

FATF



FATF GUIDANCE

CRIMINALISING TERRORIST FINANCING

(Recommendation 5)

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GUIDANCE ON CRIMINALISING TERRORIST FINANCING (RECOMMENDATION 5)

I PURPOSE AND CONTENTS

1. FATF Recommendation 5 (R.5) and its Interpretive Note (INR.5) set out in detail the specific elements required to comply with the obligation to criminalise terrorist financing (TF) based on the *International Convention for the Suppression of the Financing of Terrorism* (1999) (the *Terrorist Financing Convention*) and relevant United Nations Security Council Resolutions (UNSCRs). However, R.5 contains elements which deliberately go beyond the various international legal obligations.
2. This guidance aims to assist countries in the implementation of each of those requirements by setting out their basis and rationale as found in relevant United Nations instruments and FATF typologies studies on TF, giving guidance as to their interpretation, and offering some examples of how countries with different legal systems have implemented these requirements at the national level.
3. The contents of this guidance are structured on each separate element of R.5 and INR.5, with particular emphasis being given to elements which have been most commonly identified through mutual evaluation and other assessment processes as creating particular implementation challenges. Each section begins with the relevant provisions of R.5 and INR.5, identifies their basis, explains their rationale (including how to interpret them), and then gives some concrete examples of how specific requirements have been implemented in the context of different countries' legal systems. The relevant definitions (of "terrorist", "funds or other assets" etc.) and their interpretation are set out at the end of the guidance.

II FUNCTIONAL EQUIVALENCE

4. This guidance is based on the same general principles that govern both the interpretation and assessment of the FATF standards. As noted in the introduction to the 2012 FATF Recommendations:

"Countries have diverse legal, administrative and operational frameworks and different financial systems, and so cannot all take identical measures to counter these threats. The FATF Recommendations, therefore, set an international standard, which countries should implement through measures adapted to their particular circumstances."

5. This means that countries have considerable flexibility about *how* they implement the requirements of R.5/INR.5 in the context of their national legal systems. Countries are free to follow the usual forms, practices, and terminology of their legal system when criminalising TF, including common law and civil law traditions, and other features of national systems. Countries may choose to transpose into their domestic law some or all of the text of R.5/INR.5 and/or the *Terrorist Financing Convention*, or they may choose to incorporate these requirements into their law using different language respecting the national legal system and traditions, as long as the substance of the requirements is transposed into national law.

6. This guidance cites examples from specific countries which illustrate that there are a variety of different ways to implement the requirements of R.5/INR.5. The examples cited are not exhaustive, and countries are not expected to follow them exactly. They are provided to demonstrate how countries with different legal systems have criminalised TF, in line with R.5/INR.5, in their national context.

III. ASPECTS WHICH MUST BE COVERED BY THE TERRORIST FINANCING OFFENCE

The offence must cover all types of wilful TF activity	
Recommendation 5	Countries should criminalise terrorist financing on the basis of the <i>Terrorist Financing Convention</i> ...
Interpretive Note to R.5	2. Terrorist financing offences should extend to any person who wilfully provides or collects funds or other assets by any means, directly or indirectly, with the unlawful intention that they should be used, or in the knowledge that they are to be used, in full or in part...

Basis and rationale for these requirements

7. The requirements of R.5/INR.5 relating to the requisite mental element (*mens rea*) of the offence, and what types of TF activity must be covered, are largely based on Article 2(1) of the *Terrorist Financing Convention*:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part...

Guidance on their interpretation

...wilfully...with the unlawful intention...

8. For the requisite mental element (*mens rea*) of the offence, R.5/INR.5 requires *wilful* TF to be covered (i.e., where the conduct is deliberately committed with an unlawful intention). It does not require countries to criminalise TF as a strict liability offence (i.e., an offence for which the *mens rea* need not be proven), reckless or negligent TF, or unwitting acts of TF. The specific unlawful intention which must be present depends on whether the TF activity is being conducted in relation to a terrorist act, or in relation to financing a terrorist organisation or individual terrorist, as is explained in the next two sections below.

...provides or collects funds or other assets...

9. The offence should cover two distinct types of TF activity – *providing funds or other assets* and *collecting funds or other assets*. Additionally, the TF offence should apply in two distinct circumstances:

a) when the act of wilfully providing or collecting funds or other assets is complete, and

b) even if the act was attempted but the funds or other assets were not ultimately provided (e.g. because the TF activity was disrupted before this could be completed).¹

...by any means...directly or indirectly...in full or in part...

10. The TF offence should not be limited to certain forms or methods of providing or collecting funds, but should apply to any means of doing so. Following the revision of R.5 and the FATF Glossary in October 2016, the TF offence applies to providing or collecting funds or other assets, which explicitly includes economic resources, including oil and other natural resources, dividends and income accruing from assets, as well as any other assets which are not funds but which potentially may be used to obtain funds, goods or services. This implies that the TF offence should apply to trade or other commercial or financial relations with terrorist organisations or individual terrorists, and the provision of benefits in kind or in the form of relief of obligations.

11. The TF offence should apply when the person providing or collecting funds or other assets (the terrorist financier) is doing so themselves (i.e., directly), or when doing so indirectly (e.g., through an intermediary/middleman or a secondary trader). Indirectly providing or collecting funds or other assets would apply to those who take part in a chain of transactions knowing that these will benefit a terrorist or a terrorist organisation (e.g. as an intermediary trader). Those who organise such transactions, but do not take part in them would fall within the scope of the ancillary offences to TF, set out below.

12. The TF offence should not be limited to situations where the *full* amount of the funds or other assets collected or provided were used or intended for a terrorist act, or were collected for or provided to a terrorist organisation or an individual terrorist. Instead, it should also apply in cases where *part* or some of the funds or other assets concerned were used or intended for a terrorist act or provided to a terrorist organisation or individual, while the rest were not. This includes situations in which value and other benefits in kind are transferred through a transaction which also includes a legitimate economic component.

¹ This situation may also fall within the scope of an attempted TF offence in some legal systems.

The offence must cover the financing of terrorist acts with an unlawful intention to do so	
Recommendation 5	Countries should criminalise TF on the basis of the <i>Terrorist Financing Convention</i> ...and should criminalise not only the financing of terrorist acts...
Interpretive Note to R.5	2. Terrorist financing offences should extend to any person who wilfully provides or collects funds or other assets by any means, directly or indirectly, with the unlawful intention that they should be used, or in the knowledge that they are to be used, in full or in part: (a) to carry out a terrorist act(s)...

Basis and rationale for these requirements

13. Article 2(1)(a) and (b) of the Terrorist Financing Convention form the basis of what particular unlawful intention applies to the financing of terrorist acts, and what specific types of terrorist acts the TF offence should cover:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
- b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Guidance for their interpretation

...with the unlawful intention that they should be used, or in the knowledge that they are to be used...

14. In the context of financing terrorist acts, the person providing or collecting the funds or other assets (the terrorist financier) must have the *unlawful intention* or *knowledge* that those funds or assets were being collected for or provided to carry out a terrorist act(s), regardless of whether the terrorist act is ultimately carried out or not.

...(a) to carry out a terrorist act(s)²...

15. This aspect of R.5/INR.5 requires countries to criminalise the financing of terrorist acts – a term which is defined in the FATF glossary based on the same text from Article 2(1)(a) and 2(1)(b) the Terrorist Financing Convention. In practice, this means that the financing of two distinct types of terrorist acts must be covered, as defined in the Glossary to the FATF Recommendations:

² The Glossary to the *FATF Recommendations* defines *terrorist act* in these same terms and also lists the international legal instruments on counter-terrorism, which establish terrorist offences.

