Protecting the Right to Privacy while combating Terrorist Finance

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I. Introduction

The FATF Recommendations constitute the current international standard for anti-money-laundering and combating the financing of terrorism (AML/CFT). To date the FATF Recommendations do not explicitly require adhering countries to respect human rights in implementing or applying AML/CFT standards. Nor do country-level mutual evaluations and assessments based on the FATF Recommendations assess or consider whether AML/CFT regimes have safeguards for human rights in place. From private conversations with officers involved in country assessments the author knows that assessments bodies have a certain awareness of potential collisions between human rights and AML/CFT rules pertaining to the FATF Recommendations, especially in the field of privacy rights and suspicious transaction reports. The latter is also a matter of concern in the financial industry. The Wolfsberg Group, a leading association of thirteen global banks adopting guidance on AML/CFT, clearly states that any enhanced approach to information-sharing needs data privacy safeguards.

It is respectfully submitted that the credibility of AML/CFT soft law instruments and in particular the FATF Recommendations would greatly benefit if human rights obligations were taken account of in their implementation and application. As international treaty law and state practice demonstrate, diverging and conflicting rules of international law are to be balanced so that both rules can unfold their legitimate effects. This principle is reflected in state practice and in Art. 31(3)(c) of the Vienna Convention of the Law of Treaties. It is suggested that it be considered in the FATF Recommendations and the country assessment procedure of the FATF Recommendations. To this end, it is recommended that country evaluation and assessment bodies namely the FATF and FATF-style regional bodies (FSRBs) as well as the IMF and Worldbank assessment body should consult and cooperate with domestic, regional, and international human rights monitoring bodies such as the UN Human Rights Committee.

It is furthermore recommended that the FATF Recommendations be amended so that they

express openness to striking a balance between human rights and anti-terrorist finance measures. Alternatively, the interpretative notes should clarify that the recommendations be interpreted in a way that respects a balance between human rights and anti-terrorist finance measures.

II. The FATF Recommendations as the International Standard for AML/CFT

Several international instruments combating the illicit flow of money have been translated into national jurisdictions. Depending on each jurisdiction's level of existing regulation, they have done so to different extents. The principal developments in the international law and standards of financial crime have been initiated at the UN and by the Financial Action Task Force (FATF). Security Council resolutions have strongly influenced national AML/CFT frameworks. The sanctions and the listing procedure are regarded to be accepted in international state practice.

The last review of the FATF Recommendations took place in 2012. The new recommendations consider the need to strengthen the general risk-based approach in the face of new and emerging threats. Despite their non-bindingness they have had considerable influence on national law. In particular guidance by the FATF performs a special function as sources of interpretation of domestic law and EU law. National legislators and EU legislation have expressly identified them to perform that function. A salient example is the Fourth Money Laundering Directive which is expressly intended to implement the revised FATF guidance. In *Safe Interenvíos* and *Jyske Bank Gibraltar*[1] the European Court of Justice referred to the FATF Recommendations and the EU Money Laundering Directive, which says in its recital 5 that EU law should be in line with the FATF Recommendations. The Court interpreted the effects of EU legislation on combating money laundering and terrorist financing and said that these are legitimate aims "capable of justifying a barrier to the freedom to provide services." The Court went on to say that such restricting rules have to be balanced against the protection of other interests.

FATF guidance might not be 'international law' but it may become law at national or regional levels when national and regional actors decide to adopt it. The non-binding nature was deliberately chosen in recognition of member states' diverse legal and financial orders. The

[1] *Safe Interenvíos SA vs Liberbank SA et al*., European Court of Justice, 10 March 2016, C-235/14, para. 3 et seq. and para. 102 et seq.

authority of the recommendations is not only indicated through the endorsement by the Executive Boards of the IMF and the World Bank. Overall banking practice also reflects the FATF Recommendations. The UN Security Council, too, invoked the FATF Recommendations in several resolutions; Security Council resolution 1617 of 29 July 2005 was the first to invoke the FATF Recommendations. In this resolution, the Security Council urged member states 'to implement the comprehensive international standards embedded in the 40+9 Recommendations.' The FATF Recommendations, in turn, cross-refer to the UN Conventions and UN Security Council resolutions. With the 2012 review process, that added a risk-based approach, countries are now expected to identify, assess and mitigate risks of money laundering and financing of terrorism.

