Balancing privacy and public interest in the fight against illicit financial flows: lessons from an European case study

Roomen, T.R. van; de Jonge, B.

Journal of Economic Criminology 5 (2024) 100093

Contents lists available at ScienceDirect

Journal of Economic Criminology

journal homepage: www.journals.elsevier.com/journal-of-economic-criminology

Balancing privacy and public interest in the fight against illicit financial flows: Lessons from an European Case Study

T.R. van Roomen[a], B. de Jonge[b,*]

[a] Vrije Universiteit Amsterdam, the Netherlands
[b] Leiden University, the Netherlands

ARTICLE INFO

Keywords:
Illicit financial flows
Human rights
Organized crime
International cooperation
Cross-border data-gathering
Privacy rights
Human security

ABSTRACT

Illicit Financial Flows (IFF) – such as corruption and money laundering – have a significant negative impact on the enjoyment of human rights. Combating IFF is an integral part of the 2030 Agenda for Sustainable Development. SDG 16 explicitly promulgates the relation between the rule of law, social security and the fight against IFF. Cross-border data access and exchange by enforcement authorities is crucial to map and disrupt IFF, punish suspects and take away their criminally earned assets. At the same time, human rights restrain national enforcement authorities when combatting IFF. States must abstain from undue interference with individuals' privacy rights, such as the storage of information relating to an individual's private life and the sharing of such information. Pursuant to article 8 ECHR, interference with the right to respect for private – in accordance with the law – is only permissible if this is necessary in a democratic society, e.g. in the interests of national security and public safety. In this article we explore the balance between individual rights and states' responsibilities in the fight against IFF; between privacy and the common good of fighting bad money. To what extent may privacy concerns be an obstacle to investigate global IFF? Our conclusion is that there is an imbalance. We suggest that human dignity and human security should be given more weight in the balancing of human rights in this context.

1. Introduction

Serious organized crime and white-collar crime are aimed at financial gain. Illicit financial flows (IFF) lie at the core of criminal revenue models. They may involve money obtained illegally (e.g. from corruption, human trafficking, arms trafficking or drug trafficking), transferred illegally (e.g. tax evasion) and/or allocated illegally (e.g. terrorism financing).[1] IFF often have an international dimension and are crucial enablers for countless other serious crime.

The estimated yearly volume of illicit flows is ranging between $2 trillion and $3.5 trillion, representing between 2 % and 3 % of the global GDP.[2] At the same time, Europol's Asset Recovery Unit, in cooperation with the Asset Recovery Offices of EU Member States, roughly calculate that 2 %[3] of the estimated proceeds of crime were provisionally seized or frozen, and 1 % of the criminal profits were finally confiscated. In other words, crime still pays.

Pursuant to treaty obligations and policy commitments, investigative and enforcement authorities try to map and disrupt these

* Corresponding author.
E-mail address: b.de.jonge@law.leidenuniv.nl (B. de Jonge).

[1] In this article we use the most common definition, as used by the World Bank and Global Financial Integrity (GFI): *funds illegally earned, transferred or used that cross borders*. See 'Illicit Financial Flows (IFFs), (*The World Bank*, 1 July 2017) ⟨https://www.worldbank.org/en/topic/financialsector/brief/illicit-financial-flows-iffs⟩ accessed 5 November 2023; 'Illicit Financial Flows' (*Global Financial Integrity*) ⟨https://gfintegrity.org/issue/illicit-financial-flows/⟩ accessed 5 November 2023. See also Peter Reuter, 'Illicit financial flows and governance: The importance of disaggregation', (Report: Background Paper) 2017.