- a) The specific terrorist acts (over 30 of them) which are set out in the nine Conventions listed in Annex 1 of the *Terrorist Financing Convention*, in line with Article 2(1)(a) (together referred to as the *Treaty Offences*) and
 - b) any other unspecified acts carried out with the relevant intention to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, with the purpose of intimidating a population or compelling action by a government or an international organisation, in line with Article 2(1)(b). This last aspect is an open-ended or “catch-all” provision designed to capture any act committed for terrorist purposes which is not otherwise captured by the Treaty Offences.
16. There are different ways for countries to achieve this objective. For example, from a drafting perspective, countries could criminalise the financing of terrorist acts by:
- i. mirroring the language of Article 2(1)(a) and (b) of the *Terrorist Financing Convention* in the TF offence itself;
 - ii. using language to criminalise the financing of *terrorist acts*, and then defining that term, either in the TF offence or elsewhere in the country’s legislation, in a manner which is consistent with how that term is used in Article 2(1)(a) and (b) of the *Terrorist Financing Convention*;³
 - iii. where pre-existing criminal offences correspond to the Treaty Offences, linking those offences to the TF offence to cover the conduct set out in Article 2(1)(a), and then including a catch-all provision to capture the conduct set out in Article 2(1)(b) of the *Terrorist Financing Convention*, or
 - iv. having separate offences which criminalise the financing of each of the Treaty Offences, and then having an additional offence which includes a catch-all provision to capture the conduct set out in Article 2(1)(b) of the *Terrorist Financing Convention*.
17. Although some countries argue that the “catch-all” provision in Article 2(1)(b) will automatically capture all of the Treaty Offences included in Article 2(1)(a), this is not necessarily true, since most of the Treaty Offences do not contain a terrorist purpose (i.e., these offences do not require the prosecution to prove that the perpetrator *committed the act with a terrorist purpose*). Instead, many of the Treaty Offences are considered to be terrorist offences simply by their nature, and regardless of what intention the perpetrator had.⁴ Such acts could be understood as inherently intended to intimidate the public or compel action. In some legal systems, the TF offence applies a purposive element to all the relevant conduct, including treaty offences; but a terrorist purpose can be inferred from the nature of these actions themselves, and need not be demonstrated separately by prosecutors. See [Annex 1](#) of this guidance paper for a summary of the specific Treaty Offences.

³ e.g. with reference to the *Terrorist Financing Convention* or another instrument such as the European Council Framework Decision 2002/475/JHA.

⁴ Of the nine Conventions listed in Annex 1, only two contain a terrorist purpose in the criminal offences they specify: the International Convention against the Taking of Hostages (1979) includes an intention to compel a third party to act or abstain from action; and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988) includes both offences without any terrorist purpose and additional offences which do contain a terrorist purpose (in Article 2bis, adopted in the 2005 protocol).

Examples of Implementation

Box 1. Luxembourg

Luxembourg has criminalised in its Criminal Code the financing of all specific terrorist acts set out in the nine conventions listed in Annex 1 of the Terrorist Financing Convention (all of which are criminalised according to its national legislation in line with Article 2(1)(a) of the Terrorist Financing Convention). Luxembourg has also criminalised within the same provision the financing of the terrorist act set out in Article 2(1)(b) of the Terrorist Financing Convention as well as of any other terrorist offences which are criminalised according to its national legislation (such as e.g. the individual terrorist, the terrorist group, the terrorist provocation, recruitment, training and travelling).

(Criminal Code, Article 135-5)

- (1) The expression ‘terrorist financing offence’ refers to the unlawful and wilful providing or collecting of funds, securities or assets of any type by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, to carry out or attempt to carry out one or more offences referred to in paragraph (2) of this Article, even if they were not effectively used to carry out or attempt to carry out any of these offences, or if they are not linked to one or more specific terrorist acts.
- (2) Paragraph (1) of this Article refers to the offences set forth in the following Articles:
 - Articles 112-1 , 135-1 to 135-4 , 135-9 , 135-11 to 135-16 and 442-1 (of the Criminal Code);
 - Articles 31 and 31-1 of the Law of 31 January 1948 on the regulation of air navigation, as amended;
 - Article 2 of the Law of 11 April 1985 approving the Convention on the Physical Protection of Nuclear Materials, opened for signature at Vienna and New York on 3 March 1980, as amended;
 - Article 65-1 of the Law of 14 April 1992 introducing a disciplinary and penal marine code, as amended.
- (3) The expression ‘terrorist financing offence’ also refers to the unlawful and wilful providing or collecting of funds, securities or assets of any type by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, by a terrorist or a terrorist group, including in the absence of a link to one or more specific terrorist acts, even if they were not effectively used by the terrorist or the terrorist group.
- (4) The term ‘funds’ means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit without such enumeration being exhaustive.

Box 2. Canada

Canada's criminal code defines a terrorist financing offence both on the basis of purpose, and on the basis of the nine conventions, which are listed in the definition of terrorist activity.

(Extract from Criminal Code)

83.02 Every one who, directly or indirectly, wilfully and without lawful justification or excuse, provides or collects property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out

- a) an act or omission that constitutes an offence referred to in subparagraphs (a)(i) to (ix) of the definition of terrorist activity in subsection 83.01(1), or
- b) any other act or omission intended to cause death or serious bodily harm to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, if the purpose of that act or omission, by its nature or context, is to intimidate the public, or to compel a government or an international organization to do or refrain from doing any act,

is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

83.01 (1) The following definitions apply in this Part ... *Terrorist activity* means:

- a) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences [*lists the nine conventions and the Terrorist Financing convention*], or
- b) an act or omission, in or outside Canada,
 - (i) that is committed (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and
 - (ii) that intentionally (A) causes death or serious bodily harm to a person by the use of violence, (B) endangers a person's life, (C) causes a serious risk to the health or safety of the public or any segment of the public, (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C), ...

The offence must cover the financing of terrorist organisations and individual terrorist with an unlawful intention to do so	
Recommendation 5	Countries should criminalise... the financing of terrorist organisations and individual terrorists even in the absence of a link to a specific terrorist act or acts...
Interpretive Note to R.5	2. Terrorist financing offences should extend to any person who wilfully provides or collects funds or other assets by any means, directly or indirectly, with the unlawful intention that they should be used, or in the knowledge that they are to be used, in full or in part...(b) by a terrorist organisation; or (c) by an individual terrorist.

Basis and rationale for these requirements

18. In the context of financing terrorist organisations and individual terrorists, R.5/INR.5 deliberately goes beyond the obligations contained in the *Terrorist Financing Convention* by requiring countries to also criminalise the financing of terrorist organisations and individual terrorists on a broader basis, and without a link to a specific terrorist act or acts. This approach is consistent with the obligations set out in various UNSCRs for states to prohibit their nationals or any persons and entities within their territories from making funds, financial assets or economic resources available to terrorists or terrorist organisations. Specifically –

UNSCR 2253 (2015) states:

OP17. ... highlights that FATF Recommendation 5 applies to the financing of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act;

19. These elements of INR.5 were adopted by the FATF in 2004 and were assessed in the 3rd round of Mutual Evaluations. Since then, this aspect has grown increasingly important as TF has evolved, particularly in relation to the operational financing needs of terrorist organisations and the growing prevalence of “lone wolf” terrorists who may be inspired by, but not yet part of, a terrorist organisation. For example, as set out in the 2008 *FATF Terrorist Financing Report*, the majority of financing used by terrorist organisations is not used to meet the direct costs of mounting attacks but is needed for broad organisational support including recruitment and radicalisation, training, subsistence, travel, and maintaining a veil of legitimate activities. The 2015 *FATF report on Emerging Terrorist Financing Risks* further highlights the use of funds by large terrorist organisations for propaganda and recruitment, training, salaries and member compensation, and social services. Funds provided for and spent on these non-attack activities nevertheless contribute to terrorist attacks, by sustaining the terrorist organisation’s *capability* to mount such attacks.

