

## The legal framework of the fight against the financing of terrorism in the West African Economic Monetary Union: the case of Mali

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### Abstract:

*This article aims to analyze the legal framework of the fight against the financing of terrorism in the space of the West African Economic and Monetary Union in general and in Mali in particular. This struggle is one of the indispensable aspects in the panoply of means to fight against terrorism. Repressed by the 1999 United Nations Convention, this struggle has become a major concern of the States and the West African community organization. It quickly set up common mechanisms for preventing and detecting the financing of terrorism to dry up the resources of terrorist groups and organizations. Indeed, it has taken specific measures to punish perpetrators and their accomplices of these crimes in time and space by cooperating with financial institutions, judicial and intelligence services at the national and subregional levels. However, the economic context, the lack of follow-up to the declaration of suspicion and the lack of good faith in international cooperation make it difficult to set up mechanisms to struggle the bankrolling of terrorism in the sub-region.*

**Key words:** The fight of financing of terrorism, West African Economic Monetary Union, Mali, natural and legal persons, international cooperation.

## INTRODUCTION

Following a prolonged period of conflict, social unrest, and political instability, West Africa has made considerable progress in democracy, economic growth, and development over the last decade. Despite these advances, there are concerns about the upsurge of terrorism<sup>1</sup> and its opposing effects on the peace, security, and development of the sub-region. The frequency and deadly nature of attacks in some West African countries are indications of the superiority of terrorist groups in the sub-region. As a result, Mali and other members of the West African Economic and Monetary Union (WAEMU)<sup>2</sup> are vulnerable to terrorism and terrorist financing for a number of reasons.

The subregion suffers from political instability, ethnic and community violence, endemic corruption, rampant poverty and high rates of joblessness and underemployment, particularly among young people. Terrorists and terrorist groups can exploit these negative circumstances, particularly in relation to young people. As a symptom of the sternness of the challenges to human development in the region, the United

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<sup>1</sup> The term terrorism is nowadays very frequently used in international law and international institutions, but it does not give rise to a single and universal definition. A definition proposed by the Group of High-level Personalities and the Secretary-General of the United Nations in 2004 is supported by France, it states: « any action ... intended to cause death or serious bodily injury to civilians or non-combatants, where the purpose of such an act is, by its nature or context, to intimidate a population, or to force a government or an international organization to take any measure or action; abstain ». The United Nations General Assembly, Resolution 49/66 / AG of 9 December 1994, defines terrorism as : « criminal acts that for political purposes are designed or calculated to cause terror in the public, a group individuals or individuals are unjustifiable in all circumstances and regardless of the political, philosophical, ideological, racial, ethnic, religious or other reasons that can be invoked to justify them ».

<sup>2</sup> WAEMU is a West African organization created by treaty on January 10<sup>th</sup> in Dakar 1994, with headquarters in Ouagadougou (Burkina Faso). The member states are Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Togo, and Senegal. The organization's mission is to achieve the economic integration of the member states by strengthening the competitiveness of economic activities within the framework of an open and competitive market and a streamlined and harmonized legal environment.

Nations Development Program (UNDP), in its 2011 Human Development Report, ranked thirteen (13) out of fifteen (15) ECOWAS countries among having "low human development." In 2010, Inter-Governmental Action Group Against Money Laundering, West Africa said, « *The economy of West Africa is largely characterized by an informal activity. [...] The informal economy is vast. [...] A measure between 60% and 70% of GDP is probably representative of the region*<sup>3</sup> ». Unfortunate governance and weak public bodies underlie most of the human development challenges in the region. Most borders in West Africa are porous and there are many ungoverned spaces around borders. All countries lack the capacity to effectively control borders, which is now a permanent threat to both states and populations, hence the need to engage in a "fight against the financing of terrorism" as a whole to dry up the sources of financing of terrorist organizations.

The fight against the financing of terrorism has emerged as a major concern of States<sup>4</sup>, international organizations, international and subregional financial institutions. Thus, the United Nations Convention for the Suppression of the Financing of Terrorism defines the financing of terrorism as follows: "*For the purposes of this Convention, any person, by any means whatsoever, directly or indirectly provides or unites funds, intention to use them or to know that they will be used, in whole or in part, to commit: (a) an act that constitutes a breach of the definition of any of the treaties listed in the Schedule, or an act deliberately intended to injure or kill a civilian, or any other person who does not participate directly in hostilities in a situation of armed conflict, which by its nature is intended to intimidate a population, government or international*

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<sup>3</sup> Inter-Governmental Action Group Against Money Laundering, West Africa, GIABA, 2010, [http://: www.giaba.org](http://www.giaba.org)

<sup>4</sup> JEAN-Marc Sorel, «The Fight against terrorist financing: a transatlantic perspective» Paris, Pédone, 2009, p.214.

*organization to refrain from performing an act*<sup>5</sup> ". With respect to international financial institutions, the World Bank and the International Monetary Fund (IMF) also define the financing of terrorism as "*financial assistance, of any form, to terrorism or to those who encourage, examine or participate in this context*"<sup>6</sup> ". In addition, the Financial Action Group notes that it includes funding for terrorist acts and terrorist and terrorist organizations<sup>7</sup>. These general definitions given to the financing of terrorism are kept by WAEMU within the Community framework.