[2] United Nations, 'UNODC estimates that criminals may have laundered US $ 1.6 trillion in 2009', (2011), ⟨https://www.unodc.org/unodc/en/press/releases/2011/October/unodc-estimates-that-criminals-may-have-laundered-usdollar-1.6-trillion-in-2009.html⟩ accessed 5 November 2023; 'Illicit Financial Flows to and from Developing Countries: 2005–2014', Global Financial Integrity, GFI-IFF-Report-2017_final.pdf (gfintegrity.org) > accessed 20 June 2024; Ferwerda, J., van Saase, A., Unger, B. et al. Estimating money laundering flows with a gravity model-based simulation. *Sci Rep* 10, 18552 (2020), see ⟨https://rdcu.be/dLomK⟩ accessed 20 June 2024. See also UNCTAD, 'First-ever official data on illicit financial flows now available' (8 June 2023) ⟨https://unctad.org/news/first-ever-official-data-illicit-financial-flows-now-available⟩ accessed 5 november 2023.

[3] Europol, 'European Financial and Economic Crime Threat Assessment – The other side of the coin: An analysis of Financial and Economic Crime', (13 December 2023) ⟨https://www.europol.europa.eu/publications-events/publications/other-side-of-coin-analysis-of-financial-and-economic-crime⟩, accessed 5 November 2023.

https://doi.org/10.1016/j.jeconc.2024.100093
Received 9 March 2024; Received in revised form 30 August 2024; Accepted 2 September 2024

money flows, punish suspects and take away their criminally earned assets. However, this is not an easy task. While the movement of money is not bound by national borders – e.g. organized crime can increasingly make use of digital avenues to facilitate cross-border IFF-related activities – extraterritorial investigation is. There are legal and practical obstacles in cross-border evidence gathering in criminal matters, including hurdles because of the lack of harmonization of national IFF-related laws and differentiation of the so-called privacy space, including financial transparency.[4]

IFF-related crime is sometimes regarded as victimless-crime, because it has no direct identifiable victim.[5] Crime that enables IFF generally does not constitute itself a direct violation of human rights. However, over the last decades, both at international and national levels there appears to be a growing awareness and consensus on the urgency to combat IFF for enforcement of the rule of law and to protect and to fulfil human rights.[6] IFF and IFF-related crime causes serious harm to the population as a whole, especially to economically and socially vulnerable groups of citizens, and these crimes do have a negative impact on the enjoyment of human rights.[7]

Human rights treaty obligations and policy commitments for states to refrain from interfering with individuals' privacy can be at odds with treaty obligations and policy commitments for states to combat IFF. For instance, the so-called privacy space (including data protection rules) can obstruct cross-border data-gathering in fighting IFF, as we show below. At the same time, cross-border data-gathering without the necessary safeguards can result in violations of privacy rules.

The main purpose of this article is to examine the added value of the human rights perspective in the fight against IFF, more specifically in relation to the international and national legal-normative frameworks for cross-border data-gathering in these type of criminal investigations.

This article is the result of an extensive study of legislation, case law and existing legal literature. In addition, unstructured expert interviews were conducted in order to validate our preliminary findings based on literature study.[8]

Following an introductory session (Section 2) on the international commitments to tackle IFF, the next session (Section 3) focus on the role of human rights policies in combating IFF. Because of several country-specific characteristics, in a separate section (Section 4) we dive deeper into the translation of international commitments into Dutch criminal investigation practice today, including challenges for cross-border data-gathering. A separate section (Section 5) sets out the state obligations that may conflict and identify the most striking points of interest in balancing human rights in combating IFF. Finally (Section 6) we assess whether a human rights-based approach would be helpful in developing a legal-normative framework for combating IFF, including in the field of cross-border data-gathering.

2. IFF treaty obligations and policy commitments

Since the 1990s global efforts in combating IFF have substantially increased. Many international legal and policy anti-IFF instruments have been adopted by various multilateral institutions. These instruments contain significant commitments for states to combat IFF, including through international cooperation such as information exchange. For this article – in particular our case study concerning the Netherlands – the instruments established by the United Nations (UN), the Council of Europe (CoE), the European Parliament, G20, Financial Action Task Force (FATF) and the Organisation for Economic Co-operation and Development (OECD) are of particular interest.[9]

A distinction can be made between obligations arising from treaties and other legal instruments on the one hand and policy commitments on the other hand. An overview of the most relevant applicable international effort obligations[10] for the Netherlands is given below.

