundering and Counter-Terrorist Financing Threats Posed by Mobile Money' (2019) 22 Journal of Money Laundering Control 158, 163 <https://doi.org/10.1108/JMLC-10-2017-0061>.
[369] Chatain and others (n 357) 50.
[370] ibid xiv.
[371] Pierre-Laurent Chatain, and others, 'Protecting Mobile Money against Financial Crimes, Global Policy Challenges and Solutions' (World Bank 2011) 60060 35. Gombiro, Jantjies and Mavetera (n 357) 729. Kersop and Du Toit (n 358) 1621.
[372] Whisker (n 368) 163.
[373] Chatain, and others (n 371) 35.
[374] Filipkowski (n 308) 18.
[375] Chatain and others (n 357) 40.

illicit funds – that adheres to legal reporting limits and does not generate "red flags" – can be received and withdrawn and the account could be closed before regulatory bodies and law enforcement has time to intervene.[376] It is said that rapidity is certainly the most significant threat when compared with cash as value can be remitted, in real time, relatively easy, efficiently and without the need of physical movement[377].

Lack of oversight: This risk-factor originates from the unclear boundaries in laws, regulations and the establishment of a clearly defined overseer[378]. For many countries mobile money has not been defined in AML/CTF regulations[379]. This is because regulations were not created with mobile money in mind as a financial platform, which then leaves countries attempting to bridge the gap with inadequate laws and regulations that would normally apply to the formal banking sector[380]. In this regard, this study feels that the identified gap in the legal framework should bring the attention of FATF for the need to intervene with an additional Recommendation that clearly defines responsibilities of actors involved in MFSs which, when provided through a bank-led model raise a confusion as to who should take the lead in the supervisory role[381].

4.2.1.2 Are Mobile Financial Services Subject to the Same Rigorous AML/CFT Obligations Applicable to Financial Institutions?

To mitigate the exposure of MFSs to abuse by terrorists, a corpus of measures has been taken by jurisdictions where mobile money has almost become a lifestyle. But it clearly comes out that MFSs are typically subject to a much less stringent AML/ CFT regime, and that, from the beginning and throughout the business relationship with customers.

[376] Arvind Ashta, 'Evolution of Mobile Banking Regulations: A Case Study on Legislator's Behavior' (2017) 26 Strategic Change 3, 10 <https://papers.ssrn.com/abstract=1583080> accessed 7 May 2019.
[377] Whisker (n 368) 164.
[378] ibid 165. 'Guidance for A Risk-Based-Approach, Prepaid Cards, Mobile Payments and Internet-Based Payment Services' (n 359) Paragraph 20, 9.
[379] Whisker (n 368) 165.
[380] ibid.
[381] Maria C Stephens, 'Promoting Responsible Financial Inclusion: A Risk-Based Approach to Supporting Mobile Financial Services Expansion' (2012) 27 Banking and Finance Law Review 329, 330 <https://www.ftc.gov/sites/default/files/documents/public_comments/ftc-host-workshop-mobile-payments-and-their-impact-consumers-project-no.124808-561018-00012%C2%A0/561018-00012-82712.pdf>.

By way of illustration, when an individual is opening a bank account, the financial institution will, as part of the KYC obligation, collect and update all necessary information on the new customer (personal details, beneficial owner, profession, financial situation, family status, etc.). The customer will in his/her turn provide documentary evidence proving his/her allegations (status). It is quite different for MSFs providers for which only an ID or a valid passport suffices for new customers to open an account. Their KYC is not as tight as that of financial institutions, as they do not go further to inquire on the customer's background and his surroundings, according to the usual process for banks. They only stick to simplified CDD which are soft arrangements of supervisory measures applied to exceptional cases (i.e. customers, products and services) that pose lower risks of money laundering and terrorist financing. – financial inclusion dimension[382] –.

As part of that simplified CDD, MSFs providers can therefore see fit to require only an ID when entering in business relationship with new customers, or failing ID, other alternative accredited forms of ID official documents. Jurisdictions that accept alternative documents in lieu of ID are countries with no national ID scheme. That is the case within the East Africa Community (EAC), a region that has been at the forefront of financial services via the mobile phone[383] . In that region – except in Kenya –, there are no universal or national IDs infrastructure and MFSs providers have agreed with financial regulators to accept a range of ID documents for the registration process[384]. Across EAC, mobile money operators can accept: A voter's card, driver's license; valid passport; local village council letter or certificate; company or employer issued ID; Government issued ID; tax certificate; national ID (only available in Kenya)[385].

It is believed that, the alternative ID documents mentioned above, – though solving the problem of national ID scheme as part of application of simplified CDD –, impede a proper customer profiling by mobile money provider, since they do not contain some critical details such as the profession, that would assist in the categorization of AML/ CFT risks posed by customers.

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[382] 'Proportionate Risk-Based Customer Due Diligence (CDD), FATF General Overview' (FATF 2013) 4 <https://www.ifc.org/wps/wcm/connect/c38b190042366cd382d2ae0dc33b630b/7.3.iv+GSMA+conference+-+11+July+2013.pdf?MOD=AJPERES>.

[383] 'The Mobile Economy, Sub-Saharan Africa, 2018' (Global System Mobile Association (GSMA) 2018) 31 <https://www.gsmaintelligence.com/research/?file=809c442550e5487f3b1d025fdc70e23b&download>.

[384] 'Mobile Money for Business Development in the East African Community: A Comparative Study of Existing Platforms and Regulations' (United Nations 2012) UNCTAD/DTL/STICT/2012/2 14 <https://unctad.org/en/PublicationsLibrary/dtlstict2012d2_en.pdf>.

[385] ibid.

Even worse, they (i.e. alternative ID documents) do incur a considerable risk of falsification by criminals, using mobile money services under false ID. In addition, occasions where alternative ID documents are accepted pose significant challenges of STR exercise, as identification of suspicious activity will be harder, due to the fact that within mobile money, the service provider knows very little of the customer's background, and thus what constitutes unusual activity for him[386].