Moreover, in Malian substantive law, "*constitutes the financing of terrorism the supplying, collecting or managing of funds, securities or any property whatsoever, giving advice for that purpose with the intention of seeing such funds, securities or property used or known to be used in whole or in part for the purpose of committing any act of terrorism under this Act*"<sup>8</sup> ". It constitutes a criminal offense imprescriptible and punishable by Malian law. The funds in question may have a legal or illegal origin; but in any case, the destination of these funds makes them illegal. However, there is the financing of terrorism, even if the facts which are at the origin of the acquisition, possession, and transfer of property intended for the financing of terrorism, are committed in the territory of another Member State or on the one of a third<sup>9</sup>. The fight against the financing of terrorism, whether from "legal" or "illegal" sources, requires, in addition to sophisticated means and technics, a specific national and international legal framework that allows cooperation between financial

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<sup>5</sup> Article 2 of the United Nations Convention for the Suppression of the Financing of Terrorism, 1999.

<sup>6</sup> World Bank and International Monetary Fund, 2003.

<sup>7</sup> Financial Action Group, 2013, [http://: www.fat-gafi.org](http://www.fat-gafi.org)

<sup>8</sup> Article 8 de la loi N°08 -025 du 23 Juillet 2008 portant répression du terrorisme au Mali. See also Article 4 de la loi N°10 -062 du 30 Décembre 2010 relative à la lutte contre le financement du terrorisme.

<sup>9</sup> Any State other than a Member State.

institutions, national and international law enforcement agencies. That is why the WAEMU governing the fate of eight (8) countries with a single currency has quickly adopted a legal framework to fight transnational financing of terrorism, which was then transferred into the national laws of its member states. On this basis, what could be the scope of the counter-terrorism financing mechanism in the WAEMU zone in general and more specifically in Mali? Is the mechanism to combat the financing of terrorism specific? Is there international judicial cooperation in the fight against the financing of terrorism?

The problem of countering the financing of terrorism in the sub-region is complex, given the cross-border nature of terrorism and the more informal than the formal economic system of countries. This theme thus raises interest at two levels. On the theoretical level, it will help to decipher WAEMU's action in the fight against funding. In practical terms, it reflects the will of the Malian legislator to severely combat the financing of terrorism at the domestic and international levels.

The choice of Mali is not fortuitous. We are seeing increasing radicalization and the southward migration of terrorists and extremists, particularly members of Al Qaeda in the Islamic Maghreb (AQIM) across the Sahel towards Mali, Mauritania and Niger. Indeed, there are warnings that AQIM has operational bases in some West African countries and has forged strategic alliances with terrorist groups such as Boko Haram in Nigeria, the Movement for Unity and Jihad in West Africa (MUJWA), the National Movement for the Liberation of Azawad (NMLA) and Ansar Eddine in Mali and Niger. These alliances provided training and logistical provision to AQIM and other forms of operational<sup>10</sup> terrorism. The upsurge of the movements of terrorist groups and of independence and

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<sup>10</sup> DANIEL Serge « Al-Qaïda au Maghreb Islamique, l'Industrie de l'Enlèvement », Paris, Fayard, 2012, P. 110.

See also, Rapport GAFI, « Le financement du terrorisme en Afrique de l'ouest », 2013.

ethnicity in their north and a geographical situation in the WAEMU space like that of the Sahelian zone according to the report of the International Federation of Human Rights in 2016 and 151 killed in the first four months of 2017. This news of terrorist acts in the Sahel justifies the need to fight against the financing of terrorism whose control mechanisms concerning its field of application, the specificity of the repression must be mastered and international judicial cooperation in this area.

## **1. THE SCOPE OF THE MECHANISM TO COMBAT THE FINANCING OF TERRORISM**

The fight against the financing of terrorism in the countries of the West African Economic and Monetary Union is the update extension of the Community legal policy on the fight against money laundering and organized crime. The member states of the union implement the instruments of the United Nations, notably the United Nations Convention of 9 December 1999 for the Suppression of the Financing of Terrorism and its nine (9) annexes as well as Resolution 1373 of 28 September 2001 of the Security Council of the United Nations to which are added the main international recommendations against the financing of terrorism. Its scope covers the determination of the subject, the prevention and the detection of the financing of terrorism.