2.1. Legal instruments

The key UN instruments that establish obligations – including in relation to international cooperation – to combat IFF are the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*[11], the *International Convention for the Suppression of the Financing of Terrorism*[12], the *Convention against Transnational Organized Crime* (UNTOC)[13] and the *Convention against Corruption* (UNCAC).[14] These conventions have in common that they require states to criminalize IFF-related serious crime (e.g. money laundering, corruption, terrorist financing) and to assist each other in cross-border criminal matters.[15] UNTOC includes both corruption (Article 8) and money laundering

[4] Dimitris Ziouvas, 'International Asset recovery and the United Nations Convention against Corruption', in Colin King, Clive Walker, Jimmy Gurule (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Vol. 1, Springer International Publishing AG 2018) 592.

In her PhD research at Vrije Universiteit Amsterdam, Van Roomen will conduct research on how the current practical and legal-normative frameworks for international criminal cooperation in cross-border gathering of evidence related to IFF can be improved from the point of view of both effectiveness and lawfulness.

[5] A term used to describe criminal offences where there is no complainant and no readily recognizable victim, also see Victimless crime - Oxford Reference > accessed 20 June 2024. Brigitte Unger, 'Money laundering regulation: from Al Capone to Al Qaeda', in Brigitte Unger & Daan van der Linde (eds), *Research Handbook on Money Laundering* (Edward Elgar Publishing 2013) 615–617.

[6] Moyo argues how the failure to adopt measure to combat corruption may lead to state responsibility under human rights obligations. Khulekani Moyo, 'Corruption, human rights and extraterritorial obligations', in: Mark Gibney, Gamze Erdem Türkelli, Markus Krajewski and Wouter Vandenhole (eds), *The Routledge handbook on extraterritorial human rights obligations* (2022) 322.

[7] Ibid. See also UNGA 'Research-based study on the impact of flow of funds of illicit origin and the non-repatriation thereof to the countries of origin on the enjoyment of human rights, including economic, social and cultural rights', 9 Augustus 2017, A/HRC/36/52.

[8] In this study we made use of convenience sampling, meaning that the participants were in professional proximity to the researcher. Van Roomen conducted 15 interviews with representatives from the Netherlands Public Prosecution Service and the Netherlands Ministry of Justice and Security. Participants provided written informed consent for their interviews to be audio-recorded and for data to be used in this study.

[9] See e.g. Jorum Duri, 'Overview of international commitments on corruption and illicit finance', (Transparency International, 12 February 2021), <https://knowledgehub.transparency.org/helpdesk/overview-of-international-commitments-on-corruption-and-illicit-finance> accessed 6 November 2023.

[10] Please note that this list is not exhaustive. The scope is limited to criminal law instruments, focusing on international cooperation in combating IFF.

[11] Convention against illicit traffic in narcotic drugs and psychotropic substances, (adopted 20 December 1988, entered into force 11 November 1990), 1582 UNTS 95.

[12] Convention for the suppression of the financing of terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.

[13] Convention against transnational organized crime, (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209. UNTOC is the main international instrument in the fight against transnational organized crime.

[14] Convention against corruption, (adopted 31 October 2003, entered into force 14 December 2005), 2349 UNTS 41.

[15] As Moiseienko rightly stipulates that there is no binding treaty rule that prohibits the facilitation of money laundering. He argues that this prohibition has become part of customary international law, triggering state responsibility whenever no adequate measures are taken by the state. See Anton Moiseienko, 'Does international law prohibit the facilitation of money laundering?', (Vol. 36/1, Leiden Journal of International Law 2023) <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/does-international-law-prohibit-the-facilitation-of-money-laundering/D1D8710EEFC8ECEB7A269A15D775509A#> accessed on 6 November 2023.

(Article 6) as core crimes.[16] UNTOC becomes applicable only when money laundering or corruption offences are transnational in nature and involve an organized criminal group. Most transnational corruption and money-laundering cases will indeed relate to criminality committed in an organized form, either i.e. either serious organized crime or white-collar crime.