The rationale behind the relaxation of CFT regime applied to MFSs can be explained on a two-fold axis. On one hand, there is that ultimate need to strengthen financial inclusion through MFSs.[387] Under this banner, the whole point revolves around striking a balance between financial inclusion and integrity of financial system[388]. The former aims to ease access to financial services to low-income and rural communities unserved by traditional banking services because, among other reasons, they lack proof of identity (identification means) necessary in the CDD exercise. To this end, there is need to relax the rigorous CDD rules observed by banks, by actually accepting alternative ID documents issued by local authorities.[389] The latter effectively seeks to preserve integrity of financial services provided through mobile money, by actually taking measures designed to keep terrorist financiers and money launderers from using mobile money services. In light of current scale of MFSs[390], one could rightly or wrongly suggest that the former (financial inclusion) prevails over the latter (integrity of mobile money services)[391].

On the other hand, the simplification of CFT rules in MFSs is warranted by their low-risk of misuse by terrorists. Indeed, it is widely held that mobile money poses a reduced risk of terrorist financing compared to traditional banking services,[392] an argument that this study would like to challenge. The basis of that questioning is the current trend of terrorists to resort to low-cost terror attacks, whose supply chain does not need to go through the banking system with sophisticated monitoring

[386] Goldby (n 357) 414.
[387] Supra note 358
[388] Kersop and Du Toit (n 358) 1609. Simone Di Castri, Jeremiah Grossman and Raadhika Sihin, 'Proportional Risk-Based AML/CFT Regimes for Mobile Money, A Framework for Assessing Risk Factors and Mitigation Measures' (Global System Mobile Association (GSMA) 2015) 10 <https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2015/10/Proportional-risk-based-AMLCFT-regimes-for-mobile-money.pdf>. Goldby (n 357) 405. Alexandre and Eisenhart (n 242) 287.
[389] Supra note 385. Goldby (n 357) 406.
[390] Supra note 360
[391] Goldby (n 357) 413.
[392] Chatain, and others (n 371) 169. Alexandre and Eisenhart (n 242) 291.

control system, but rather transits via low-scale money transfer system (such as mobile money), whereby transaction of illicit value can go unnoticed. Furthermore, it has occurred that terrorists nowadays start taking an interest in mobile money[393]. Probably because they have realized the above-discussed risk-factors associated to it which, as a reminder, are anonymity, elusiveness, rapidity, and lack of oversight.

The above allegation is far from being an imagination as it was found in the very recent terror attack carried out on 15 January, 2019, in DusitD2 hotel, in Nairobi, Kenya, terrorists made use of mobile money to transfer money that funded the attack[394]. It is therefore a matter of time before a similar scenario occurs again, should the level of risk of terrorist financing posed by MFSs not be reconsidered.

One thing's for sure, the recourse to mobile money by DusitD2 hotel terrorists highlighted some of the arguments contended above, notably that terrorists are adaptative and smart enough to exploit loopholes in CFT measures. One of the gaps identified in this study is the soft CFT regime to which MFSs are subject to, which is the result of a flawed assessment that mobile money poses low risk.[395] Such an assertion is wrong, at least in light of the anonymity and elusiveness provided by MFSs which attract financial criminals. It is therefore high time for CFT regulators and practioners to draw due lesson from cases of abuse of mobile money by criminals and then reconsider the level of risk of criminal activity posed by MFSs[396]. For in the current state, the counter-measures and the whole approach to contain the risk of terrorist financing inherent in MFSs, seems to remain on their infancy.

[393] Gombiro, Jantjies and Mavetera (n 357) 727.
[394] Dominic Omondi, 'Mobile Cash Transfers Pose New Headache for Security Agencies, Local Banks' *The Standard* (Nairobi, Kenya, 29 January 2019) <https://www.standardmedia.co.ke/article/2001311163/mobile-cash-transfers-pose-new-headache-for-security-agencies-local-banks> accessed 7 May 2019.
[395] Supra note 392
[396] Jane Winn and Louis Koker, 'Introduction to Mobile Money in Developing Countries: Financial Inclusion and Financial Integrity Conference Special Issue' (2013) 8 Washington Journal of Law,Technology &Arts 155, 156 <http://digital.law.washington.edu/dspace-law/handle/1773.1/1195>.

4.2.2. Alternative Remittance System (ARS)

Along with the mobile money transfer, the money remittance sector has been widely used to move value. That underground money transfer system has been of great help in war torn countries, where the presence of banks is very limited.[397] The FATF defines Alternative Remittance Systems (ARS), as any system used for transferring money from one location to another, and generally operating outside the banking channels.[398]Such a definition includes a wide array of channels, ranging from large, fully regulated multinational companies to small, covert value transfer outlets operating incognito[399].

Thus, from that definition emerge two sorts of ARS: Formal and informal value transfer system (IVTS). For formal money transfer system, this study will look at the Western Union money transfer service. The heavy reliance on that remittance system to send value worldwide has meant that special attention has been devoted to it. As to informal money transfer system, only Hawala will be the subject of a case study, for its use has been repeatedly reported in multiple occasions, and with reference to a diverse range of terrorist groups worldwide[400]. In many cases, ISIS financial transactions are conducted through a web of hawaladar (Hawala brokers), an underground network established throughout Iraq, Syria and beyond.[401]

[397] Edwina A Thompson, 'Misplaced Blame: Islam, Terrorism and the Origins of Hawala' (2007) 11 Max Planck Yearbook of United Nations Law, 279, 280 <http://www.mpil.de/files/pdf1/mpunyb_08_thompson_11.pdf>.
[398] 'Money Laundering & Terrorist Financing Typologies 2004-2005' (FATF 2005) 3 <http://www.fatf-gafi.org/media/fatf/documents/reports/2004_2005_ML_Typologies_ENG.pdf>.
[399] Matteo Vaccani, 'Alternative Remittance Systems and Terrorism Financing, Issues in Risk Management' (World Bank 2010) Working Paper No. 180 1 <https://openknowledge.worldbank.org/bitstream/handle/10986/5916/518410PUB0REPL101Official0Use0Only1.pdf?sequence=1&isAllowed=y>.
[400] ibid 7.
[401] Magnus Normark and Magnus Ranstorp, 'Understanding Terrorist Finance' (Swedish Defence University 2015) 46/2015 19 <https://www.fi.se/contentassets/1944bde9037c4fba89d1f48f9bba6dd7/understanding_terrorist_finance_160315.pdf>.