### **1.1 - Determination of subject persons**

Subjected persons are determined in the community regulations<sup>11</sup> and those of the uniform law<sup>12</sup>. These regulations highlight certain aspects of the interdependence established between the anti-terrorist financing system and other anti-

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<sup>11</sup>Article 8 de la Directive N°04/2007/CM/UEMOA relative à la lutte contre le financement du terrorisme dans les Etats membres de l'Union Economique et Monétaire Ouest Africaine

<sup>12</sup> Loi N°10- 062 du 30 Décembre 2010 portant loi uniforme relative à la lutte contre le financement du terrorisme.

money laundering and organized crime mechanisms in the Union<sup>13</sup>. From this angle, the determination of the subject people appears very vague. First, it covers the entire banking and financial sector, including the Public Treasuries of the member states of the Central Bank of West African States (CBWAS), the financial institutions. Secondly, they are members of the independent legal professions, when they represent or assist clients outside any legal proceedings, particularly in the context of activities such as: the purchase and sale of real estate or businesses commercial; manipulation of money, securities or other assets belonging to the client; opening or managing bank, savings or securities accounts; incorporation, management or management of companies, trusts or similar structures, execution of other financial transactions. Lastly, the other taxable persons concern, the introducers of businesses to the financial organizations; the Statutory Auditors; Real Estate Agents; merchants of valuable items such as paintings, stones and precious metals; carriers of funds owners, managers and managers of casinos and gaming establishments, including national lotteries; travel agencies; Non Governmental Organizations (NGOs)<sup>14</sup>.

These subject persons, in particular, financial institutions, are subject to numerous obligations which revolve around the main obligation, namely the declaration of suspicion and the obligation of vigilance. In this respect, financial organizations become the privileged target of the taxable persons in view of the importance of the obligations incumbent upon them. They may not in any circumstances invoke any consideration of a political, philosophical, ideological, racial, ethnic or religious nature and any other similar reason for the commission of such an offense.

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<sup>13</sup>Article 5 de la Directive N° 07/2002/CM/UEMOA du 19 septembre 2002, relative à la lutte contre le blanchiment de capitaux dans les Etats membres de l'UEMOA.

<sup>14</sup> Article 3 de la loi N°10- 062 du 30 Décembre 2010 portant loi uniforme relative à la lutte contre le financement du terrorisme.

## **1.2. Prevention**

As far as prevention is concerned, financial organizations play an indispensable role. They identify their clients and the people on whose behalf they are acting, by producing a probative document when they tie up business relationships. This identification concerns any transaction whose amount or value in CFA francs reaches or exceeds five million (5,000,000) CFA francs<sup>15</sup> equal to seven thousand six hundred twenty one(7,621) euro or eight thousand six hundred and eighty (8,680 USD) dollar. Whether the transaction is made in one or more transactions between which a link appears to exist. The financial institution concerned proceeds to the identification as soon as it becomes aware of it and finds that the threshold is reached. To serve as evidence in any investigation related to the financing of terrorism, financial institutions retain: the copy or references of the required documents, for a period of ten (10) years<sup>16</sup> from the closing of their accounts, after the cessation of their relations with their habitual and occasional customers; supporting documents and records of original documents or copies having probative force with regard to the laws and regulations in force.

In Malian substantive law, the respect of this period in relation to the retention of documents and documents applies to other persons subject to the fight against the financing of terrorism. The same applies to natural or legal persons who wish to provide a fund or value transaction service, as a principal or ancillary activity, must first obtain the authorization of the Minister of the Economy and finances. Non-profit organizations have a special duty of care. A non-profit organization wishing to raise funds, receive or order transfers of funds must enter a register set up for this purpose by the competent authority. Donations to a non-profit

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<sup>15</sup> Article 9 paragraphe 2 de la loi N°10- 062 du 30 Décembre 2010, Ibid.

<sup>16</sup> Article 10 paragraphe de la loi N°10- 062 du 30 Décembre 2010, Ibidem.



organization of an amount equal to or greater than five hundred thousand (500,000) francs<sup>17</sup>, equal to seven hundred sixty two(762) euro or eight hundred sixty eight (868 USD) dollar, must be recorded in the register containing the full details of the donor and all other necessary information. This register must also be kept for a period of ten years for any consultation of the national cell processing financial information. In addition, donations equal to or greater than one million francs are declared to the national cell for the processing of financial information by the donor and the beneficiary organization<sup>18</sup>. For cash couriers, who are physical carriers of cash and instruments, an amount equal to or greater than five million francs must be declared at the entry and exit of the national territory written at the border crossing point by the carrier<sup>19</sup>. The competent authorities shall identify the carrier of cash and bearer instruments. This system facilitates the control of the quantity of capital that passes through the freight without these movements being subject to the declarative obligation of the customs which does not weigh on the capital and goods without prejudicing the free movement of persons and goods properties in the sub-region.

### **1.3. The detection of terrorist financing:**

The States of the West African Economic and Monetary Union intend to detect the financing of the terrorism with two following processes: the extension of the attributions of the National Cell of Financial Information Processing<sup>20</sup>; statements relating to suspicious transactions.

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<sup>17</sup> Article 14 paragraphe 3 de la loi N°10- 062 du 30 Décembre 2010, Ibidem.

<sup>18</sup> Article 14, paragraphe 4 de la loi N°10- 062 du 30 Décembre 2010, Ibidem.

<sup>19</sup> Article 15 de la loi N°10- 062 du 30 Décembre 2010, Ibidem.

See also, Directive N°04/2007/CM/UEMOA relative à la lutte contre le financement du terrorisme dans les Etats membres de l'Union Economique et Monétaire Ouest Africaine.