The UN General Assembly has introduced the Resolution on the *Promotion of international cooperation to combat illicit financial flows and strengthen good practices on assets return to foster sustainable development.*[17] The resolution calls upon states to cooperate in the areas of mutual legal assistance and the automatic exchange of financial account information. Furthermore, the resolution recognizes the importance of enhanced capacity for data collection and analysis to combat IFF, emphasizing the need to increase cross-border data exchange.

The CoE has adopted the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*[18], the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism*[19], the *Criminal Law Convention on Corruption*[20] and the *Convention on Cybercrime.*[21] The preambles of the former two conventions call for the use of *"modern and effective methods on an international scale".* The latter two conventions state in their preamble that an effective fight against corruption and cybercrime – respectively – requires increased, rapid and well-functioning international co-operation in criminal matters. The CoE conventions, except for the Convention on Cybercrime, also include provisions to the effect that bank secrecy shall not be invoked as a ground to refuse any international co-operation.

The EU[22] has adopted six *Anti-Money Laundering and Terrorist Financing Directives*[23], the *Transfer of Funds Regulation*[24] and the *Directive on the exchange of information between the law enforcement authorities of Member States*[25] and presented proposals for a *Regulation on information accompanying transfers of funds and certain crypto-assets (recast)*[26] and a *Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.*[27] In these instruments, the EU calls upon states to intensify international cooperation – also with relevant third countries – in order to strengthen transparency and information sharing.As for the OECD, the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* and the *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*[28] are of utmost importance. The Recommendation was originally adopted by the OECD Council on 26 November 2009, succeeding the 1997 Revised Recommendation. It contains extensive paragraphs on international cooperation and calls upon states to consider, in a manner consistent with national laws and relevant treaties and arrangements, complementary forms of international exchange of information through other mechanisms. These mechanisms encompass facilitating (a) exchange of financial intelligence by Financial Intelligence Units (FIUs); (b) exchange of tax information; (c) exchange of information with financial regulators; and (d) cooperation, as appropriate, within relevant international and regional networks.

Other than de obligation to create certain domestic criminal offenses, the terms of the conventions are extremely permissive. Further cooperation is encouraged, but respect for sovereignty reigns supreme in the language of the conventions. At the same time, more and more instruments are being developed in relation to combating IFF that aim to promote international cooperation in this respect. Also, some legal instruments are incorporating supervisory mechanisms, see OECD's country reports on the implementation of the OECD Anti-Bribery Convention[29] and GRECO's evaluation reports on the implementation of the CoE Criminal Law Convention on Corruption.[30]

2.2. Policy commitments

In addition to the aforementioned legal instruments, there is a wide range of international policy commitments aimed at combating IFF.

The G20 has also introduced policy commitments in relation to IFF. In 2013 the G20 launched the *High-Level Principles on Mutual Legal Assistance.*[31] Furthermore, as of 2010 the G20 published eight *Anti-Corruption Action Plans*[32], with the most recent being the G20 *Anti-*

[16] Corruption can be the source of IFF and an enabler of money laundering, while money laundering allows for the proceeds of corruption to be concealed and used.

[17] United Nations General Assembly (UNGA) Resolution on the Promotion of international cooperation to combat illicit financial flows and strengthen good practices on assets return to foster sustainable development (2021) UN Doc A/RES/76/196.

[18] Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, (adopted 8 November 1990, entered into force 9 September 1993), CETS 141.

[19] Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, (adopted 16 May 2005, entered into force 1 May 2008), CETS 198.

[20] Criminal Law convention on Corruption (adopted 27 January 1999, adopted 1 July 2002) CETS 173.

[21] Convention on Cybercrime, (adopted on 23 november 2001, entered into force 1 July 2004) CETS 185. Article 26 includes provisions on spontaneous information exchange between state parties.

[22] CoE, 'Committee of Experts on the Evaluation of Anti-money Laundering measures and the Financing of Terrorism', 〈https://www.coe.int/en/web/moneyval/home〉 accessed 6 November 2023; EC, 'EU context of anti-money laundering and countering the financing of terrorism' 〈https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-countering-financing-terrorism_en#legal〉 accessed 6 November 2023. See also EC, 'Types of legislation', 〈https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en#:~:text=Directives,how%20to%20reach%20these%20goals〉, accessed 6 November 2023.