4.2.2.1 Western Union

Western Union money transfer service is a widely known business that has pioneered in the money remittance sector at a global scale[402]. As a money remittance channel, Western Union falls under the category of Money or Value Transfer Service (MVTS), which is defined by FATF as financial services that involve the acceptance of cash, cheques, other monetary instruments or other stores of value and the payment of a corresponding sum in cash or other form to a beneficiary by means of a communication, message, transfer, or through a clearing network to which the MVTS provider belongs[403]. Transactions performed by such services can involve one or more intermediaries and a final payment to a third party, and may include any new payment methods[404].

Western Union is of wide use for both licit and illicit purposes. For licit ends, migrant workers and diaspora communities rank among the first users of Western Union's remittance services.[405] As to illicit ends terrorist financiers and money launderers are the main abusers of Western Union[406] as they resort to it when conducting their financial operations. For instance, the November 2015 terror attacks in Paris were in part financed through welfare benefits received in Belgium that were moved via Western Union transfers[407]. One of the suspects sent seven Western Union wires totaling $552 and another sent a single wire for $226[408].

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[402] Federal Trade Commission, Press Release: Western Union Admits Anti-Money Laundering Violations and Settles Consumer Fraud Charges, Forfeits $586 Million in Settlement with FTC and Justice Department, 19 January, 2017, available at https://www.ftc.gov/news-events/press-releases/2017/01/western-union-admits-anti-money-laundering-violations-settles accessed on 9 May, 2019.

[403] 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, The FATF Recommendations' (n 270) 120.

[404] ibid.

[405] Ezequiel Minaya, 'Western Union Makes Digital Push Amid Fierce Competition for Money Transfers' *Wall Street Journal* (5 October 2018) <https://www.wsj.com/articles/western-union-makes-digital-push-amid-fierce-competition-for-money-transfers-1538731800> accessed 9 May 2019. Drake Bennett and Lauren Etter, 'Give Us Your Tired, Your Poor, Your Huddled Masses Yearning to Send Cash, Western Union Built Its Business on Refugees and Immigrants. Can It Survive the Political Backlash against Them?' *Bloomberg* (New York, USA, 16 June 2017) <https://www.bloomberg.com/news/features/2017-06-16/for-western-union-refugees-and-immigrants-are-the-ultimate-market> accessed 9 May 2019.

[406] David J Lynch, 'Western Union to Pay $586m after Illicit Cash Sent to Criminals' *Financial Times* (Washington, 19 January 2017) <https://www.ft.com/content/fac9423a-de7f-11e6-9d7c-be108f1c1dce> accessed 9 May 2019. Lawrence Malkin and Yuval Elizur, 'Terrorism's Money Trail' (2002) 19 World Policy Journal 60, 64 <https://www.jstor.org/stable/40209791> accessed 9 May 2019.

[407] Security Council/ Counter Terrorism Committee, 'Paris Attacks Showed Role of Small Transactions in Terror Finance; UN Meeting Hears' (*United Nations Security Council Counter-Terrorism Committee*, 15 April 2016) <https://www.un.org/sc/ctc/news/document/paris-attacks-showed-role-of-small-transactions-in-terror-finance%cd%be-un-meeting-hears/> accessed 12 April 2019.

[408] ibid.

As a money remittance provider, the regulations that apply to Western Union to prevent its use for criminal purposes require a special attention especially when we consider its operational mode. Indeed, like any MVTS, Western Union is subject to the same CFT obligations applicable to banks and non-bank financial institutions[409]. Accordingly, obligations of KYC and STR also find application in Western Union's remittance services.

However, the question at hand is how the above-mentioned obligations apply to Western Union whose anatomy differs from that of banks[410] for which the said obligations were initially intended to. On one hand KYC implies that a customer holds an account in a financial institution where s/ he submits all documentary evidence of who s/he is for the bank to develop an adequate knowledge of the person with whom it entered into a business relationship. In this manner, considering that Western-Union is not a financial institution per say, where a customer can open an account and thus engage in a durable business relationship – as it is for the banking counterpart –, one can understandably wonder how a Western Union agent can observe an obligation of KYC, since from the beginning there is no legal bound between Western Union and the customer (either the sender or the receiver).

On the other hand, with regard to the STR obligation, it infers referring a transaction that does not correspond to the bank's knowledge on the customer, or simply a transaction of an abnormally high sum considering the financial capacity of the customer. As such, with Western-Union barely knowing the sender and the receiver to have a clearer picture of what would amount a suspicious activity for them; coupled with the fact that some customers occasionally resort to services of Western- Union for it to constitute a fairly consistent transaction record in order to compare and detect abnormal patterns, one can conclude that STR obligation for Western-Union remains more in the realm of theory than that of practice.

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[409] FATF, 'Combatting the Abuse of Alternative Remittance Systems, International Best Practices' (2003) Special Recommendation VI: Alternative Remittance, 1 <https://www.fatf-gafi.org/media/fatf/BPP%20SRVI%20June%202003%202012.pdf>. See also FATF Interpretative Note to Special Recommendation VI: Alternative Remittance.

[410] Banks only conduct transactions with people holding accounts at that bank, and those account holders must provide a significant amount of personal information when they open the account. Western Union, on the other hand, just like all MSBs does not require that customers have existing accounts. Customers only need to present a valid form of ID. See Michael Freeman and Moyara Ruehsen, 'Terrorism Financing Methods: An Overview' (2013) 7 Perspectives on Terrorism 5, 12 <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/279> accessed 9 May 2019.