III. Collision with human rights: example of suspicious transaction reports, customer due diligence, record-keeping

According to FATF Recommendations no. 26 and no. 28 national jurisdictions are expected to institute a comprehensive regulatory and supervisory regime for banks and non-banks, financial institutions, and other bodies particularly susceptible to money laundering (including persons providing formal or informal services for the transfer of funds or value) to deter all forms of money laundering. Such a regime should have requirements for customer identification, record-keeping, and reporting of suspicious transactions.

The language of these rules is openly put, leaving room for states to implement the standards according to their domestic law. Yet, the rules do not explicitly require to take rights of individuals into account, nor do they suggest doing so. They do not clarify what transactions are to be deemed as suspicious. Moreover, they do not specify which customer data should be subject to what kind of identification. If applied in isolation or even driven to the extreme, one could interpret the rules broadly, paving the way for systematic data screening at an extensive range to the extent of data harvesting.

It is therefore an intensive field of legal conflicts between individual rights and AML/CFT frameworks. Even though rules on information exchange are at times qualified by data protection rules in national or regional contexts, the danger of rather extensive interpretation of AML/CFT

rules—and thereby extensive use of data—does not disappear as both AML/CFT rules and data protection rules tend to be rather principle-based.

Indeed AML/CFT rules can interfere with the right to privacy as, for instance, laid down in Art. 17 ICCPR. The right to privacy comprises freedom from unwarranted and unreasonable intrusions into activities that society recognises as belonging to the realm of individual autonomy. It also includes the right to determine when, how and to what extent personal information should be communicated. The collection of information about individuals without their consent will interfere with their private life as will its use, for example, in investigative measures or court proceedings.[2]

IV. Resolving the collision: striking a fair balance between AML/CFT and the right to privacy

The interpretative principle expressed in Art. 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which has attained the status of customary international law, provides a crucial means to address such conflicts.[3] Presupposing the compatibility of different rules of international law,[4] the principle[5] requires a fair balance to be struck between potentially conflicting rules of international law. Conflicts can thereby be avoided as both rules are given effect.

The principle has seen increasing recognition and consideration, in particular in connection with financial security sanctions and financial data transmissions in the context of cross-border law

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[2] See further Human Rights Committee, General Comment 16, no. 10, OECD Privacy Framework, Council of Europe Convention no. 108.

[3] See H. Thirlway, The Law and the Procedure of the International Court of Justice 1960–1989 Supplement, 2006: Part Three (2006) 77 British Yearbook of International Law p. 1, 19.

[4] See *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary objections, International Court of Justice, 26 November 195, I.C.J. Reports 1957, p. 125 (para. 142); see also Georges Pinson (France) v. United Mexican States, 19 Oct. 1928, Recueil des sentences arbitrales, vol. V, p. 327 (422).

[5] The principle is also referred to as the principle of systemic integration, see in detail C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention* (2005) 54 International and Comparative Law Quarterly 279, 280. The principle was emphasised in the ICJ's Oil Platform decision, serving as a bridge between a treaty of friendship and law on the use of force. See *Case concerning Oil Platforms (Islamic Republic of Iran vs United States of America)*, International Court of Justice, 6 November 2003, I.C.J. Reports 2003, p. 161.

enforcement.[6] In *Nada vs Switzerland* the European Court of Human Rights qualified Security Council resolution 1390 as having 'the effect of affording the national authorities a certain flexibility in the mode of implementation of the resolution' for the sake of meeting the requirements of the European Convention on Human Rights. The Court therefore found that in implementing the relevant binding resolution of the UN Security Council states enjoyed some latitude.[7]

The treaties and internationally recognised standards concerned with AML/CFT[8] are therefore presumed to produce effects in accordance with potentially conflicting privacy rights. As the FATF Recommendations do not have the legal quality of treaty obligations, the question might be raised whether Art. 31(3)(c) VCLT is analogously applicable. Being the result of inter-governmental exchange akin to treaty negotiations, the FATF Recommendations can arguably be presumed to produce effects in accordance with other rules of international law, especially as they do not indicate otherwise. As the structure of these rules and standards is rather programmatic, their language is generally broad. They allow for space to adjust them to other conflicting norms by striking a balance. In striking a balance between conflicting norms a clear recognition of the values embodied in the norms in question is indispensable.[9] The special character of individual rights imposing special obligations on states must be taken adequately into account. Unlike other rules of international law, individual rights, or human rights respectively, do not merely protect the reciprocal interest of other signatory states but the rights of individuals. This particular characteristic requires state authorities to interpret human rights obligations in a manner sufficiently favourable to the effective protection of individuals.