[23] EC, 'EU context of anti-money laundering and countering the financing of terrorism' 〈https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-countering-financing-terrorism_en#legal〉 accessed 6 November 2023.

[24] Council regulation (EU) 2015/847 on information accompanying transfers of funds and repealing regulation (EC) 1781/2006. [2005] OJ L 141/1. The Regulation was adopted to enhance the traceability of transfers funds by requiring payment service providers to ensure transmission of information on the payer and payee throughout the payment chain, to prevent, detect and investigate possible misuse of funds for money laundering and terrorist financing.

[25] Council Directive (EU) 2023/977 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA [2023] OJ L 134/1.

[26] Commission, 'Proposal for a regulation of the European Parliament and of the council on information accompanying transfers of funds and certain crypto-assets (recast)' COM (2021) 422 final.

[27] Commission, 'Proposal for regulation of the European Parliament and of the council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing', COM (2021) 420 final.

[28] OECD, 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions', OECD/LEGAL/0378.

[29] OECD, 'Country reports on the implementation of the OECD Anti-Bribery Convention', 〈https://www.oecd.org/corruption/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm〉, accessed 11 November 2023.

[30] CoE, 'Group of Stations against corruption Evaluations', 〈https://www.coe.int/en/web/greco/evaluations〉, accessed 11 November 2023.

[31] UNODC, 'G20 high-level principles on mutual legal assistance', (OECD 2021) 〈https://www.unodc.org/documents/corruption/G20-Anti-Corruption-Resources/Principles/2013_G20_High-Level_Principles_on_Mutual_Legal_Assistance.pdf〉 accessed 7 November 2023.

[32] UNODC, 'G20 Anti-Corruption resources', 〈https://www.unodc.org/unodc/en/corruption/g20-anti-corruption-resources/by-presidency.html〉, accessed 8 November 2023.

Corruption Action Plan 2022–2024.[33] In the latter, the G20 emphasis its commitment to promote enhanced law enforcement cooperation and information-sharing among competent authorities to trace, freeze and confiscate proceeds of crime, and to promote the denial of safe havens.

The intergovernmental Financial Action Task Force (FATF) focuses on global prevention and combat of money laundering, terrorist financing and other related threats to the integrity of the international financial system. FATF's *Forty Recommendations* (2012) contain objectives covering a range of requirements related to international cooperation, including mutual legal assistance and cross-border asset freezing and confiscation.[34] Recommendation 40 states that countries should ensure that their competent authorities can rapidly, constructively and effectively provide the widest range of international co-operation in relation to money laundering, associated predicate offences and terrorist financing. The 2012 FATF *Operational Issues Financial Investigations Guidance* includes additional practical recommendations and best practices on international cooperation.[35] In 2017, FATF published its *Consolidated FATF standards on information sharing*.[36] FATF standards are 'de facto' global norms. According to the European Commission, FATF is "*the international standard setter in the fight against money laundering and terrorist financing.*"[37]

In 2015, countering IFF was included in the UN Sustainable Development Goals[38]: "*Without peace, stability, human rights and effective governance, based on the rule of law we cannot hope for sustainable development. Reducing illicit financial flows and corruption are key to this process.*"[39]; SDG 16 on "*peace, justice and strong institutions*" includes the following two targets;

- by 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime (16.4) and
- substantially reduce corruption and bribery in all their forms (16.5).