As matter of principle, AML/CFT regulations for banks and non-bank financial institutions apply mutatis mutandis to MVTS[411]. However, when it comes to Western-Union, a meaningful compliance with those regulations is very unlikely due mainly to its anatomy. If someone wants to send money via Western-Union; only an ID will suffice and there will not be a stringent process for the outgoing payment, neither on the part of the sender nor on that of the receiver. Once money has reached its destination and the sender gets confirmation message of reception by the receiver, the relation with Western-Union will end without the latter to have additional information on both the sender and receiver. That modus operandi raises a couple of questions as to the exercise of KYC and STR: How can a customer who has no history[412] with a Western-Union's agent be subject to a KYC scheme? The sender or receiver does not need to hold an account for a Western Union's agent to look at abnormal patterns. Thus, on which basis can a remittance be suspected to be for illicit purposes?

The above-raised issues are meaningful, considering Western-Union does not, strictly speaking, conduct a customer profiling and that transactions through that channel are fast. This makes – as one would expect – Western Union services an attractive option for criminals deterred by banks' controls.[413]

FATF in its study related to MVTS has tried to address those issues, however it did not clearly show how CDD can apply to occasional customers for whom MVTS generally do not open or maintain accounts[414]. Yet, it is that category of customers that generally poses risk of misuse of MVTS. FATF only focused on customer loyalty schemes and relationship management tools, which coupled with an agreement between the MVTS providers and customers, indicate that a business relationship has been formed[415].There is therefore a need for FATF to develop KYC and

[411] 'IX Special Recommendations, (Incorporating All Subsequent Amendments until February 2008)' (n 25) Special Recommendation IV, 2.
[412] Generally, agents of Western-Union stick to the information provided by ID, other personnel important details such as profession, current address of both the sender and the receiver, or fingerprint are not regarded.
[413] Chrisol Correia, 'Interpreting the FATF Guidance on Money or Value Transfer Services' (15 March 2016) <https://www.linkedin.com/pulse/interpreting-fatf-guidance-money-value-transfer-services-correia> accessed 12 April 2019.
[414] 'Money or Value Transfer Services' (FATF 2016) Guidance for a Risk-Based Approach 25 <https://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-RBA-money-value-transfer-services.pdf>.
[415] ibid.

STRs guidelines compatible with MVTS which conduct occasional transactions (remittance) like Western-Union.

As part of those guidelines, action plan for that purpose would be for instance to subject money remittance, to or from a terrorist-exposed area to a kind of enhanced due diligence whereby, in addition to the ID, the sender would have to provide documentary evidence of his/her financial situation. That way, if money s/he sends goes far beyond his/her financial position, the remittance service provider could enquire on the origin of money to be remitted. Another move would be – where it's not the case – to communicate to MVTS providers blacklist of terrorist financiers for them to be excluded from their service.

Providing MVTS providers with blacklists of individuals involved in terrorism would be a strategic move to engage the remittance sector in the CFT. That financial entity-like sector widely dominates in the money transfer business[416]. For instance, as of 30 June 2018, Western Union by itself had over 550,000 retail agents in more than 200 countries and territories[417], with a capability to send money to billions of accounts and processing 32 transactions every second[418]. Thus, with such omnipresence and a wide use of its services, a well-defined guidance by FATF, – detailing the applicability of CFT obligations by Western Union and other remittance operators exercising the business without opening and maintain an account –, would be of an added value in the implementation of FATF Recommendations by MVTS, and consequently, this will contribute to preserve the integrity of MVTS by excluding criminals from remittance services.

[416] Anna Lindley, 'Somalia Country Study, A Part of the Report on Informal Remittance Systems in Africa, Caribbean and Pacific (ACP) Countries (Ref: RO2CS008).' (Centre on Migration, Policy and Society (COMPAS) 2005) 11 <https://www.compas.ox.ac.uk/wp-content/uploads/ER-2005-Informal_Remittances_Somalia.pdf>.

[417] Western Union, Press Release: Western Union Launches High-Value Digital Account-to-Account Transfers from U.K. to Around the World, 10 October, 2018, available at http://ir.westernunion.com/news/archived-press-releases/press-release-details/2018/Western-Union-Launches-High-Value-Digital-Account-to-Account-Transfers-from-UK-to-Around-the-World/default.aspx , accessed on 12 April, 2019

[418] 'Western Union Launches High-Value Digital Account-to-Account Transfers from U.K. to Around the World' (10 October 2018) Press Release <http://ir.westernunion.com/news/archived-press-releases/press-release-details/2018/Western-Union-Launches-High-Value-Digital-Account-to-Account-Transfers-from-UK-to-Around-the-World/default.aspx> accessed 12 April 2019.

4.2.2.2. Hawala

Originating from an Arabic root *h-w-l*, which means "change" or "transform"[419], the term "Hawala" refers to an ancient banking practice, deeply rooted in Islamic moral traditions and based on trust that enables the transfer or remittance of money between two parties, without involvement of a financial institution—such as a bank or a money transfer[420]. Thus, in that sense, Hawala is said to be ''informal.'' Its origins can be traced in ancient China and the Middle East, where similar systems were used to avoid contingencies of moving tax proceeds from remote provinces and carrying cash or other valuable assets serving long-distance trade.[421]

Just like many other formal and informal money transfer systems, Hawala entails cash transaction but devoid of money movement.[422] Generally what happens, a person resorting to Hawala will reach out a hawaladar A (Hawala dealer) and give him the money to be remitted. The hawaladar A will, on his turn, liaise with his counterpart Hawaladar B based in the location of the receiver, and have him remitted the money (in local currency) to the designated receiver[423]. Once the remittance processed, the outstanding debt between the two hawaladars A and B will be settled using various methods, including conventional banking system, physical transfer of cash through

[419] Passas (n 29) 11. Dulce Redin, Reyes Calderon and Ignacio Ferrero, 'Cultural Financial Traditions and Universal Ethics: The Case of Hawala' (Universidad de Navarra 2012) Working Paper Nº 08/12 5 <https://www.academia.edu/28342090/Cultural_Financial_Traditions_and_Universal_Ethics_the_Case_of_Hawala > accessed 9 May 2019.