20. Moreover, all funds or other assets are fungible. In other words, a terrorist organisation may spend available funds or other assets on an activity other than that for which the funds or other assets were originally intended. Even terrorist organisations which use advanced financial management practices are not believed to maintain funds or other assets in separate accounts based on the conditions of each donation. This means that funds or other assets provided to a terrorist organisation ostensibly for a non-attack purpose may themselves be used to meet the cost of an

attack. Even if specific funds or other assets are used for non-attack expenses, they may substitute for other funds or other assets which can then be used to pay for an attack.

Guidance for their interpretation

...wilfully ... with the unlawful intention that they should be used, or in the knowledge that they are to be used... (b) by a terrorist organisation; or (c) by an individual terrorist

21. In the context of financing terrorist organisations and individual terrorists, the person providing or collecting the funds or other assets (the terrorist financier) must have the *unlawful intention* or *knowledge* that those funds or other assets were being collected for or provided to a terrorist organisation or individual terrorist. This is sometimes referred to as the requirement to criminalise the financing of terrorist organisations and individual terrorist “*for any purpose*”.

22. Use of the term “*for any purpose*” has, in the past, caused some confusion in terms of what specific level of knowledge is required for the offence (the *mens rea*), and separately, whose and what unlawful intention/purpose must be proven as part of the offence. To clarify: (a) the terrorist financier must be acting with the knowledge that the funds or other assets are to be provided or collected for a terrorist organisation or individual terrorist; and (b) it is only the terrorist financier’s unlawful intention/purpose which is relevant, and that unlawful intention/purpose must be to provide or collect funds or other assets for a terrorist organisation or individual terrorist. This

means that, pursuant to R.5/INR.5, the following aspects are not relevant to the scope of the TF offence:

1. the purpose for which the terrorist financier intended those funds or other assets to be used by the terrorist organisation/individual terrorist;
2. any knowledge that the terrorist financier may have had about how the terrorist organisation/individual terrorist was using or intending to use the funds or other assets;
3. the use to which the terrorist organisation/individual terrorist actually put (or intended to put, or tried to put) the funds or other assets; and
4. whether or not the funds or other assets were used to plan, prepare for or carry out a specific terrorist act.

23. Whether or not the organisation or individual to which funds or other assets are provided is, in fact, a terrorist organisation or an individual terrorist can be relevant. In the context of a criminal trial, it is for courts to determine whether an organisation or individual should be considered to be a terrorist organisation or individual, based on national legal procedures, and on circumstances, including whether the individual or entity has been designated by the UN pursuant to UNSCR 1267/1988 and successor resolutions or by a competent national authority. In some cases the question of whether the organisation to which funds were provided is in fact a terrorist organisation, is central to whether a TF offence has been committed. Cases may also arise in which a terrorist financier has an unlawful intention to finance a terrorist organisation (or a terrorist act), but is unsuccessful in doing so (e.g. because the funds or other assets are in fact intercepted by an undercover police officer). Such cases could be considered a TF offence (or an attempted TF offence) if the *intended* recipient of the funds or other assets is an individual terrorist or a terrorist organisation, regardless of the *actual* recipient of the funds or other assets.

24. In summary, for this aspect of the offence, the prosecutor should only have to prove that the terrorist financier knew (or believed) that the funds or other assets were being collected for or provided to a terrorist organisation or individual terrorist, or unlawfully intended to do so. The mental element is decisive in establishing criminal liability.

25. The terms *terrorist organisation* and *terrorist* are defined in the FATF Glossary,⁵⁶ and refer to an organisation or individual that commits, attempts, or is otherwise complicit in a *terrorist act* – a term which is, in turn, defined consistent with Article 2 of the *Terrorist Financing Convention*. These definitions are, therefore, somewhat circular. The reason for this is that, in the absence of an internationally agreed definition of *terrorism*, countries are left with the flexibility to choose how they define a *terrorist organisation* and *individual terrorist*, provided that their definitions cover persons or entities who commit or attempt to commit the *terrorist acts* which are defined in Article 2.⁷

26. In practice, countries could consider designation by the United Nations (pursuant to UNSCR 1267/1988 and successor resolutions), or by the country under its own national or supranational powers, as a *prima facie* indication that the designated person or entity falls within the definition of *terrorist organisation* or an *individual terrorist* for the purposes of the TF offence.⁸ In principle, the same applies in relation to persons or entities designated by other countries pursuant to UNSCR 1373, provided that the country has given effect to the request of a foreign country to implement targeted financial sanctions.⁹ Both UNSCR 1267/1988 and successor resolutions and UNSCR 1373 are aimed at stopping the flow of funds to terrorist organisations and individual terrorists by applying targeted financial sanctions to designated persons and entities.

Other questions of scope

27. The following additional issues have been raised, in discussions with countries or in the course of assessments, regarding the interpretation of these provisions and the challenges some

⁵ “The term *terrorist organisation* refers to any group of terrorists that: (i) commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully; (ii) participates as an accomplice in terrorist acts; (iii) organises or directs others to commit terrorist acts; or (iv) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.”

⁶ The term *terrorist* refers to any natural person who: (i) commits, or attempts to commit, terrorist acts by any means, directly or indirectly, unlawfully and wilfully; (ii) participates as an accomplice in terrorist acts; (iii) organises or directs others to commit terrorist acts; or (iv) contributes to the commission of terrorist acts by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act.

⁷ A current or former foreign terrorist fighter may be considered by a court to be an individual terrorist by virtue of their affiliation to a terrorist organisation, their recent activities, or the training they have received. If so, the TF offence would apply to the wilful provision of funds or other assets to the individual terrorist for any purpose, without requiring a link to a terrorist act.

⁸ As designations are not themselves based on a criminal standard of proof, the fact of the designation alone may be insufficient in some legal systems for a criminal court to accept that a designated organisation is a terrorist organisation. Nevertheless, it may be sufficient to show unlawful intention on the part of the person providing funds to that organisation.

⁹ Paragraph 4(b) of the Interpretive Note to Recommendation 6 requires countries to have “*authority and effective procedures or mechanisms to examine and give effect to, if appropriate, the actions initiated under the freezing mechanisms of other countries pursuant to resolution 1373(2001)*”.

countries face in reconciling the scope of the TF offence with their fundamental principles of domestic law¹⁰ or other principles of criminal justice.

Recklessness

28. Some countries use the concept of recklessness to criminalise financing an individual terrorist in the absence of a link to a specific terrorist act or acts. This requires prosecutors to show that the offender was aware of a substantial risk that the funds would be used for terrorist purposes, and that the risk was unjustifiable. Reckless TF can be established even if the funds are in fact used for a purpose unrelated to terrorism, provided there was a risk of their being used for terrorist purposes. Recklessness need not be a distinct and lesser degree of intent also included in the TF offence: e.g. in some legal systems the mental element (*mens rea*) of the TF offence is *dolus eventualis*, and requires that the suspect “consciously accepts the substantial chance” that funds will serve to offer financial support – however this does not apply in all legal systems.

