

Financing of Terrorism – A Predicate Offence to Money Laundering?

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1. Introduction

On 30 October 2001, the Financial Action Task Force on Money Laundering (FATF) agreed to a set of Special Recommendations on Terrorist Financing.¹ Recommendation II provides:

‘Each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations. *Countries should ensure that such offences are designated as money laundering predicate offences.*’ (emphasis added, AJK)

These Special Recommendations were agreed upon at a FATF ‘extraordinary Plenary’, at which the FATF extended its mission beyond money laundering.²

The 11 September 2001 attacks on America triggered drastic legislation aimed at suppressing the financing of terrorism,³ appearing to depart from the legal apparatus, classically used in the fight against money laundering. For instance, the significant part of the USA PATRIOT Act package is the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001. In the Act, the American Congress finds that money laundering permits transnational criminal enterprises to conduct and expand their operations to the detriment and safety of American citizens, and that *money launderers subvert legitimate financial mechanisms and banking relationships by using them as protective covering for the movement of criminal proceeds and the financing of crime and terrorism.*

By making a brief *tour d’horizon* of relevant source materials from international (institutional) organizations, this paper shall address whether, from a methodolo-

¹ FATF news release of 31 October 2001, FATF cracks down on Terrorist Financing (available on the web at < http://www1.oecd.org/fatf/TerFinance_en.htm > .

² See the news release mentioned in *ibid.*

³ Two of the highest profile laws in this category being the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (‘the USA PATRIOT ACT’) and the UK Anti-Terrorism, Crime and Security Act 2001.

gical perspective, it makes sense to legislate to suppress financing of terrorism on the basis of analogies with money laundering.

2. Money laundering

Whilst the *United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances* of 19 December 1988 (‘the Vienna Convention’) created momentum for the attention to money laundering as a global phenomenon,⁴ it only required the prohibition of the ‘laundering’ of *drug proceeds*.⁵ Note that the FATF, in its initial 40 Recommendations of 1990⁶ took the ‘definition’ of money laundering from the Vienna Convention.

The Council of Europe⁷ Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990⁸ (the Strasbourg Convention), takes this a step further, by giving its Article 6 the title: ‘Laundering offences’. Whilst repeating constituent elements already contained in the Vienna Convention, it widens the circle of ‘predicate offences’ beyond drug trafficking. In so far as is relevant for the purposes of this article, it provides that the parties must establish as offences under their domestic laws:

- a. the conversion or transfer of property, knowing that such property is *proceeds* for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the *predicate offence* to evade the legal consequences of his actions;
- b. the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of property, knowing that such property is proceeds and subject to its constitutional principles and the basic concepts of its legal system;
- c. the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds. (emphasis added)

⁴ The term ‘money laundering’ as such seems to have been introduced in the US Money Laundering Control Act of 1986.

⁵ It is noted that the Vienna Convention does not explicitly refer to (the term) money laundering.

⁶ Later in this article, it will be seen that the 1996 revision aimed at widening the scope.

⁷ The Council of Europe should not be mistaken with the European Council. The Council of Europe is an international institutional organization, whereas the European Council is an organ of the European Union.

⁸ Available on the web at <<http://conventions.coe.int/treaty/en/Treaties/Html/141.htm>> .

The Strasbourg Convention defines 'proceeds' as: *any economic advantage from criminal offences*.⁹ It goes on to define 'predicate offence' as: *any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in the 'laundering article'*.¹⁰ This yields an entirely open-ended range of predicate offences, hinging on the definition of 'proceeds' as *any economic advantage from criminal offences*. Perhaps the only limitation is hidden in the fact that it is left to the Member States to incorporate the convention's requirements in their domestic criminal laws, which leaves them discretion to draw the circle themselves.

The Commission of the European Communities labelled the methodology of the Strasbourg Convention: *'an approach to combating the laundering of the proceeds of a wider range of criminal offences than required by the Vienna Convention'* (emphasis added).¹¹

I now turn to the European Union (and the European Communities) itself. The Council of the European Communities Directive of 10 June 1991 on prevention of the financial system for the purpose of money laundering¹² provides:

'Whereas for the purposes of this Directive the definition of money laundering is taken from that adopted in the Vienna Convention; whereas, however, since money laundering occurs not only in relation to the proceeds of drug-related offences but also in relation to the proceeds of other criminal activities (such as organized crime and *terrorism*), the Member States should, within the meaning of their legislation, extend the effects of the Directive to include *the proceeds of such activities*, to the extent that they are likely to result in laundering operations justifying sanctions on that basis.' (emphasis added)

The 1991 Convention thus envisages and recognizes that terrorism is a criminal activity potentially resulting in proceeds in relation to which money laundering may occur. From a logical perspective, however, it seems that this approach presumes the criminal activity preceding the laundering of the proceeds.