<sup>20</sup> Article 17 de la loi N°06-066 du 29 Décembre 2006 relative à la lutte contre le blanchiment de Capitaux «la Loi uniforme relative à la lutte contre le blanchiment de

With regard to the National Cell of Financial Information Processing, it is responsible for collecting and processing information on the financing of terrorism. It receives, analyzes and processes the information necessary to establish the authenticity of the transactions as well as the nature of the transactions subject to the reporting of suspicions to which the taxable persons are subject. The Cell also receives all the useful information that is necessary for the accomplishment of its task, in particular, those communicated by the supervisory authorities<sup>21</sup> and the judicial police officers. The cell communicates with the natural or legal persons subject to obtain information held by them that could enrich the suspicious transaction reports. On the national territory, it carries out periodic studies on the evolution of the technics used for the financing of terrorism. It issues opinions on the implementation of State policy in the fight against the financing of terrorism and proposes the necessary reforms to reinforce the effectiveness of this policy. The reports of the cell are submitted to the Minister of Finance. In 2016, the National Cell of Financial Information processing received more than one hundred fifty (150) reports of suspicions of money laundering and terrorist financing. It also transmitted to the specialized Counter-Terrorism Center, one hundred (100) files concerning this crime in the same year<sup>22</sup>.

With respect to suspicious transaction reporting, it refers to money, assets and related transactions where such suspected items could be used for the financing of terrorism. Subordinated

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capitaux », assortie d'un Décret uniforme portant création de la Cellule Nationale de Traitement des Informations Financières (CENTIF) érigé en Loi N°16-008/AN-RM/du 17 mars 2016. See also, Directive N° 07/2002/CM/UEMOA relative à la lutte contre le blanchiment de capitaux dans les Etats membres de l'UEMOA, adoptée à Cotonou, le 19 septembre 2002.

<sup>21</sup>The supervisory authorities are the national or community authorities of WAEMU empowered by law or regulation to control natural and legal persons.

<sup>22</sup> Malian Minister of Justice, Human Rights, Guards of Seals, SANOGO Aminata Mallé, on February 25, 2016 at the National Assembly of Mali.

natural and legal persons are obliged to declare the operations thus carried out of suspicious origin. Statements made by telephone or electronic means must be confirmed in writing within forty-eight (48) hours. They must indicate the reasons why the operation has already been carried out and the time within which the suspected operation must be carried out. After receiving a written suspicious transaction report, the national cell of financial information processing processes and analyzes immediately the information collected and requests additional information from the declarant and the public control authorities. On the basis of serious, concordant and reliable information, the cell may oppose the execution of the said operation before the expiry of the execution period mentioned by the declarant. This opposition is notified to the latter in writing and obstructs the execution of the operation for a period of forty-eight (48) hours and sends a report on these facts to the public prosecutor who, in turn, seizes the investigating judge<sup>23</sup>. The investigating judge may order, in accordance with the law, for a specified period of time, without professional secrecy being able to be opposed to him, various investigation techniques. It means the monitoring of bank accounts, access to systems, networks and computer servers used, the communication or seizure of authentic deeds or under private signature, the surveillance or the interception of communication, audio or video recording or photography of acts and actions or conversations and the interception or seizure of mail<sup>24</sup>. But in the absence of opposition or if according to the deadline, no decision of the investigating judge has reached the declarant, the latter may execute the operation.

However, these statements are confidential and can not be disclosed to the owner of the sums or the authors of the transactions. Supervisory authorities and their agents who

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<sup>23</sup>Articles 18 et 21 de La loi N°10- 062 du 30 Décembre 2010 portant loi uniforme relative à la lutte contre le financement du terrorisme.

<sup>24</sup> Article 26 de la Loi N°10- 062 du 30 Décembre 2010, Ibid.

transmit information or make statements in accordance with this regulation shall be exempt from any penalty for breach of professional secrecy. Similarly, members and staff of the cell may not be required to testify, during a public hearing in a court proceeding, about terrorist financing activities that they have had to deal with in the exercise of their jurisdiction function. The Malian legislator guarantees them that no action in civil or criminal liability can be brought against them. Reports of suspicion of good faith that caused harm to people but which proved to be inaccurate are then incumbent upon the state<sup>25</sup>. In addition, the suspicious transaction reporting mechanism for the primary obligations and vigilance of financial institutions allows the anonymity in the economy to be reduced in order to better trace the transactions. Anonymous payment methods limit the control capacities of financial institutions. So, it would be desirable to limit the possibilities of payment in cash in the economy of Mali. This process will undoubtedly lower the level of cash in circulation in economic life. But, it will facilitate the tracking of payments, their sources, and their destinations.

Anyway, it is important to note that there is a very little investigation or prosecution that comes from reports of suspicion made by reporting entities. This shows a gap in the statements, as well as difficulties in identifying suspicious transaction reports related to terrorist financing as well as in the prosecution of cases related to terrorism and terrorist financing. Identification difficulties may be due to sufficient capacity, lack of guidance, and weakness of international cooperation. Thus, Marcel Alain De Souza, President of the Economic Community of West African States (ECOWAS) testifies: « *Without financing, there is no terrorism. And we have a specialized institution that does its work. From the statements of suspicion, we detect what is the money that goes to*

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<sup>25</sup> Article 24 de la loi N°10- 062 du 30 Décembre 2010, Ibidem.