29. This approach is consistent with the rationale for criminalising all funding of an individual terrorist even in the absence of a link to a specific terrorist act, (i.e. that funds or other assets are fungible and can be repurposed, and that there is always an irreducible risk that any terrorist organisation or individual terrorist will use any available funds or other assets for terrorist purposes). Criminalisation of recklessness as to the use of funds or other assets for terrorist purposes could therefore be considered as consistent with this requirement in some circumstances, although it cannot substitute for criminalising the intentional financing of a terrorist organisation.

Overlap with targeted financial sanctions

30. Most countries criminalise the act of wilfully breaching targeted financial sanctions as a separate offence (and in some countries as a strict liability offence). In cases where the targeted financial sanctions in question are related to terrorism (and where the designation criteria are such that it is reasonable to consider a designated person or entity to be a terrorist), the breach could also be within the scope of the TF offence, because a person or entity designated as a terrorist for the purpose of sanctions might also be considered a terrorist for the purposes of the TF offence.¹¹

31. As noted above, R.5 requires TF to be criminalised as a stand-alone offence, but does not require that every detail of R.5 is included within that offence alone. In most cases, targeted financial sanctions are applied consistently with R.6 and breaches of sanctions are penalised consistently with R.35, and the targeted financial sanctions regime does not overlap with R.5. However in some circumstances – when the country imposes criminal penalties for violation of sanctions – the targeted financial sanctions regime may in effect be the mechanism which implements elements of R.5. Such circumstances would be (i) that the sanctions regime includes an ongoing prohibition against making any funds or other assets available to a designated person or entity; (ii) that the breach-of-sanctions offence should have a range of criminal penalties comparable to the separate TF

¹⁰ The FATF glossary states: *Fundamental principles of domestic law* refers to the basic legal principles upon which national legal systems are based and which provide a framework within which national laws are made and powers are exercised. These fundamental principles are normally contained or expressed within a national Constitution or similar document, or through decisions of the highest level of court having the power to make binding interpretations or determinations of national law. Although it will vary from country to country, some examples of such fundamental principles include rights of due process, the presumption of innocence, and a person’s right to effective protection by the courts.

¹¹ Although this may require separate proof: countries are not obliged to domestically designate UN-designated persons or entities as terrorists, and the fact of the UN designation alone is not always a sufficient basis for a criminal court to conclude that a designated organisation is in fact a terrorist organisation.

offence; and (iii) that the country concerned makes active use of national targeted financial sanctions powers to designate terrorist organisations and individuals (such that most or all of the groups and individuals which would be considered terrorists by national courts are included in national designation lists).

Principle of Guilt

32. Many countries apply a *principle of guilt* (also expressed as “*schuldprinzip*” or “*nulla poena sine culpa*”) as a fundamental element of criminal law. This principle requires that there is a fault on the part of the offender in order for a criminal offence to be committed, and that any penalty is proportionate to this fault. In some legal systems, the application of the TF offence to the provision of funds or other assets to an individual terrorist for a purpose entirely unrelated to terrorism may come into conflict with this principle, because the act of providing funds or other assets would be criminalised on the basis of the identity of the person receiving them, and not on the basis of their intended or actual use. The principle may also be invoked because the person who provides funds or other assets did not know or could not foresee that any harm would result from their actions.

33. Whether there is a conflict between R.5 and the *principle of guilt* depends on how the requirements of R.5 are interpreted – specifically the requirement that “*Countries should criminalise... the financing of terrorist organisations and individual terrorists even in the absence of a link to a specific terrorist act or acts...*”, which is sometimes referred to as the requirement to criminalise the financing of terrorist organisations and individual terrorist *for any purpose*. There does not seem to be any conflict between the *principle of guilt* and the criminalisation of financing a terrorist organisation – since the purposes of a terrorist organisation can be assumed to be terrorist purposes.

34. The *principle of guilt* permits criminalisation of the provision of funds or other assets to an individual terrorist, even in the absence of a link to a specific terrorist act or acts, if this is for a purpose which is in some way related to terrorism (e.g. for recruitment, training, travel, or concealing terrorist activity). However it does not permit criminalisation of the provision of funds or other assets to an individual terrorist “*for any purpose*”, as this would include funds or other assets which were used for purposes which did not contribute to terrorism in any way (e.g. basic subsistence). The *principle of guilt* would therefore conflict with the specific R.5 requirement to criminalise TF even in cases where there is no actual or foreseeable harm resulting from the offender’s actions.

Trivial offences

35. Criminal offences may have a greater or lesser degree of seriousness, and legal systems vary in how they deal with these differences. Some legal traditions define “trivial” offences, which may carry a reduced penalty or no penalty at all. Other legal traditions give discretion to prosecutors to determine whether to proceed with prosecution (e.g. on the basis of whether it is in the public interest), and wide flexibility to judges to determine the appropriate penalty (e.g. with no minimum sentence).

36. The concern raised is that this element of R.5 may be understood to require countries to prosecute or criminalise all cases of providing funds or other assets to an individual terrorist, no matter how trivial. This is not the case: this part of R.5 does not override the principles governing the prosecution and sentencing of minor or trivial offences in domestic law.

Limitations on the scope of TF offences

37. Article 6 of the *Terrorist Financing Convention* specifically prohibits exemptions from the scope of the TF offence:

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

38. However, it should be noted that the way in which some countries define *terrorism*, *terrorist organisation*, or *terrorist* may impact the scope of the activities which would fall within the TF offence. These issues have been evaluated by the FATF on a case-by-case basis in the context of its mutual evaluation, follow-up and International Cooperation Review Group processes.

Examples of Implementation

Box 3. Belgium

Belgium's Penal Code includes two terrorist financing offences which together encompass the financing of a terrorist act, an individual terrorist, or a terrorist organisation. The financing of an individual terrorist is included as part of "financing by any means an activity of a terrorist group" within Art.140.

(Extracts from the Code Penal – unofficial translation)

Art. 140. §1. Anyone who participates in an activity of a terrorist group, including by supplying information or material support to the terrorist group, or by financing by any means an activity of a terrorist group, with knowledge that such participation contributes to commit a crime or an offense of a terrorist group shall be punished by imprisonment of five to ten years and a fine of one hundred euros to five thousand euros.¹

Art. 141. Any person who, except as provided in Article 140, provides material support, including financial assistance, to the commission of a terrorist offense under section 137, shall be punished by imprisonment of five to ten years and a fine of one hundred euros to five thousand euros.²

Box notes:

1. Art. 140. § 1er. Toute personne qui participe à une activité d'un groupe terroriste, y compris par la fourniture d'informations ou de moyens matériels au groupe terroriste, ou par toute forme de financement d'une activité du groupe terroriste, en ayant connaissance que cette participation contribue à commettre un crime ou un délit du groupe terroriste, sera punie de la réclusion de cinq ans à dix ans et d'une amende de cent euros à cinq mille euros.

2. Art. 141. Toute personne qui, hors les cas prévus à l'article 140, fournit des moyens matériels, y compris une aide financière, en vue de la commission d'une infraction terroriste visée à l'article 137, sera punie de la réclusion de cinq ans à dix ans et d'une amende de cent euros à cinq mille euros

Box 4. Australia

Australia's criminal code defines separate offences which criminalise the financing of a terrorist organisations (102.6), terrorist acts (103.1) and individual terrorists (103.2). These provisions criminalise the collection or provision of funds if the person is reckless as to (a) whether an organisation is a terrorist organisation; or (b) whether the funds will be used to facilitate or engage

in a terrorist act; or (c) whether another person will use the funds to facilitate or engage in a terrorist act.

102.6 Getting funds to, from or for a terrorist organisation

(1) A person commits an offence if: (a) the person intentionally: (i) receives funds from, or makes funds available to, an organisation (whether directly or indirectly); or (ii) collects funds for, or on behalf of, an organisation (whether directly or indirectly); and (b) the organisation is a terrorist organisation; and (c) the person knows the organisation is a terrorist organisation. Penalty: Imprisonment for 25 years.