[420] Dulce M Redín, Reyes Calderón and Ignacio Ferrero, 'Exploring the Ethical Dimension of Hawala' (2014) 124 Journal of Business Ethics 327, 327 <https://doi.org/10.1007/s10551-013-1874-0> accessed 12 April 2019.

[421] Alexander Lascaux, 'Crowding Out Trust in the Informal Monetary Relationships: The Curious Case of the Hawala System' (2015) 44 Forum for Social Economics 87, 90 <https://doi.org/10.1080/07360932.2014.954250> accessed 9 May 2019.

[422] John A Cassara, *Hide and Seek: Intelligence, Law Enforcement, and the Stalled War on Terrorist Finance* (Potomac Books Inc 2007) 145. Joseph Wheatley, 'Ancient Banking, Modern Crimes: How Hawala Secretly Transfers the Finances of Criminals and Thwarts Existing Laws' (2005) 26 University of Pennsylvania Journal of International Law 347, 348 <https://scholarship.law.upenn.edu/jil/vol26/iss2/4>.

[423] Redin, Calderon and Ferrero (n 419) 6. Kalyani Munshani, 'The Impact of Global International Informal Banking on Canada, An Empirical Research Study Commissioned by The Nathanson Center for the Study of Organized Crime and Corruption' (The Nathanson Center for the Study of Organized Crime and Corruption 2005) Research Study 5 <https://www.yumpu.com/en/document/read/25063793/the-impact-of-global-international-informal-banking-on-canada>. Henk Van de Bunt, 'A Case Study on the Misuse of Hawala Banking' (2008) 35 International Journal of Social Economics 691, 693 <https://www.emeraldinsight.com/doi/abs/10.1108/03068290810896316> accessed 9 May 2019.

couriers, if not through a series of reverse trade and hawala transactions.[424] The last method being moreover the most preferred[425].

From the above operation mode, it appears that Hawala payment mode is comparable with services provided by official banks and by non-banking financial institutions such as Western Union and MoneyGram[426], but unlike these companies, hawala dealers disregard the legal obligations concerning the identification of clients, record keeping, and the disclosure of unusual transactions, to which these official financial institutions are subject[427]. It is that aspect of defying standard rules of financial transparency, – thus making it secret and underground –, that has meant Western world financial authorities to regard Hawala as a potential avenue for criminal use, as it is not subject to any supervision[428].

The stand against that channel of transferring money became particularly strong after the 9/11 terrorist incidents in the USA and the start of the 'War on Terror' in 2001[429]. At that time, a wide-spread popular belief was prevailing in media, academia, and public political discourse in US and other Western countries that Al Qaeda largely channeled its funds through Hawala[430]. To this end, Hawala system was described as 'the terrorist's informal financial mechanism'.[431] Such a depiction was reflected in media, as the transferring money system became stereotyped as the banking

[424] Mohammed El Qorchi, Samuel Munzele Maimbo and John F. Wilson, 'Informal Funds Transfer Systems: An Analysis of the Informal Hawala System' (IMF-World Bank 2003) Occasional Paper No. 222 25–28 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.527.3226&rep=rep1&type=pdf>. 'FinCEN Advisory on Informal Value Transfer Systems' (United States Department of the Treasury, Financial Crimes Enforcement Network (FinCEN) 2003) Advisory: Issue 33 5 <https://www.fincen.gov/sites/default/files/advisory/advis33.pdf>. 'The Role of Hawala and Other Similar Service Providers in Money Laundering and Terrorist Financing' (FATF 2013) 10 <http://www.fatf-gafi.org/media/fatf/documents/reports/Role-of-hawala-and-similar-in-ml-tf.pdf>.

[425] El Qorchi (n 29).

[426] Van de Bunt (n 423) 691.

[427] ibid. Fabian Maximilian Johannes Teichmann, 'Financing Terrorism Through Hawala Banking in Switzerland' (2018) 25 Journal of Financial Crime 287, 290 <https://www.emeraldinsight.com/doi/abs/10.1108/JFC-06-2017-0056> accessed 10 May 2019.

[428] Teichmann (n 427) 289. 'The Role of Hawala and Other Similar Service Providers in Money Laundering and Terrorist Financing' (n 424) 10.

[429] Saima Husain and Kamran Siddiqui, 'ZARCO Exchange: Corporate Governance Failure' (2013) 12 IUP Journal of Corporate Governance 57, 57 <https://www.researchgate.net/publication/316239760_ZARCO_Exchange_Corporate_Governance_Failure/download>.

[430] Marieke de Goede, 'Hawala Discourses and the War on Terrorist Finance' (2003) 21 Environment and Planning D: Society and Space 513, 513 <http://journals.sagepub.com/doi/10.1068/d310t> accessed 10 May 2019.

[431] Robert Looney, 'Hawala: The Terrorist's Informal Financial Mechanism' (2003) 10 Middle East Policy 164, 164 <https://onlinelibrary.wiley.com/doi/abs/10.1111/1475-4967.00099> accessed 10 May 2019.

system built for terrorism.[432] Since then, Hawala has remained in the eye of the storm for international financial regulation[433].