*speculation, what is the money that goes to the financing of terrorism. But we do not always have the right information* <sup>26</sup> ».

In the same way, an anonymized anti-terrorism investigator comes out of the silence by blaming « *The mechanisms put in place do not correspond to African realities, especially the Sahel, where the rate of banking is the lowest in the world and where there are difficulties of traceability. So statements of suspicion are not respected* <sup>27</sup> ». To overcome these difficulties, it is necessary to be aware of the scale of the phenomenon and its global impact. As such, better coordination would certainly ensure the proper orientation of the mechanisms put in place. It is relevant to reinforce the capacities of the taxable persons, in particular, the financial organizations that control illegal flows in order to improve the technicalities of the financial security services and to better monitor the financial masses so that this fight is not "*a lot of noise for nothing* <sup>28</sup>". If the fight against financing also depends on the exchange of information between national and sub-regional bodies, it is important to set up cooperation and exchange structures encompassing tax authorities, judicial bodies, financial intelligence services, the police and the authorities responsible for the administrative freeze. Just as the geographical scope of their actions must be broadened so that they can apprehend the suspects as soon as possible and make them available to the judicial authorities.

## **2. REPRESSION OF THE FINANCING OF TERRORISM:**

Non-compliance by taxable persons with the obligations imposed on them by the anti-terrorist financing mechanism

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<sup>26</sup> Dakar International Forum "Towards an integrated solution to fight terrorism in Africa", held from 13 to 14 November 2017.

<sup>27</sup> Ibid.

<sup>28</sup> JEAN François Daguzan, « La lutte contre le Financement du terrorisme : Beaucoup de bruit pour rien? », revue Défense, n°132, hiver 2007-2008, pp.1-2.

entails the implementation of a composite battery of sanctions. The law provides for significant administrative and disciplinary sanctions. They are supplemented and reinforced by criminal sanctions. One of the essential aspects of the originality of the terrorist financing repression mechanism lies in the coexistence of these parallel sanctions.

## **2.1 - Administrative and disciplinary sanctions**

The principle of administrative and disciplinary sanctions is set out in article 28 of the Uniform Law, which states: "*When, as a result, either a serious lack of vigilance or a deficiency in the organization of its control procedures a person referred to in Article 3 has failed to comply with the obligations imposed on him by the provisions of Articles 8, 18 and 19 of this Law, the supervisory authority having disciplinary power may act ex officio under the conditions provided for in specific laws and regulations in force. It also notifies the National Cell of Financial Information Processing, as well as the Public Prosecutor*". It follows from this provision that failure to report suspicion entails the implementation of administrative and disciplinary sanctions. The financial institution which, as a result of a serious lack of vigilance or a deficiency in its internal control procedures, has failed to comply with its obligation to report to the national cell of financing information processing the suspicious transactions it has the knowledge, incurs disciplinary sanctions. These sanctions are pronounced by a supervisory authority. It is therefore incumbent on the supervisory authorities only, to sanction breaches of the suspicious transaction report. For example, in the case of credit institutions and other financial institutions, the supervisory authority is the west african monetary union Banking Commission. As the supervisory authority of these institutions, the Banking Commission has a general power of supervision and control. It has a supervisory role for the entire banking

system, including the correct application of the financing of terrorism prevention mechanism. In case of anomaly and infraction, it is empowered to take administrative and disciplinary sanctions under Article 28 above.

The Banking Commission controls and therefore exercises disciplinary power, in particular with regard to credit institutions, manual money changers, interbank market agents and decentralized financial systems. These administrative and disciplinary sanctions are those provided for by the combined provisions of the appendix to the Convention establishing the Banking Commission and the Uniform Banking Regulations Act<sup>29</sup>, namely the warning, the reprimand, the suspension or the prohibition to perform certain transactions and other limitations in the exercise of banking activity, including transactions that have contributed to the financing of terrorism; suspension or resignation of the responsible officers; the resignation of one or more members of the executive body; withdrawal of approval which leads, by a natural slope, to the disappearance of the Bank or the financial institution concerned; the "*freezing of funds and other financial resources or other property*"<sup>30</sup> without delay and without prior notification to the persons or entities concerned.

Furthermore, the aforementioned administrative and disciplinary sanctions are independent of any legal proceedings brought in the event of characterized breaches by the financial institutions. They do not exclude the use of criminal sanctions enacted in the uniform law on the repression of the Financing of Terrorism. The ambition of this measure and its originality

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<sup>29</sup>Articles 22 and 23 de l'Annexe à la Convention du 3 avril 2007, Cotonou, portant création de la Commission Bancaire de l'Union Monétaire Ouest Africaine et les articles 46 et 47 de la loi uniforme cadre N°2008-26 du 28 juillet 2008, portant réglementation bancaire.

<sup>30</sup> It means "any action to prevent any movement, transfer, alteration, use or manipulation of funds that would result in a change in their volume, amount, location, ownership, possession, nature, destination or any other change that could to allow its use, notably portfolio management.

are also to widen the offense of financing of terrorism, by creating a qualification of financing of the general terrorism which could be retained whenever the funds come from an infraction. This option is fundamental since it reflects the desire to repress very severely all acts intended to conceal or disguise the nature of assets obtained in an illicit manner, so as to integrate them into the circuits of the legal economy. In addition, these funds may be subject to administrative freeze as well as the resources of terrorist organizations in the Republic of Mali.