(2) A person commits an offence if: (a) the person intentionally: (i) receives funds from, or makes funds available to, an organisation (whether directly or indirectly); or (ii) collects funds for, or on behalf of, an organisation (whether directly or indirectly); and (b) the organisation is a terrorist organisation; and (c) the person is reckless as to whether the organisation is a terrorist organisation. Penalty: Imprisonment for 15 years.

103.1 Financing terrorism

(1) A person commits an offence if: (a) the person provides or collects funds; and (b) the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act. Penalty: Imprisonment for life.

(2) A person commits an offence under subsection (1) even if: (a) a terrorist act does not occur; or (b) the funds will not be used to facilitate or engage in a specific terrorist act; or (c) the funds will be used to facilitate or engage in more than one terrorist act.

103.2 Financing a terrorist

(1) A person commits an offence if: (a) the person intentionally: (i) makes funds available to another person (whether directly or indirectly); or (ii) collects funds for, or on behalf of, another person (whether directly or indirectly); and (b) the first-mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act. Penalty: Imprisonment for life.

(2) A person commits an offence under subsection (1) even if: (a) a terrorist act does not occur; or (b) the funds will not be used to facilitate or engage in a specific terrorist act; or (c) the funds will be used to facilitate or engage in more than one terrorist act.

The offence must cover financing the travel of foreign terrorist fighters	
Interpretive Note to R.5	3. Terrorist financing includes financing the travel of individuals who travel to a state other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training.

Basis and rationale for these requirements

39. This requirement was added to INR.5 in October 2015, in order to implement the requirement of UNSCR 2178, OP6:

6. ...decides that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense: ...

(b) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training; and,

Guidance for their interpretation

40. This amendment clarifies that R.5/INR.5 requires countries to criminalise financing the travel of *foreign terrorist fighters* (individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training).

41. Foreign terrorist fighters pose a significant TF threat and are considered to be one of the main forms of material support to terrorist groups. As set out in the 2015 FATF report on *Emerging Terrorist Financing Risks*, foreign terrorist fighters generally have modest financing needs related to transportation, accommodation while in route, outdoor clothes, camping goods, mobile phone/plans, food and other general living expenses. They often cover these using funds provided unwittingly from legitimate sources (e.g., self-funding through employment income, social assistance, or family support, or bank loans) to finance their travel to the conflict zone.

42. Although the existing TF offences (or in some cases, existing prohibitions on involvement in foreign military activity) of some countries may already cover this aspect, most countries will need to amend their legislation to incorporate these new requirements.¹² Countries may choose to criminalise this activity by including it as part of a single TF offence, or as a separate offence. Countries should ensure that these aspects are criminalised as a matter of urgent priority, given the serious threats posed by foreign terrorist fighters.

¹² *Terrorist Financing: FATF Report to G20 Leaders – Actions Being Taken by FATF* (November 2015), pages 4 and 5.

Examples of Implementation

Box 5. Italy

In 2015 Italy added a specific offence to the Penal Code to criminalise the financing, organisation, and promotion of foreign terrorist fighters. This is in addition to the existing TF offence(s).

Article 270-quarter.1 – Organisation of transfers having terrorist purposes

In cases other than those laid down under Articles 270-bis and 270-quarter, any person who organises, finances or promotes journeys to foreign countries for accomplishment of conducts having terrorist purposes as per Article 270-sexies shall be punished with five to eight years imprisonment.

Box 6. South Africa

South Africa's TF offence (Section 4 of the Protection of Constitutional Democracy against Terrorism and Related Offences Act, 2004) applies to a range of predicate offences, including "Offences associated or connected with terrorist activities". These offences include (among others) entering or remaining in a country for the benefit of or at the direction of an entity engaging in terrorist activity; and providing or receiving training connected with terrorist activity. The TF offence therefore applied to travel for the purposes of terrorism, without the need for specific amendments to implement UNSCR 2178.

Terrorist financing should be criminalised as a stand-alone offence	
Interpretive Note to R.5	4. Criminalising terrorist financing solely on the basis of aiding and abetting, attempt, or conspiracy is not sufficient to comply with this Recommendation.

Basis and rationale for these requirements

43. This clarification of the requirements is based on Articles 2(4) and (5) of the *Terrorist Financing Convention* which require countries to criminalise a range of ancillary offences to the TF offence which are specified in paragraphs 10 and 11 of INR.5, as discussed below in a later section. In practice, this means that the TF offence itself cannot be an ancillary offence. The rationale for this is so that certain types of TF activity do not fall outside the scope of the TF offence.

Guidance for their interpretation

44. This requirement focuses on the need for TF to be criminalised as a distinct (i.e., stand-alone) offence (rather than as an ancillary offence related to a primary offence of committing a terrorist act). This is an important aspect because ancillary offences alone are unable to cover the full range of TF activity. For example, ancillary offences will not capture instances where a terrorist financier (who is acting alone and has no intention of participating in the commission of a terrorist act) is making preparations to collect or provide funds or other assets to finance a terrorist act (which has not yet been committed), but has not yet completed the actual collection or completed the provision of funds or other assets (e.g., because he/she was apprehended by the competent authorities before such steps could be taken). The ancillary offence of:

- a) *aiding and abetting a terrorist act* does not apply because no terrorist act has been committed
- b) *attempting to commit a terrorist act* does not apply because the terrorist financier is attempting to finance someone else's commission of a terrorist act without ever being involved in committing the terrorist act itself
- c) *organising or directing others to commit a terrorist act* does not apply because it only covers indirect TF activity (i.e., where the terrorist financier was organising or directing others to provide or collect funds or other assets), not instances where the terrorist financier will be collecting or providing the funds or other assets directly themselves, and
- d) *contributing to the commission of a terrorist act by a group of persons acting with a common purpose* (i.e., conspiracy) does not apply because the terrorist financier is acting alone (not in a group with a common purpose).

45. Another inherent weakness of criminalising TF as an ancillary offence to a primary offence of terrorism is that, in practice, it means the requirements to have ancillary offences to the TF offence¹³ can never be met. This is because it is not possible to have an ancillary offence to an ancillary offence (e.g., there is no such thing as an offence of attempting to commit an attempt).

46. For these reasons, TF should be criminalised as a distinct activity (i.e., as a stand-alone offence). In doing so, countries may choose to criminalise all TF activities within a single offence, within several separate offences, or they may choose to criminalise certain aspects of TF across different offences.

¹³ See paragraphs 10 and 11 of INR.5, and Article 2(4) and 2(5) of the *Terrorist Financing Convention*.

The offence should cover the broadest possible definition of <i>funds or other assets</i>, regardless of their origin	
Interpretive Note to R.5	5. Terrorist financing offences should extend to any funds or other assets, whether from a legitimate or illegitimate source

Basis and rationale for these requirements

47. This element of R.5 is based on the broad definition of *funds* in Article 1(1) of the *Terrorist Financing Convention*, which states:

1. "Funds" means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

48. Based on the definition in the *Terrorist Financing Convention*, the FATF adopted a very similar definition which appears in the Glossary to the *FATF Recommendations*, and applies to R.5/INR.5:

The term funds refers to assets of every kind, whether corporeal or incorporeal, tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets.

49. The definition of "*funds or other assets*" also includes elements of other UN instruments, including *economic resources*, (which are noted in UNSCR 1373 and defined in UNSCR 2199); and oil and other natural resources; which are noted in UNSCRs 2161, 2199 and 2253.