In 1996, the FATF strengthened its 4th Recommendation to state that 'each country should extend the offence of drug money laundering to one based on serious offences', done so as to extend the ambit of the predicate offences beyond that of the Vienna Convention.

⁹ Article 1, sub a.

¹⁰ Article 1, sub e.

¹¹ Commission of the European Communities, Proposal for a European Parliament and Council Directive, amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, Brussels, 14 July 1999, COM (1999) 352 final, explanatory memorandum.

¹² OJ 1991 L 166, p 77 *et seq.*

In 1998, under the auspices of the UN Office for Drug Control and Crime Prevention,¹³ the report *Financial Havens, Banking Secrecy and Money Laundering*¹⁴ was published. Under the header 'issues for consideration', this report addresses 'predicate offences'¹⁵:

'The time may have come to end the artificial division of criminal money into categories depending on the nature of the crime. . . . One possible approach would be to have member countries agree that any funds that are derived through criminal activity are funds that can give rise to a charge of money-laundering.'

From the context of the report, it can be inferred that the term 'artificial division' is used to point to distinctions sometimes made between *criminal* tax offences and tax offences classified otherwise.

On 9 December 1999 the General Assembly of the UN adopted the International Convention for the Suppression of the Financing of Terrorism.¹⁶ Article 2 provides, in so far as is relevant here:

'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:

[...]

(b) Any other act [subparagraph (a) refers to acts constituting offences under a list of treaties] 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 so or to abstain from doing any act.

[...]

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).

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

Article 1 paragraph 3 defines 'proceeds' as: any funds derived from or obtained, directly or indirectly, through the commission of an offence set forth in Article 2.

¹³ Based in Vienna, this office created the UN Global Programme against Money Laundering (GPML) and the GPML Forum. See the website mentioned in footnote 14.

¹⁴ Available on the web at < <http://odccp.org/publications.html> > .

¹⁵ At pages 73 and 74

¹⁶ Available on the web at < <http://untreaty.un.org/English/Terrorism/Conv12pdf> > – entry into force was 10 April 2002.

In its Article 8, the Convention refers to ‘proceeds’ by providing, in so far as is relevant here:

1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 *as well as the proceeds derived from such offences*, for purposes of possible forfeiture.
2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 *and the proceeds derived from such offences.*’ (emphasis added).

The Convention does not make any explicit reference to money laundering. The closest it comes to an analogy (if it is one) is in Article 18, which provides:

1. States parties shall co-operate by adapting their domestic legislation, including:
[. . .]
 - (b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:
[. . .]
 - iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith.’

Thus, for instance, proceeds arising, by whatever means, directly or indirectly, unlawfully and wilfully, from *collecting* funds with the intention that they should be used or in the knowledge that they will be used, in full or in part, to carry out a terrorist act are within the scope of the convention. It is not clear how the required element of ‘unlawfulness’ must be related to the collection of funds. It is clearly possible that the method used for collecting funds is not unlawful as such.

On 15 November 2000, the UN General Assembly adopted the United Nations Convention against Transnational Organized Crime.¹⁷ This Convention is intended to close the major loopholes blocking international efforts to crack down on those engaging in illegal activities ranging from money laundering to trafficking in human beings.

¹⁷ Available on the web at <<http://www.odccp.org/palermo/convmain>>.

The Convention contains definitions of a wide range of terms. Thus, for instance, it defines 'serious crime' as: 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.'¹⁸

Article 6 of the new Convention addresses the 'Criminalization of the laundering of proceeds of crime'.¹⁹ The 'definition' of money laundering itself is extended quite a bit further than that in the Vienna Convention of 1988. Notably, in this Article 6, the new Convention provides:

'Each State Party shall seek to apply [...] its definition of money laundering to the widest range of predicate offences;

Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention ...' (parentheses and emphasis added).

It should be added that the new Convention explicitly provides for a so-called dual criminality test.²⁰

Hence, the UN seeks to use and define 'serious crime', as well as 'organized crime'. We are approaching the point of an 'all crimes' ambit of predicate offences. This brings one back to the EU.

On 4 December 2001, the European Parliament and the Council of the European Union adopted the second money laundering prevention directive.²¹

Both the EU Council of Ministers and the European Parliament had called for additional measures to enhance the 1991 EU anti-money laundering Directive.²² On 14 July 1999, the EU Commission presented its proposal²³ (the Proposal). The main changes to the 1991 Directive are a widening of the prohibition of money laundering to embrace not only drugs trafficking but also all organized crime, and an extension of the obligations of the Directive to certain non-financial activities and professions.

It is this 'widening' of the prohibition of money laundering that shall now be the focus of the rest of this paper. The explanatory memorandum expresses it thus:

¹⁸ Art. 2(b).

¹⁹ Thus, this Convention makes an explicit reference to the term 'money laundering'; contrast the absence of such reference in the Vienna Convention of 1988, as was noted *supra*.