Following that negative cliché about Hawala, countries took a very varied stance in dealing with that money transfer method. While some (the hardliners) chose to outlaw it (the criminalization approach)[434], others opted to subject it to licensing or registration (the proposed FATF VI Special Recommendation)[435], and many more simply do not regulate it.[436] One point worth noting is that for the second option, i.e. countries which legitimized Hawala (through a licensing or registration scheme), the legality of that practice ranges from reasonable and moderate regulations to strict and difficult to comply measures.[437] For instance, in Norway, Germany, and France, financial requirements make it very difficult for Somali remittance companies to operate formally[438], while in other countries, such as the UK, where barriers to registration are lower, virtually all the Somali remittance companies are believed to have been registered with tax authorities and financial regulatory body.[439]

From the above cases, it could be inferred that while moderate regulations of Hawala promote the formalization process of that practice – which is the ultimate goal of FATF Special Recommendation VI that urges the licensing or registration of MVTS, including Hawala[440] –, strict regulations on contrary produce opposite from desired effects, as they force hawaladars and their clients to keep a low profile and hide their business as much as they can[441], due to costly and

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[432] Meenakshi Ganguly, 'A Banking System Built for Terrorism' [2001] *Time* <http://content.time.com/time/world/article/0,8599,178227,00.html> accessed 3 April 2019.
[433] Redín, Calderón and Ferrero (n 420) 331.
[434] For instance, India's Foreign Exchange Management Act (FEMA) and the Prevention of Money Laundering Act (PMLA) are the two major legislative systems that deter the use of hawala in the country
[435] FATF (n 409) Special Recommendation VI: Alternative Remittance, 1.
[436] Jonas Rusten Wang, 'Regulating Hawala: A Comparison of Five National Approaches' (2011) 14 Journal of Money Laundering Control 210, 210 <https://www.emeraldinsight.com/doi/abs/10.1108/13685201111147522> accessed 10 May 2019.
[437] Karen Pamer, 'A Global Study of Hawala Targeting Regulations' (Thesis, Utica College 2016) 6 <https://pqdtopen.proquest.com/pubnum/10153553.html?FMT=AI>.
[438] Lindley (n 416) 14.
[439] ibid.
[440] 'IX Special Recommendations, (Incorporating All Subsequent Amendments until February 2008)' (n 25) Special Recommndation VI: Alternative Remittance, 3.
[441] Nikos Passas, 'Formalizing the Informal? Problems in the National and International Regulation of Hawala', *Regulatory Frameworks for Hawala and Other Remittance Systems* (Kindle, International Monetary Fund 2005) 12 <https://www.elibrary.imf.org/view/IMF072/05659-9781589064232/05659-9781589064232/05659-9781589064232.xml>.

burdensome procedure for licensing Hawala[442]. This, therefore creates a breeding ground for Hawala to be used for criminal purposes such as terrorist financing and money laundering, as perpetrators involved in those offences do normally prefer forms of banking that are secretive and opaque in nature, two traits that are inherent in hawala banking[443].

However, apart from providing for a hotbed for financial crime activity, Hawala banking is also used for laudable purposes that should not be overlooked when discussing Hawala's anatomy. Indeed, Hawala provides financial services that meet specific needs of minorities and migrants communities set abroad, who may be excluded from Western banking and `legitimate' money-transfer institutions for a complexity of reasons, including a lack of required paperwork in order to open a bank account (most importantly in the case of illegal immigrants), lack of language skills, lack of a formal education and the skills required to understand and fill out banking documents, and a distrust or fear of banks and other unfamiliar financial institutions.[444] In Western countries in general, and in the USA in particular, opening a bank account is a complicated process which requires a number of official documents.[445] In the USA, customers have to pay a fee in order to maintain a bank account, and account holders can be penalized for having bank balances below minimum requirements[446]. It is believed that, the aforementioned measures which led to the financial exclusion of migrants has been exacerbated in the USA as a result of the Patriot Act, which requires additional identification of foreign nationals wishing to open bank accounts.[447] Simply put, and as the World Bank came to the notice, Western banks have not shown much interest in workers' remittances in the past[448], hence their resort to Hawala to send money to their families back in their home countries. For that, Hawala can be said to have played a considerable role in humanitarian relief operations. That is why drastic move by Western countries to shut down Hawala banking was met with a great deal of consternation in the migrant communities.

[442] ibid.
[443] Wheatley (n 422) 347.
[444] Al-Suhaimi Jammaz, 'Demystifying Hawala Business' (2002) 152 *The Banker* 76, 77.
[445] de Goede (n 430) 522.
[446] ibid.
[447] ibid.
[448] 'Global Development Finance, Striving for Stability in Development Finance' (World Bank 2003) 25900 165 <http://documents.worldbank.org/curated/en/698051468128113998/pdf/multi0page.pdf>.

The above development suggests that the financial practice of Hawala provides customized financial services to the financially excluded potential customers. However, that delivery of services to the long-neglected by the banking industry should not be an excuse to operate underground in a total opaqueness. That being said, a strict regulations model governing Hawala would, as shown above, create more harm than good, hence the proposed moderate model which has already prove efficient in countries where it is in effect.

4.3 Conclusion

In conclusion, it is clear from the study conducted that going after money transfer circuits of terrorist groups is as important as targeting funding sources of terrorism. The point here is above all to preserve the integrity of money transfer services, by keeping away terrorists from their misuse. The task is not easy to accomplish as each circuit of moving money has its different stakes and complexities that come into play. It is important therefore for States to come up with more stringent regulations that govern and/or regulate mobile financial services among other non-banking financial institutions.

Nevertheless, money transfer services and mobile financial services remain key actors in the fight against terrorist financing, and given the tremendous upsurge of new, fast, and reliable methods of moving money around the world, the success or the failure of financial war against terror will also depend on the level of involvement of remittance sector.

CHAPTER FIVE

Findings, Recommendations and Conclusion

5.1 Introduction

The struggle to fight against terrorism and its funding has – with the fresh drive shown by the S/RES/1373 (2001) 28 September 2001, – accrued a lot of prominence in the global arena. In this specific struggle against the financing of terrorism, the financial services sphere has taken the lead since it can easily become aware of and upset financial ploys by terrorists. The issue that thus arises with respect to S/RES/1373 (2001) 28 September 2001 entails the fact that the statutory setting – on CFT– failed to prepare for the progression of terrorist groups in retorting to counter-terrorist funding. Processes and actions that have been taken in a bid to trace funding of terrorism in the financial sector did not progress as to acclimatize to new methodologies used to finance terrorist groups. These groups have subsequently been financing themselves and further resorted to other forms of money transfer methods as opposed to just using the conventional banking system, where onuses linked to CFT are either less limiting or nearly fictional.