Guidance for their interpretation

50. The definition of funds or other assets, as used in R.5/INR.5, goes far beyond what is commonly understood by the term funds and is not limited to only financial assets, but covers every possible kind of property, regardless of its corporeality (form), tangibility or movability. It is not required that each element of the UN or FATF definition is repeated in national law, provided that the scope of the offence includes all the elements of the FATF definition. Indeed, using the term funds may create confusion, given how expansively the term should be defined. Regardless of what term countries choose to use, the TF offence should extend to all possible types of funds or other assets.

51. Additionally, the TF offence should cover such funds or other assets, regardless of whether they originate from legitimate or illegitimate sources (i.e., are obtained legally or illegally). This is an important aspect: typologies studies have highlighted that terrorists make use of both legally and illegally obtained funds. Legitimate sources of funds or other assets such as income from employment, social assistance, family support, and loans are a primary source of funding for foreign terrorist fighters and small terrorist cells.

52. The term funds or other assets as used in R.5/INR.5 also includes the concept of economic resources (including oil and other natural resources). This is an important issue as one of the main

methods of TF used by ISIL (Da'esh) is the exploitation of oil and other natural resources seized from its occupied territories¹⁴.

Examples of Implementation

Box 7. Japan

The TF offence applies to the provision of funds or other benefits, and defines the latter in an open-ended way:

“funds, or other benefits”. (“other benefits” shall hereinafter mean benefits other than funds including, but not limited to, land, building, goods and service).

Box 8. Netherlands

The TF offence applies to a wide range of support to terrorism, including means or information, and anything else which provides financial support.

Penal Code, Art. 421 (1) a. a person who deliberately provides himself or another with means or information or deliberately collects, acquires, possesses or provides another with objects which, wholly or partly, directly or indirectly, serve to offer financial support for commission of a terrorist crime or a crime in preparation of or facilitating a terrorist crime;

¹⁴ See FATF (2015), *Financing of the terrorist organisation Islamic State in Iraq and the Levant (ISIL)*, FATF, www.fatf-gafi.org/topics/methodsandtrends/documents/financing-of-terrorist-organisation-isil.html

TF offences include a broad range of circumstances	
Interpretive Note to R.5	6. Terrorist financing offences should not require that the funds or other assets: (a) were actually used to carry out or attempt a terrorist act(s); or (b) be linked to a specific terrorist act.

Basis and rationale for these requirements

53. Paragraph 6(a) of INR.5 is based on Article 1(3) of the *Terrorist Financing Convention*:

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).

54. Paragraph 6(b) of INR.5 relates to the wider provisions which are discussed above in relation to the financing of a terrorist organisation or an individual terrorist.

Guidance for their interpretation

55. The TF offence should not be restricted to cases where the funds or other assets were used to carry out or attempt a terrorist attack, and should not require prosecutors to link the funds or other assets to a specific terrorist act. The reasons for this are set out more fully in paragraphs 14 to 17 above.

56. Paragraph 6(a) requires countries to extend their TF offences to cover instances where the terrorist financier intended to finance a terrorist act, but no terrorist act was in fact carried out or attempted (e.g. because a planned terrorist act was prevented; or because no specific act had been planned; or because the funds or other assets intended for use in a terrorist act were in fact used for some other activity).

57. Paragraph 6(b) requires countries to extend their TF offences to cover instances where there is no link between the specific funds or other assets provided and any specific terrorist attack. In practice, this means that, for example, the prosecution does not need to prove a link between the specific funds or other assets provided and a specific terrorist attack. This relates to the requirement to criminalise the financing of terrorist organisations and individual terrorists which is discussed above.

The terrorist financier's intent and knowledge may be inferred	
Interpretive Note to R.5	7. Countries should ensure that the intent and knowledge required to prove the offence of terrorist financing may be inferred from objective factual circumstances.

Basis and rationale for these requirements

58. This element is based on Article 6(2) of the United Nations Convention on Transnational Organised Crime (UNTOC):

(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

59. Paragraph 7(a) of the Interpretive Note to FATF Recommendation 3 applies this same requirement to the criminalisation of money laundering. In practice, this means that the terrorist financier's knowledge, intention and state of mind may be reasonably inferred from objective factual circumstances. Including the same requirement in INR.5 gives parity between money laundering and TF offences in terms of the burden of proof.

Guidance for their interpretation

60. It should be possible for prosecutors to infer the mental element (*mens rea*) of a TF offence from objective factual circumstances. This need not be stated explicitly in the TF offence. Indeed, in most countries, this aspect is based on general provisions of criminal procedure, or on legal traditions (supported by case law).

Sanctions should apply to natural persons	
Interpretive Note to R.5	8. Effective, proportionate, and dissuasive criminal sanctions should apply to natural persons convicted of terrorist financing.

Basis and rationale for these requirements

61. This element is based on Art. 4 of the *Terrorist Financing Convention*:
- Each State Party shall adopt such measures as may be necessary: ... (b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.*
62. This also parallels the requirements of R.3 with respect to money laundering offences.

Guidance for their interpretation

63. There is no single benchmark for the level of sanctions that is considered effective, proportionate, and dissuasive, and this level may vary between countries, depending on the legal tradition and the normal penalty range for criminal offences.
64. TF should be treated as a serious criminal offence. The potential penalties should be proportionate to those for other serious criminal offences within each country, including terrorism offences. When considering proportionality, it may also be relevant to compare the penalties for TF in other countries - especially those with similar legal traditions and penalty ranges.

Examples of Implementation

65. The 2015 Terrorist Financing Fact-Finding Initiative surveyed penalties for TF offences in 172 countries. The maximum penalties applicable for the TF offence were:
- | | | |
|----------------------------|---|--------------|
| a) 0-5 years | - | 4 countries |
| b) 6-10 years | - | 49 countries |
| c) 11-15 years | - | 41 countries |
| d) 16-20 years | - | 18 countries |
| e) 21+ years ¹⁵ | - | 60 countries |

¹⁵ Including life imprisonment and capital punishment.

Sanctions should apply to legal persons	
Interpretive Note to R.5	9. Criminal liability and sanctions, and, where that is not possible (due to fundamental principles of domestic law), civil or administrative liability and sanctions, should apply to legal persons. This should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which more than one form of liability is available. Such measures should be without prejudice to the criminal liability of natural persons. All sanctions should be effective, proportionate and dissuasive.

Basis and rationale for these requirements

66. This element is based on Article 5 of the *Terrorist Financing Convention*:

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.

2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.

3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

67. This also parallels the requirements of FATF Recommendation 3 (R.3) with respect to money laundering offences.

Guidance for their interpretation

68. Legal persons should be subject to criminal prosecution for TF offences unless this is contrary to a *fundamental principle of their domestic law*¹⁶. As set out in the FATF glossary, this is a very narrow concept which is limited to principles expressed within a national Constitution (or equivalent document), or binding decisions of the country's highest court. Some examples of fundamental principles are: rights of due process, the presumption of innocence, and the right to effective protection by the courts.

69. Where criminal liability is not possible due to a country's fundamental principles of domestic law, civil or administrative liability should apply. Where a country's legal system allows for more than one form of liability against legal persons (e.g., criminal, civil or administrative), parallel proceedings should be possible. Similarly, it should be possible to prosecute both legal persons and natural persons for the same TF activity.

70. As is the case with natural persons, the sanctions applicable to legal persons should be effective, proportionate and dissuasive.

¹⁶ See definition in note 11, above.