## **2.2. - Criminal sanctions**

Malian positive law has considered the financing of general terrorism as an offense punishable by the most severe penalties. This general financing of terrorism offense coexists with satellite offenses. In addition, the uniform law provides for two types of punishment for the financing of terrorism: primary sentences and additional penalties.

Concerning the main sentences, these sentences can be pronounced against natural persons and legal persons. Natural persons guilty of terrorist financing offenses are liable to imprisonment for a minimum of ten (10) years<sup>31</sup>. These penalties coexist with fines equal to at least five times the value of the assets or funds on which the terrorist financing transactions were made. For legal persons, only the fine is provided as the main sentence. The maximum rate of the fine is five times that provided for natural persons and for the same offense<sup>32</sup>. At this level, it is necessary to make a clear distinction between the financing of simple terrorism and the financing of aggravated terrorism. According to the uniform

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<sup>31</sup> Article 32 de La loi N°10- 062 du 30 Décembre 2010 portant loi uniforme relative à la lutte contre le financement du terrorisme.

See also GAFNER Julien « L'incrimination du Financement du Terrorisme », Schulthess verlaq, recherches Juridique lausannoises, Zurich, 2006, p.401.

<sup>32</sup> Article 32,35 de La loi N°10- 062 du 30 Décembre 2010, Ibid.



law, the aggravation may result from the circumstances of the commission of the offense of the financing of general terrorism itself or the nature of the original offense. So three circumstances are likely to aggravate the terrorist financing offense. It is the habit, the use of the facilities provided by the exercise of a profession and the state of recidivism. In this case, this terrorist financing offense is punishable by penalties attached to other related offenses of which the perpetrator is aware.

As regards to the Complementary sentences, there are two kinds: mandatory complementary sentences and optional additional penalties.

Compulsory complementary sentences consist of confiscation for the benefit of the Malian public treasury, funds, financial resources related to the offense as well as any movable or immovable property used for the commission of the said offense. It is common to individuals and legal entities. On the other hand, for optional complementary penalties, we find the distinction between natural persons and legal persons. For the former, optional complementary penalties have the common denominator to restrict their freedom of action (prohibitions) or limit their prerogatives on certain properties: the ban on residence for a period of three (3) to seven (7) years or to leave the Malian territory, the prohibition to exercise civil and political rights from two to five years, to exercise a profession in public functions to issue checks, to carry a weapon, the withdrawal of permits or licenses for a period of five to ten years<sup>33</sup>. For the second, the optional supplementary penalties are mainly intended to limit their rights to certain property (confiscation). They may be punished by penalties such as the exclusion from public procurement on a permanent basis or for a maximum of ten years, placement under judicial supervision, the prohibition to engage in one or more professional activities,

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<sup>33</sup> Article 36, de La loi N°10- 062 du 30 Décembre 2010, Ibidem.

the final closure of the establishment of the undertaking used to commit the offending acts and to post the decision or broadcast it by the written press or by any means of audiovisual communication, at the expense of the convicted legal person.

Besides that, one of the fundamental innovations in the fight against the financing of terrorism lies in the fact that legal persons can be declared criminally responsible for the crime of financing terrorism. Thus, the same criminal sanctions are applicable to accomplices in the financing of terrorism. It ranges from twelve (12) months to four (4) years imprisonment with a fine ranging from two hundred thousand francs (200,000F CFA), equal to three hundred and four (304) euro or three hundred forty seven (347 USD) dollar for natural persons and one hundred thousand (100,000) francs to one million five hundred thousand (1,500.000) francs for legal entities<sup>34</sup>. It is equal, from one hundred fifty two (152) euro to two thousand and two hundred eighty six (2,286) euro or from one hundred seventy three (173 USD) dollar to two thousand six hundred and four (2,604 USD) dollar. This is the agreement or participation in an association for the commission of a terrorist financing event, the association to commit the fact, the aid, the inducement or the advice to a person to carry out or facilitate the financing of terrorism. This may involve several culprits from different countries because of the transnational nature of the phenomenon of terrorism.

### **3 - INTERNATIONAL JUDICIAL COOPERATION:**

The cooperation mechanism aims to promote, coordinate and organize national policies to combat the phenomenon of terrorism. The West African Economic Monetary Union was inspired by the principles defined by the main international

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<sup>34</sup> Article 35,38 de La loi N°10- 062 du 30 Décembre 2010, Ibidem.

conventions<sup>35</sup>, especially in the field of international repression. These include the obligation of mutual legal assistance; the speeding up of requests for mutual legal assistance by avoiding the cumbersome communication of requests through the diplomatic channel; the principle of double criminality, which requires that the facts be incriminated under each of the two laws. The essential aspects of cooperation in this area concern the search for evidence and the execution of restraint measures.