This study aimed at getting a clear comprehension on the idea behind terrorist financing and its overall implications, especially with regards to both local and international regulations that have been put into place in a bid to combat the same altogether. The above was realized through undertaking a thorough evaluation of the concept of terrorist financing alongside the systems used therein. Through this analysis, we got to learn that in the past, banks were the main hub through which terrorist financing would take place devoid of any sort of exposure. This was made possible and further encouraged especially due to the banks' duty of confidentiality, a duty which bankers owe all their customers and which had very few exceptions in the past when compared to recent times. This duty is founded upon the bank's need to ensure that their customer's information is at all times protected from unauthorized and/or unlawful access from third parties.

5.2. Overview of the Study

This study mainly purposed to achieve the following:

- An analysis of the current regulatory framework against terrorist financing
- A clearer comprehension on issues and stakes of the financial war against terrorism

- Formulation of recommendations on how to make more effective the fight against terrorist financing

5.3 Findings of the Study

In order to get a clearer comprehension of how significant the bank's duty of confidentiality in the spread of terrorist financing alongside other crimes, it was important to first and foremost take a serious look into the historical background of terrorism as well as the different regulations that have been put into place over the passing of time in a bid to fight terrorism. The study then went ahead to look into the S/RES/1373 (2001) 28 September 2001 on terrorism and the different ways in which terrorist financing has always been undertaken within different periods in time. The research therefore found and came to the conclusion that whereas banks were the major players in terms of terrorist financing in the past, other financial institutions equally play a great role in the financing of terrorism especially during modern times.

Chapter three then critically looked into the different roles taken by the financial sector with regards to set regulations in a bid to combat terrorist financing while chapter four looked at the role of non-banking institutions in the fight against terrorist financing and the different ways through which terrorists have moved from the use of banks as their major financing platform to other forms of non-banking institutions. It is as a result of all the above-mentioned, that this chapter thus seeks to suggest and discuss a number of recommendations that need to be effected by countries across the world in a bid to combat the financing of terrorism.

One of the major aspects discussed in this study is the aspect of customer due diligence which is a duty owed by financial institutions especially banks to their customers. Whereas it is important for banks to uphold their duty of customer due diligence through upholding their duty of confidentiality to its customers, but there are a number of serious limitations that are accompanied by the strict interpretation of this duty. This is due to the fact that terrorists all around the world are aware of the fact that banks owe their customers a duty not to disclose their information which makes it easy for culprits to undertake all kinds of transactions including the financing of terrorism across borders through the financial system channels.[449] It is as a result of the above-mentioned

[449] He Ping, 'Banking Secrecy and Money Laundering' (2004) 7 Journal of Money Laundering Control 376, 381 <https://www.emeraldinsight.com/doi/abs/10.1108/13685200410810074> accessed 3 April 2019.

fact that this study recommends the need by member States to enforce stringent measures in light of the exceptions to the banks duty of confidentiality and secrecy as outlined in the FATF, 40 Recommendations.[450]

5.4 Recommendations

This research recommends the need to come up with regulations that lift banking confidentiality altogether despite the fact that it may appear as though it generally undermines the significance of banks safeguarding the duty of secrecy they owe to their clients on grounds that their operational reputation rests on it.[451] This will go a long way into ensuring that the integrity and stability of the international financial sector is preserved, especially in the wake of globalization which has made trade and the ability to make cash transfers across different jurisdictions much simpler, mainly because the removal of trade barriers between different jurisdictions has made it more and more of a task for authorities across the world to trace assets. As a result of this, criminals thereby have a sufficient platform to carry out their illegal activities which ultimately eat into the authentic global economy. It is precisely for this reason, that there is need to lift banking confidentiality since it will ascertain that there is disclosure of customer information that is valuable in the inquiry, prosecution and sentencing terrorist financiers.[452]

Most member States, such as Kenya and South Africa alongside other States, have come up with banking regulations that protect the bank's duty to secrecy, thus confidentiality and only gone as far as to make exceptions whereby the law requires banks to set aside this duty of confidentiality in cases where they detect suspicious activity. However, it is important to take note of the fact that the trend with regards to the financing of terrorists has greatly changed and that means that there is equally a need to amend counter-terrorist financing laws on a regular basis and this shall have a

[450] 'FATF 40 Recommendations, (Incorporating All Subsequent Amendments until October 2004)' (n 24) Recommendation 4, 36, and 40.
[451] Riaz Ismail, 'Legislative Erosion of the Banker - Client Confidentiality Relationship' (2008) 48 Codicillus 3, 3 <https://journals.co.za/content/codi/48/2/EJC27537> accessed 3 April 2019.
[452] MA Mamooe, 'Banking Confidentiality with Reference to Anti-Money Laundering and Terrorist Financing Measures in South Africa and Lesotho' (Thesis, North-West University 2018) 70 <https://repository.nwu.ac.za:443/handle/10394/31330> accessed 3 April 2019.

larger effect on banking secrecy that is already restricted and could in due course be forced into elimination[453].