Examples of Implementation

Box 9. Spain

Spain's TF offence (Penal Code Art 576 paragraph 5 includes specific penalties for legal persons:

5. When, according to the provisions of article 31 bis of the Penal Code, a legal person will be responsible for the crimes included in this article, the following sanctions will be applied:

- a) Fine of two to five years, if the offence committed by the natural person brings with more than five years prison penalty.
- b) Fine of one to three years, if the offence committed by the natural person brings with more than two years prisons penalty not included in the former subsection.

Pursuant to the rules established in article 66 bis of this Code, the Judges and Courts of Law may also impose the penalties established in subsections b) to g) of section 7 of article 33.

Subsections b) to g) of section 7 of article 33 foresee the following penalties:

- b) Dissolution of the legal person. The dissolution shall cause definitive loss of its legal personality, as well as of its capacity to act in any way in legal transactions, or to carry out any kind of activity, even if lawful.
- c) Suspension of its activities for a term that may not exceed five years.
- d) Closure of its premises and establishments for a term that may not exceed five years.
- e) Prohibition to carry out the activities through which it has committed, favoured or concealed the offence in the future. Such prohibition may be temporary or definitive. If temporary, the term may not exceed five years.

There should be a full range of ancillary offences to the TF offence	
Interpretive Note to R.5	<p>10. It should also be an offence to attempt to commit the offence of terrorist financing.</p> <p>11. It should also be an offence to engage in any of the following types of conduct:</p> <ul style="list-style-type: none"> (a) Participating as an accomplice in an offence, as set forth in paragraphs 2 or 9 of this Interpretive Note; (b) Organising or directing others to commit an offence, as set forth in paragraphs 2 or 9 of this Interpretive Note; (c) Contributing to the commission of one or more offence(s), as set forth in paragraphs 2 or 9 of this Interpretive Note, by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a terrorist financing offence; or (ii) be made in the knowledge of the intention of the group to commit a terrorist financing offence.

Basis and rationale for these requirements

71. These requirements are based on Article 2(4) and 2(5) of the *Terrorist Financing Convention*:

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

5. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;

(c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or (ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

72. This parallels the requirements of R.3 to have a full range of ancillary offences to the money laundering offence.

Guidance for their interpretation

73. There should be a full range of ancillary offences to the TF offence, so that the activities of attempting, participating in, organising, directing, or contributing to a TF offence as part of a group are criminalised. Countries may choose to include these ancillary offences within the primary

offence of TF. Alternatively, the ancillary offence(s) may be included in general provisions of the criminal law or in legal traditions (supported by case law), and then linked to the TF offence.

74. It is also not necessary to use the language of INR.5, provided that the underlying activity is covered. For example, in some countries the offence of *conspiracy* covers the activity of contributing to a TF offence as part of a group acting with a common purpose. Likewise, in some countries the single ancillary offence of *aiding and abetting* may encompass a wide range of ancillary offences including participating in, organising, directing, or contributing to the commission of a TF offence. Depending on the country's legal traditions, the ancillary offence of *complicity* may encompass some or all of the relevant conduct prescribed by paragraphs 11 and 12 of INR.5. If any of the relevant conduct set out in INR.5 is not encompassed by such general ancillary offences, then it should be criminalised specifically in relation to the TF offence.

Examples of Implementation

Box 10. Sweden

Sweden's criminal code includes a general provision on attempted crimes (Ch23, §1) and a general provision on complicity (Ch23 §4), which is set out below. These provisions apply to all offences included in the criminal code.

Punishment as provided for an act in this Code shall be imposed not only to the person who committed the act but also on anyone who furthered it by advice or deed. The same shall also apply to any other act punishable with imprisonment under another Act or statutory instrument.

A person who is not regarded as the perpetrator shall, if he induced another to commit the act, be sentenced for instigation of the crime and otherwise for aiding the crime.

Each accomplice shall be judged according to the intent or the negligence attributable to him. Punishments defined in law for the act of a manager, debtor or other person in a special position shall also be imposed on anyone who was an accomplice to the act of such person.

The provisions of this paragraph do not apply if the law provides otherwise in special cases. (Act 1994:458)

Jurisdictional issues	
Interpretive Note to R.5	12. Terrorist financing offences should apply, regardless of whether the person alleged to have committed the offence(s) is in the same country or a different country from the one in which the terrorist(s)/terrorist organisation(s) is located or the terrorist act(s) occurred/will occur.

Basis and rationale for these requirements

75. This element reflects a similar provision in R.3 with respect to money laundering offences. It also relates to the objective set out in UNSCR 1373:

2. Decides also that all States shall: ...

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;...

Guidance for their interpretation

76. As noted in the FATF's 2015 reports on *Emerging Terrorist Financing Risks*,¹⁷ TF is an international phenomenon. Terrorists frequently raise funds in different countries to those in which they conduct attacks. The absence of terrorist acts in a country does not indicate a low risk of terrorist financing, as terrorists may nevertheless raise funds in the country or move funds through its financial system. As highlighted in the preamble to UNSCR 1373, "...every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts".

77. The TF offences should also cover the financing of a terrorist act regardless of whether the terrorist act is committed within the country or abroad, or whether the person alleged to have committed TF is in the same country or a different country from the one in which the terrorist(s) or terrorist organisation is located¹⁸. In practice, this means that countries must ensure that their TF offences are not limited to financing acts of domestic terrorism, or terrorist acts against their own government, country or population. When proving that a TF offence has occurred, it should not be necessary that financing be linked to a terrorist act committed, attempted or intended to be committed within the country, or against the country's government or population. The offence should cover financing a terrorist act, even if that act is not committed in and has no other nexus to the country.

78. The TF offence should not be limited to cases in which the person collecting or providing funds or other assets; and the terrorist act, organisation, or individual are located in the same country.

79. Depending on the country's legal traditions, the geographical scope of the TF offence may be included in general provisions of criminal procedure or legal traditions (supported by case law); or may be explicitly stated in relation to the TF offence or a wider category of offences.

¹⁷ FATF (2015) a - p.20ff

¹⁸ INR.5, paragraph 12.

Examples of Implementation

Box 11. South Africa

The Protection of the Constitutional Democracy against Terrorist and Related Activities Act (POCDATARA), Act No 33 of 2004, defines “terrorist activity” so as to specifically include acts committed inside South Africa or in a different jurisdiction. This definition is the basis for the TF offence.

Ch.1 (1) ‘terrorist activity’, with reference to this section and sections 2, 3 and 17 (2), means –

(a) any act committed in or outside the Republic, which – ...

(b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to – ...

(ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organisation or body or intergovernmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles,

TF should be a predicate offence for money laundering	
Recommendation 5	... Countries should ensure that such offences are designated as money laundering predicate offences.

Basis and rationale for these requirements

80. This requirement is based on FATF Recommendation 3 which requires all serious offences to be predicate offences for money laundering; paragraph 2 of INR.3. As TF is a serious offence, this requirement applies.

Guidance for their interpretation

81. In countries which apply an all-crimes approach to specify ML predicate offences, no specific action is needed.

82. In countries which apply a threshold approach to specify ML predicate offences, the penalty for a TF offence should be set at a level above the threshold required to be considered an ML predicate offence (or should be included in the category of serious offences which are ML predicates).

83. In countries which use a list approach to specify ML predicate offences, the TF offence should be included in the list. As set out in the 2008 *FATF Terrorist Financing Report* and the 2015 *Report on Emerging Terrorist Financing Risks*, proceeds-generating crimes are a significant source of funds for terrorists; terrorists are known to have engaged in a wide range of criminal activities including smuggling cigarettes, narcotics trafficking; credit card fraud, cheque fraud; insurance fraud; currency counterfeiting; bank robberies; tax crimes; and extortion. Terrorists are also known to move funds using the same methods as money launderers.