Transferring these principles to AML/CFT rules means the following: in requiring banks to identify suspicious customers and to report suspicious transactions, states are obliged to respect

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[6] *G.S.B. vs Switzerland*, European Court of Human Rights, 22 December 2015, application no. 28601/11, paras. 70 and 75 et seq.

[7] *Nada vs Switzerland*, European Court of Human Rights, 12 December 2012, application no. 10593/08, para. 178, the wording 'where appropriate' in Security Council Resolution 1390(2002) was qualified as having 'the effect of affording the national authorities a certain flexibility in the mode of implementation of the resolution' for the sake of meeting the requirements of the ECHR.'

[8] See the Merida Convention, Palermo Convention, SFT Convention. The FATF Recommendations, too, provide respective requirements.

[9] This gives consideration to the principle of effectiveness, see International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*, ILC Yearbook (1966), vol. II, p. 187, 219.

and protect privacy rights of individuals. The risk should be taken into account that too ready an imposition of legal liability would serve to motivate banks not to act for customers involved in certain areas of business which give rise to a general suspicion of money laundering even where there was no information or suspicion that a particular customer was so involved.[10] States are bound to strike a reasonable balance between their duty and aim of ensuring public security and protecting proven rights reflected in data protection rules. In balancing they must give sufficiently favourable weight to bank customers' financial privacy.[11] What this requires and means in practice can therefore only be subject to a case by-case analysis. Similarly, in cooperation between law enforcement authorities and financial intelligence units there is an obligation to give proper consideration to privacy rights by weighing their importance sufficiently favourably.[12] Of course, the aim of ensuring security must be considered. This process of balancing interests will vary in each case. Different standards on privacy rights can make it harder to effectively exchange information in cross-border collaboration. Different legal standards can indeed pose a challenge to the applicability of the principle if several jurisdictions are involved. However, there are various ways and techniques of overcoming that challenge.[13] As international cooperation is key to successful AML/CFT—especially when cross-border issues are involved—states should seek a balance between their respective legal standards on AML/CFT and data protection.

V. Recommendations

The FATF Recommendations should clarify its legal relationship with human rights. As previously argued, the credibility of the combat of terrorist finance would greatly benefit if the FATF Recommendations explicitly expressed respect for human rights. To that end, the FATF Recommendations should explicitly recommend striking a fair balance between human rights

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[10] See *Abou-Rahmah vs Abacha*, EWCA Civ 1492, Lady Justice Arden (2005), para. 82.

[11] See for instance, *G.S.B. vs Switzerland*, *supra*, para. 76.

[12] See *Big Brother Watch and others vs United Kingdom*, European Court of Human Rights, 13 September 2018, application nos. 58170/13, 62322/14 and 24960/15. The ECtHR, for instance, gives guidance on meeting the ECHR's requirements for intelligence sharing, the bulk interception of communications, and the obtaining of communications data from communication service providers.

[13] See further Report of the International Law Commission on Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law, A/CN.4/L.682 13 April 2006, para. 472.

and mechanisms on AML/CFT.

Alternatively, there should be, at least, an interpretative note clarifying that the FATF Recommendations do not deviate from human rights, thereby encouraging adhering countries to strike a balance. The note could say that nothing in the FATF Recommendations shall be construed as restricting or derogating from any international human rights obligation.

It is furthermore recommended that stakeholders such as human rights monitoring bodies be consulted in the evaluation and assessment of countries' compliance with the recommendations. Their expertise could help raise awareness of human rights issues in implementing and applying measures on AML and anti-terrorist finance. It could furthermore lead to monitoring bodies assisting FATF assessments by providing information on countries' adherence to human rights commitments.

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