The above can be demonstrated by the fact that in recent times it has become easy for transactions to be made without necessarily being traced courtesy of globalization. This is so in that there is constant and easy relocation of labor force across jurisdictions, meaning more cash is sent home. However, opening a bank account in a foreign country is not always easy especially in cases where a person is an informal worker and does not have the appropriate documentation. This means that quite a number of the above-mentioned persons may end up not using the appropriate financial channels, thus ultimately finding alternative channels to send home their money. This goes a long way in making it more difficult for the money to be traced and therefore if the money is used to finance terrorism, then it would give the authorities a hard time tracing it. This certainly poses a risk to the financial sector, especially banks. It is for this reason that banks need to have such stringent regulations such as having the duty to confidentiality being done away with in an attempt to ensure transparency and accountability thus minimizing such risks.[454]

There is need therefore, for countries to harmonize their legislations such that each State has only one anti-money laundering authority and one counter financing of terrorism authority which should enter in cooperation with each other in order to ensure that there is no overlap with regards to their obligations. This will certainly go a long way in ascertaining there is a more transparent and detailed AML/CFT framework.[455] As such, in as much as the duty of confidentiality is an important element in every kind of fiduciary relationship, there is need for this duty to be redefined especially when coming up with regulations in order to ensure a higher degree of transparency and accountability among customers.

It is clear therefore that banks play a central role in the counter-financing of terrorists all over the world. This is so because of the validity it offers for illegal funds, expediency it avails to terrorists in terms of massive transactions as well as the services and products banks have to offer to their

[453] Johan van der Walt, 'Bank Secrecy – the Difference between Theory and Reality –' (*South African Institute of Tax Professionals*, 22 September 2012) <https://www.thesait.org.za/news/103563/Opinion-Bank-secrecy--the-difference-between-theory-and-reality.htm> accessed 12 May 2019.
[454] Barry Peterson, 'Red Flags and Black Markets: Trends in Financial Crime and the Global Banking Response' (2013) 6 Journal of Strategic Security 298, 304–305 <http://scholarcommons.usf.edu/jss/vol6/iss5/30/> accessed 12 May 2019.
[455] ibid.

customers. It is only prudent therefore, that in order for the fight against terrorist financing to succeed, there is need for banks to ascertain a firm devotion to the AML/CFT system since it purposes to safeguard the well-being and reliability of the banking system. Adherence to the AML/CFT system does not mean that States simply enact legislation on these policies but rather, they ought to ensure that they are fully committed to realize all the AML/CFT policies and are complied with to the fullest and at all times.

Additionally, there is a serious need for cooperation between the bank and other security actors in order for this war against the financing of terrorists to be effectively realized. Cooperation as provided for in FATF Recommendation 36-40 entails "international cooperation, mutual legal assistance, mutual assistance to seize and confiscate, extraditing money launderers and financiers of terrorism who are using other jurisdictions as their safe haven and other forms of cooperation."[456] There is need therefore for banks, being the gatekeepers in this whole AML/CFT system to ensure that they, at all times, work together with the relevant partners and/or authorities in realizing an effective AML/CFT regime.

The second recommendation with regards to the realization of an effective AML/CTF regime is the need for countries to come up with more stringent laws that govern other forms of banking, other than the conventional banking system such as MFSs and ARS. This is after that terrorists, – due to heightened AML/CFT laws observed by banks –, embraced new alternative non-conventional methods of banking that run in parallel with conventional banking system. The findings of this study revealed that AML/CFT measures subject to those non-conventional banking methods have however not been effective due to the fact that the laws that have been put in place are not as stringent as they ought to be. There are still numerous loopholes which may be taken advantage of by terrorist' sponsors, donors and/or sympathizers. The study therefore brings about the need for key stakeholders (financial regulators, telecom operators as mobile money providers, remittance companies, etc) to reassess the level of risk of AML/CFT posed by non-conventional banking services provided by non-traditional financial entities, with a view to review their terms of reference in stemming financial crimes.

[456] 'FATF 40 Recommendations, (Incorporating All Subsequent Amendments until October 2004)' (n 24) Recommendations 36-40.

One example of a commonly used non-conventional banking method entails the use of mobile money. It is quite common in jurisdictions where MFSs have sustained to have more than one mobile money account. This study regards that eventuality as an escape route that can be possibly exploited by terrorists in their bid to circumvent the transaction limit underlying mobile money transaction. It cannot be ruled out that terrorists use multiple mobile money accounts to move their funds, should the transaction limit hamper the financial transactions. This study thus recommends the setting of limit of mobile money accounts to be held by users in order to avoid their potential abuse.

Lastly, this study recommends considerable efforts of AML/CFT to be focused on new and emerging technologies that have fundamentally changed the way terrorist organizations raise money to support their activities.[457] One striking example of reliance on emerging technology by terrorists is the use of bitcoin which provided for them a safe harbor in their banking transactions. This holds true especially considering the particularly challenging hardships faced in identifying the real person using bitcoin system, due to its high degree of anonymity.[458] Given the wide use of bitcoin by major terrorist organizations like ISIS[459], a financial war against terrorism that would not give due consideration the vulnerability of bitcoin as a platform of terrorism financing is unlikely to success.

5.2 Conclusion

One of the more challenging aspects of organizing international terrorist activities is rooted in financial transactions,[460] and the ability of terrorists to sustain networks through which they move their funds is as critical as fundraising itself. If terrorists still using the financial world in all its variety – banks, MFSs, remittance sector, emerging technologies of payment – to meet their financial needs, it is because there are still some loopholes in CFT regime to which various actors of the financial sector are subject to. Thus, for regulators to come up with stringent measures that cover all aspects of the field of finance in a bid to anticipate and/mitigate all channels used in the

[457] Aaron Brantly, 'Financing Terror Bit by Bit' (2014) 7 *Combating Terrorism Center (CTC) Sentinel* 20, 1.
[458] Angela SM Irwin and George Milad, 'The Use of Crypto-Currencies in Funding Violent Jihad' (2016) 19 Journal of Money Laundering Control 407, 420 <https://www.emeraldinsight.com/doi/abs/10.1108/JMLC-01-2016-0003> accessed 12 May 2019.
[459] A study focused on the use of crypto currencies by terrorists largely referred to a number of reported cases of use of bitcoin by ISIS. See ibid 410.
[460] Brantly (n 457) 1.

financing of terrorists. This will definitely go a long way in helping the global war against terrorism to take a positive step forward.

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