### **3.1- Mutual legal assistance for investigation purposes:**

In accordance with this principle, States must accord each other the widest measure of mutual legal assistance for all investigations, prosecutions and judicial proceedings concerning a terrorist financing offense. For this reason, the Financial Action Group<sup>36</sup> has stressed, early on, the need to improve the cooperation of national authorities. Borders separating national legal systems constitute one of the main assets of criminal organizations for the recycling of their illicit profits. The international cooperation mechanism makes it possible to remedy this situation. It is based on a basic principle, that of international competence. This principle is the keystone of repressive mutual aid. It gives national courts the power to deal with offenses committed by any natural or legal person, irrespective of his nationality or the location of his seat, even

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<sup>35</sup> La convention des Nations Unies du 20 décembre 1988, dite convention de Vienne ; la convention de coopération en matière de justice, signée à Tananarive, le 12 septembre 1961 ;

La Convention A/P du 1er juillet 1992 relative à l'entraide judiciaire en matière pénale de la Communauté Economique des Etats de l'Afrique de l'Ouest (CEDEAO), signée à Dakar le 29 juillet 1992 ;

La convention d'extradition A/P1 de la CDEAO, signée à Abuja le 06 août 1994.

<sup>36</sup>The Financial Action Group is an intergovernmental organization for the fight against money laundering and terrorist financing created by the G7 at the Paris Arch summit in 1989. Bringing together representatives of 34 member states, as well as 160 other countries, Through regional bodies, the Financial Action's Group mission is to develop standards and promote the proper implementation of legislative, regulatory and operational measures in the fight against money laundering, the fight against the financing of terrorism and the protection of money laundering international financial system.

outside the national territory, provided that the place of the commission is located in the territory of the country, one of the WAEMU member states. Reinforced by other principles, in particular, the obligation to provide mutual assistance and the need to justify any refusal in this area<sup>37</sup>, it is part of a strategy to harmonize the rules and sanctions applicable to the financing of terrorism within the WAEMU. In this respect, it reflects the desire to relax certain rules of criminal procedure in force, particularly as regards territorial jurisdiction. This international competence also guarantees the effective and rapid implementation of the main aspects of mutual assistance in the field of: transfer of proceedings; conservatory measures; request for search and seizure, as well as confiscation of illegal profits; a confiscation order pronounced abroad as to its effect; application for enforcement of foreign judgments and extradition. The implementation of this principle is ensured by mechanisms to facilitate cooperation in investigations of terrorist financing and money laundering offenses. These mechanisms of mutual assistance for the purpose of the investigation, judicial cover a very wide field, since it must be granted to all investigations, criminal prosecution, and judicial proceedings. It may be requested for the purpose of gathering evidence concerning the commission of the offense, the identity, and location of its perpetrators. It aims to facilitate, by any means permitted by the domestic law of the requested State, the provision and preservation of evidence relating to the existence of such property, its location, movements, nature, legal status or their value. This assistance includes the collection of testimonies or depositions; the provision of assistance in making available to the judicial authorities of the requesting State detained persons or other persons for the purpose of testimony or assistance in the conduct of the

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<sup>37</sup>Articles 43,52 de La loi N°10- 062 du 30 Décembre 2010 portant loi uniforme relative à la lutte contre le financement du terrorisme.

investigation; the delivery of court documents; searches and seizures; the examination of objects and places; the supply of originals or certified true copies of relevant records and documents, including bank statements, accounting records and records showing the operation of a business or its business activities.

Similarly, the request for investigation may be formulated with a view to the possible seizure or confiscation of the instruments or proceeds of trafficking resulting from a money laundering and terrorist financing offense. The request for assistance shall be made in writing to the competent authority for that purpose. It includes the name of the competent authority requesting the measure; the indication of the measure sought; the statement of the facts constituting the offense and the applicable legislative provisions, all known elements allowing the identification of the person or persons concerned; any information necessary to locate the instruments, resources or property concerned and any other information necessary for the proper execution of the request<sup>38</sup>. This request may be refused only if its execution would undermine public order, sovereignty, security or the fundamental principles of law.

In terms of police cooperation, the uniform law aims to encourage member states to collaborate closely in order to enhance the effectiveness of the action to detect and punish offenses related to the financing of terrorism. For the same circumstance, joint investigations are allowed. In parallel with the investigation and the search for evidence, law enforcement assistance has also been strengthened in the areas of enforcement.

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<sup>38</sup> Articles 50,61 de La loi N°10- 062 du 30 Décembre 2010, Ibid.

### **3.2.- Mutual legal assistance for enforcement of coercive measures:**

Mutual legal assistance for the enforcement of coercive measures concerns the extradition of the perpetrators of terrorist financing offenses and the confiscation<sup>39</sup> of illegal profits.

With regard to extradition in WAMU member States, the system established for extradition is not intended to replace treaties and conventions that support their domestic law but aims to complement them. This includes the financing of terrorism in the category of extradition offenses. The law has laid down the conditions for extradition for this purpose. It has simplified the procedure which is now derogatory to that of common law. Thus, within the framework of the established mechanism, the procedure is simplified, since the request is sent directly to the Attorney General of the requested State. It improves the efficiency of the process by providing mechanisms to expedite extradition proceedings and simplify certain evidentiary requirements<sup>40</sup>. It further recognizes the possibility for the requested State to proceed, at the request of the requesting State, to the provisional arrest of the person who is the subject of a request for extradition, to place him in detention or to take all other appropriate measures to ensure his presence in the implementation of the extradition proceedings. Nonetheless, the principle of double criminality provided for by the extradition conventions in force in the WAEMU member states is not waived.