Glossary

The term ***funds or other assets*** means any assets, including, but not limited to, financial assets, economic resources (including oil and other natural resources), property of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such funds or other assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, or letters of credit, and any interest, dividends or other income on or value accruing from or generated by such funds or other assets, and any other assets which potentially may be used to obtain funds, goods, or services.

Basis and rationale

84. This term derives from the definition of “funds” based on that contained in Article 1 of the *Terrorist Financing Convention*:

1. “Funds” means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

85. It also derives from UNSCR 2199, which clarified the scope of “economic resources”:

OP.6. Confirms that economic resources include oil, oil products, modular refineries and related material, other natural resources, and any other assets which are not funds but which potentially may be used to obtain funds, goods or services;

86. As noted above, the definition also includes elements of other UN Resolutions, notably 2161 and 2253.

Guidance for their interpretation

87. The TF offence should apply to a range of funds or other assets to the widest possible sense, including all the forms set out in the FATF definition or in the *Terrorist Financing Convention*.

88. R.5 previously referred to a separate (but wide) definition of “funds”. In order to avoid causing confusion, INR.5 was amended in October 2016. The term “*funds or other assets*” is now used across the board in INR.5 so that all TF-focused FATF Recommendations refer to the same kinds of thing and specific forms of support to terrorism highlighted in recent UNSCRs (i.e. economic resources) are now clearly within the scope of the definition. However, it is not necessary to amend national legislation to reflect this change, provided the term(s) used in national law are sufficiently broadly defined.

89. The definition of “*funds or other assets*” was clarified in October 2016 to refer explicitly to *oil and other natural resources*, as these were identified in UNSCR 2199 as a key source of ISIL financing. The other items highlighted in OP6 of UNSCR2199 (oil products, modular refineries, and related materials) are also within the scope of this definition. It was also amended to refer to *any other assets which potentially may be used to obtain funds, goods, or services*, in order to ensure the definition will apply to key sources of financing for other terrorist organisations, including those

which may be highlighted in future UN resolutions. These elements are therefore within the scope of both R.5 and R.6.

Examples of Implementation

90. A variety of different approaches are used among FATF members:

- a) Some jurisdictions' laws explicitly criminalise providing material support to terrorism, as well as financial forms of support (e.g. "material support or resources" or forms of support including financial, material, or information).¹⁹
- b) Some jurisdictions specify the TF offence using a compound phrase which implies wide scope (e.g. "*Funds or other property*", "*money or other property*", "*any funds or assets*", "*funds, securities or property of any kind*").²⁰
- c) Many jurisdictions specify the TF offence using a single term (e.g. "*funds*", "*assets*", or "*property*"). In some jurisdictions, this term is defined in law so as to include all kinds of property and assets.²¹

¹⁹ e.g. the US, Belgium, Iceland, Japan, South Africa, Netherlands.

²⁰ e.g. Norway, Sweden, the UK, Korea, Denmark, France, Portugal, Turkey, Argentina, Mexico.

²¹ e.g. Australia, Ireland, Luxembourg, New Zealand (funds), Greece, Germany, Austria (assets), Canada, Singapore (property).

ANNEX 1

Treaty Offences as contained in the Conventions and Protocols listed in Annex 1 of the Terrorist Financing Convention

	Convention	Criminal offences of terrorism
1.	Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.	<i>Article 1. Any person who on board an aircraft in flight:</i> (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act.
2.	Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.	<p><i>Article 1. Any person commits an offence if he or she unlawfully and internationally ...</i></p> <p>(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or</p> <p>(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or</p> <p>(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or</p> <p>(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or</p> <p>(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.</p> <p>2. Any person also commits an offence if he or she:</p> <p>(a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or</p> <p>(b) is an accomplice of a person who commits or attempts to commit any such offence.</p>
3.	Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the	<p><i>Article II. Any person commits an offence if he or she unlawfully and intentionally using any device, substance or weapon:</i></p> <p>(a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or</p> <p>(b) destroys or seriously damages the facilities of an airport serving</p>

	Convention	Criminal offences of terrorism
	Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.	international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport.
4.	Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.	<p><i>Article 2(1). The intentional commission of:</i></p> <p>(a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;</p> <p>(b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;</p> <p>(c) a threat to commit any such attack;</p> <p>(d) an attempt to commit any such attack; and</p> <p>(e) an act constituting participation as an accomplice in any such attack;</p> <p>Shall be made by each State Party a crime under its internal law.</p>
5.	International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.	<p><i>Article 1 (1) Any person commits an offence if he or she...</i></p> <p>...seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking")</p> <p>(2) Any person who:</p> <p>(a) attempts to commit an act of hostage-taking, or</p> <p>(b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking</p> <p>Likewise commits an offence for the purpose of this Convention.</p>
6.	Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.	<p><i>Article 7 (1) The intentional commission of:</i></p> <p>(a) an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property;</p> <p>(b) a theft or robbery of nuclear material;</p> <p>(c) an embezzlement or fraudulent obtaining of nuclear material;</p> <p>(d) an act constituting a demand for nuclear material by threat or</p>

	Convention	Criminal offences of terrorism
		<p>use of force or by any other form of intimidation;</p> <p>(e) a threat (i) to use nuclear material to cause death or serious injury to any person or substantial property damage, or (ii) to commit an offence described in sub-paragraph (b) in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;</p> <p>(f) an attempt to commit any offence described in paragraphs (a), (b) or (c); and</p> <p>(g) an act which constitutes participation in any offence described in paragraph (a) to (f)</p> <p>Shall be made a punishable offence by each State Party under its national law.</p>
7.	<p>Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988</p>	<p><i>Article 3, paragraph 1</i> – Any person commits an offence if he or she unlawfully and intentionally:</p> <p>(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or</p> <p>(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or</p> <p>(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or</p> <p>(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or</p> <p>(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or</p> <p>(f) communicates information that person knows to be false, thereby endangering the safe navigation of a ship; or</p> <p>(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).</p>
8.	<p>Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988</p>	<p><i>Article 2 (1)</i> Any person commits an offence if he or she unlawfully and intentionally;...</p> <p>(a) seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation; or</p> <p>(b) performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; or</p> <p>(c) destroys a fixed platform or causes damage to it which is likely to endanger its safety; or</p>

	Convention	Criminal offences of terrorism
		<p>(d) places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; or</p> <p>(e) injures or kills any person in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (d).</p> <p>2 Any person also commits an offence if that person:</p> <p>(a) attempts to commit any of the offences set forth in paragraph 1; or</p> <p>(b) abets the commission of any such offences perpetrated by any person or is otherwise an accomplice of a person who commits such an offence: or</p> <p>(c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any offences set forth in paragraph 1, subparagraphs (b) and (c), if that threat is likely to endanger the safety of the fixed platform.</p>
9.	<p>International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.</p>	<p><i>Article 2 (1) Any person commits an offence within the meaning of this Convention if he or she unlawfully and intentionally...</i></p> <p>...delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:</p> <p>(a) With the intent to cause death or serious bodily injury; or</p> <p>(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.</p> <p>2. Any person also commits an offence if he or she attempts to commit an offence as set forth in paragraph 1.</p>



CRIMINALISING TERRORIST FINANCING

This guidance aims to help countries implement the requirements of FATF Recommendation 5. It explains the various aspects that the terrorist financing offence must cover in national legal systems.

The guidance emphasises that countries have significant flexibility in determining how they implement each requirement in their national legal system, given that countries have diverse legal, administrative and operational frameworks and different financial systems. The guidance includes a number of country examples which illustrate how countries with different legal systems have criminalised terrorist financing.