²⁰ Thus, offences committed outside the jurisdiction of a party constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the country where it is committed and would be a criminal offence under the domestic law of the party applying the Convention, had it been committed in that party's jurisdiction, viz. Art. 6(2)(c).

²¹ Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, OJ 2001 L 344, p 76 et seq, available on the web at <<http://europa.eu.int/eur-lex/pri/en>> .

²² See, *supra*, note 12

²³ Commission of the European Communities, Proposal for a European Parliament and Council Directive, amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, Brussels, 14 July 1999, COM (1999) 352 final.

'The 1991 Directive only requires the prohibition of the laundering of drugs proceeds, as required by the Vienna Convention, but encourages Member States to apply the approach of the Strasbourg Convention,²⁴ namely of combating the laundering of the proceeds of a wider range of criminal offences (often referred to as 'predicate offences').

The FATF strengthened its relevant recommendation in 1996 to state that 'each country should extend the offence of drug money laundering to one based on *serious offences*'. This corresponds to a growing trend based on the dramatic increase in non-drugs based organised crime and on the realisation that having a wide range of predicate offences should improve suspicious transaction reporting and above all facilitate international co-operation between judicial and police authorities in different countries.' [parentheses and emphasis added]

As to the concrete question whether it would also be appropriate to base the prohibition of money laundering contained in the (updated) Directive on the same concept of 'serious offences' as in the Strasbourg Convention,²⁵ the Commission interestingly distinguishes between, on the one hand, the criminal law treatment of money laundering (i.e., the definition of the crime of money laundering) and, on the other hand, the specific obligation to report suspicions of money laundering as imposed upon the financial sector. It stresses that the Directive addresses the obligations of reporting.

The Commission then writes:

'The anti-money laundering defences thus depend to a large extent on the goodwill and efforts of, in particular, the financial sector. The financial sector has expressed considerable reticence concerning any reporting requirement that would extend to an excessively wide range of offences, even including relatively minor ones.'

Which leads the Commission to conclude:

'The Commission has concluded that for the purposes of the Directive, and its extension to certain non-financial activities, a reporting obligation based on *serious offences* might be too broad. The Commission is therefore proposing that the reporting obligation under the Directive should be based on activities linked to organised crime or damaging the European Communities financial interests.' (emphasis added)

Concretely then, the Proposal now defines 'criminal activity' as encompassing 'participation in activities linked to organised crime', and 'fraud, corruption or any other illegal activity damaging or likely to damage the European Communities' financial interests'.²⁶

²⁴ See, *supra*, note 8.

²⁵ See, *supra*, note 8.

²⁶ Proposal, Article 1(E).

For the Directive, the Commission has knowingly thrown out 'serious offences', and opted instead for: 'organised crime'. In the Proposal, 'organised crime' means exactly what it says: 'involvement of an organised crime group'.²⁷ This clear choice was made in the face of the noticeable 'trend' among the EU Member States to extend their domestic legislation to outlaw the laundering of the proceeds from a wide range of 'serious crime'.²⁸

Conclusion

Where does all this lead? One thing is clear: Money laundering and financing of terrorism are two completely different concepts. As is implied by the term 'laundering', its intent and purpose are to have moneys, derived from crime, assume an apparent legal role in the financial system without this being known to the *bona fide* participants in the financial system. Logically, this presumes the criminal offence preceding the laundering. Ultimately, if the laundering succeeds, it is instrumental in having those taking an interest in the crime enjoy its financial benefits.

Money launderers will seek to hide the funds and their origin from detection. Surely, those contemplating to finance terrorism will strive to hide the funds and their origin devoted to their cause from detection, too. This may well mean that they resort to similar techniques to those used by money launderers. It is precisely here that the strongest analogy between the two phenomena can be seen.

Where financing of terrorism is concerned, possibly no criminal offence preceded the introduction of the funds in the financial system. Of course, there will be criminal intent, but it makes no sense to construe the funds used to promote the cause as the 'proceeds' of that criminal intent.

Arguably, money laundering, to some extent, engenders the predicate offences. Clearly, few would commit predicate offences if they did not perceive an opportunity to ultimately derive the monetary benefit therefrom. Money laundering, however, does not occur so as to bring about, or facilitate the criminal offence itself (although, of course, some proceeds may be used to finance criminal operations).

It is suggested that it makes no sense to designate the financing of terrorism as a money laundering predicate offence. Rather, it should be recognized and distinguished as a separate category. This is not to say that, in legislating for the consequences of cases involving the financing of terrorism, one should not draw upon inferences taken and developed from the classical money laundering apparatus.

²⁷ Proposal, explanatory memorandum, p. 7.

²⁸ See European Commission, *Second Commission Report to the European Parliament and the Council on the implementation of the Money Laundering Directive*, XV/1116/97-rev.2 – En, III, 2