As for the confiscation of profits related to the financing of terrorism, this is part of the measures related to the enforcement of coercive measures. It is the very purpose of the fight against the financing of terrorism since it ultimately prevents criminal organizations from enjoying the economic

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<sup>39</sup> Confiscation means "final dispossession of property by decision of a competent court, a supervisory authority or any competent authority".

<sup>40</sup> Articles 68, 69,71 de La loi N°10- 062 du 30 Décembre 2010, Ibidem.

benefits derived from their activities. Measures in this area are provided by WAEMU member states and the procedure to be followed in the matter of confiscation requests<sup>41</sup>. The decision of the competent court of the requested State shall be subject to referral to the competent authority of the requesting State. For this purpose, the confiscation order pronounced abroad allows the requested State to give effect to any decision issued by a court of a WAEMU member State. In addition, it gives effect to any decision rendered by the courts of a third State to a WAEMU member State, subject to reciprocity in the latter case, a principle of public international law.

Apart from the confiscation itself, the uniform law to the state control, the obligation to order, at the request of the State, provisional measures, the conservation of fraudulent property so as to prevent any operation goods that may lead to their transfer out of the territory or to their volatilization. So, the state enjoys the power of disposal over property confiscated on its territory at the request of foreign authorities, less an agreement concluded with the state.

Moreover, we are worried about the success of the bet of this international cooperation given the behavior of certain States to pay ransoms to the terrorists in exchange for the liberation of the hostages<sup>42</sup>. This prematurely predictable failure of international cooperation in the fight against the financing of terrorism can be explained by the potentially embarrassing nature of the investigations. They raise questions that governments do not want to explore, either to hide their mistakes inadvertently or to protect their allies<sup>43</sup>. Faced with this challenge, the fight against the financing of terrorism must remain a priority in the political agendas of the States of the

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<sup>41</sup> Article 60,61 60,61 de La loi N°10- 062 du 30 Décembre 2010, Ibidem.

<sup>42</sup> DANIEL Serge « Al-Qaïda au Maghreb Islamique, l'Industrie de l'Enlèvement », Paris, Fayard, 2012, P. 52

<sup>43</sup> GUILLERMO R. Aureano, « La Lutte Contre le Financement du terrorisme », in « Géopolitique du terrorisme. Quelles menaces ? Quelles solutions ? », Diplomatie GD n°32, avril-mai 2016, p.87.

West African Economic and Monetary Union. It calls for a comprehensive and concerted response that excludes partisan considerations of states. Cooperation must continue to consolidate around terrorism and not around a politico-strategic reality.

## **CONCLUSION:**

In sum, the legal framework for combating the financing of terrorism in Mali and WAEMU is intended to be integrated into the overall anti-money laundering and organized crime to complete and strengthen it. The main strictly controlled instrument in the fight against terrorist financing in the sub-region is cash money. This reflects the nature of the sub region's cash-based economy. The key mechanism is the physical movement of this money. Another common mechanism is found in NGOs charities and legal entities or companies. The last is in the financial institutions' sector. Thus, the Malian legislator has criminalized the financing of terrorism in accordance with international standards and rules. The approach adopted by the legislator is original and specific. This translates into the design and implementation of two distinct but complementary and competing devices. This incrimination, which is particularly extensive, makes it possible to prosecute all those who participate in one way or another in the financing of terrorism as long as they are aware of the use of the funds. It makes it possible to reach the natural persons as well as the legal person accomplices. In order for the terrorist financing offense to be established, it is not necessary that the funds have been used, it is sufficient that funds have been collected for the purpose of committing a terrorist act. In the same logic, the attempt is also constitutive of the offense of financing terrorism. The technic of international judicial cooperation implemented is justified by the transnational nature of the



financing of terrorism which implies a dynamic policy of judicial cooperation at the regional as well as the international level without implying any more the questioning of the national sovereignty. Member States remain solely competent, through the judicial authorities, in particular, to prosecute and punish offenses related to the financing of terrorism.

This much hoped for success certainly depends on the good cooperation of the States of the sub-regions and the international community. At the national and sub-regional levels, it is necessary to put in place an effective governance system that breaks with corruption. Ensure that all citizens can be banked to adopt the electronic money system. This makes the task of the supervisory and fund management bodies more efficient and effective. In addition, States must act in good faith in the implementation of international instruments of cooperation relating to the fight against the financing of terrorism. Let the states face the dangers of terrorism and get rid of the political-strategic divide of the allies when it comes to drying up the resources of terrorism for the security of humanity. Finally, the international community must redouble its efforts to eradicate transcontinental narcotics trafficking, arms smuggling and money laundering. These phenomena favor the financing of terrorism in developing countries. Because the money used in these illegal activities escapes all control and complicates the fight against the financing of terrorism.

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