Combating IFF is thus an integral part of the 2030 Agenda for Sustainable Development. The Addis Ababa Action Agenda[40] calls for redoubling efforts to substantially reduce IFF by 2030, with the aim of eventually eliminating them. Regarding the further strengthening and effective use of domestic resources, the Agenda states that the state representatives "*will strive to eliminate safe havens*" and "*strengthen international cooperation and national institutions to combat money-laundering and financing of terrorism.*" Transparency International's SDG 16 Spotlight Reporting Initiative assesses national progress towards SDG 16, including targets 16.4[41] and 16.5.[42]

Because policy commitments are non-binding and do not require a wide international consensus for its adoption, it has enabled a group of (largely) Western states in particular to promote what they regard as best practice as a guide for other states to follow. Some policy commitments are incorporating supervisory mechanisms, e.g. FATF's mutual evaluation reports.[43]

3. The link between IFF and human rights

3.1. The rationale for international efforts to curb IFF

It follows from the previous section that state obligations to combat IFF arise from both IFF-related legal instruments and policy commitments. The main goal of combating IFF internationally is the protection of human rights and principles. It is evident from various studies and reports[44] that IFF deprive governments of resources required to realize economic, social, and cultural rights (ESCR) and undermine efforts to establish effective institutions to uphold civil and political rights (CPR) and the rule of law. IFF – such as corruption and money laundering – has a negative impact on the enjoyment of human rights.[45] In this context, reference can also be made to SDG 16, which explicitly promulgates the relation between the rule of law, social security and the fight against IFF and corruption. Also, Goal 16 includes states commitments to "*ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements*" (16.10) and to "*strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime*" (16.A).

A further link between IFF and human rights relates to the profits that flow from human rights abuses by the commitment of predicate

[33] UNODC, 'G20 Anti-corruption working group. Anti-corruption action plan 2022–2024', (2021), ⟨https://www.unodc.org/documents/corruption/G20-Anti-Corruption-Resources/Action-Plans-and-Implementation-Plans/2021_G20_Anti-Corruption_Action_Plan_2022-2024.pdf⟩, accessed 8 November 2023.

[34] FATF, 'International Standards on combating Money Laundering and the Financing of Terrorism & proliferation', (November 2023), ⟨https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html⟩, accessed 8 November 2023.

[35] Operational Issues - Financial Investigations Guidance (fatf-gafi.org).

[36] FATF, 'Consolidated FATF Standards on Information Sharing', ⟨www.fatf-gafi.org/publications/fatfrecommendations/documents/consolidated-fatf-standard-information-sharing.html⟩. accessed 10 November 2023. In chapter V it is emphasized that law enforcement " *should be able to exchange domestically available information with foreign counterparts for intelligence or investigative purposes relating to money laundering, associated predicate offences or terrorist financing, including the identification and tracing of the proceeds and instrumentalities of crime.*"

[37] Money laundering - European Commission (europa.eu) > accessed 20 June 2024.

[38] On 1 January 2016, the 17 Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development — adopted by world leaders in September 2015 at an historic UN Summit — officially came into force.

[39] UN, 'Peace, Justice and Strong Institutions', ⟨https://www.un.org/en/academic-impact/page/peace-justice-and-strong-institutions⟩, accessed 10 November 2023.

[40] United Nations, 'Addis Adaba action agenda of the third International conference on Financing for development', (Third International Conference, Ethiopia 13–16 July 2015) ⟨https://sustainabledevelopment.un.org/content/documents/2051AAAA_Outcome.pdf⟩ accessed 10 November 2023.

[41] See Transparency International, 'Targets – Organised Crime and Illicit flows', ⟨https://sdg16.transparency.org/targets/16-4⟩ accessed 10 November 2023.

[42] See Transparency International, 'Targets – Corruption and bribery' ⟨https://sdg16.transparency.org/targets/16-5⟩ accessed 10 November 2023.

[43] FATF mutual evaluations are in-depth country reports analysing the implementation and effectiveness of measures to combat money laundering and terrorist financing. See FATF, 'Mutual evaluations', ⟨https://www.fatf-gafi.org/en/publications/Mutualevaluations/More-about-mutual-evaluations.html⟩ accessed 10 November 2023.

[44] Illicit Financial Flows, Sovereign Debt, and Human Rights | Sovereign Debt and Human Rights | Oxford Academic (oup.com) > accessed 10 November 2023. Also see the following initiatives: COMCRIM - COMCRIM - Maastricht University and Corruption and Human Rights Initiative > accessed 10 November 2023.

[45] UNCTAD, 'Economic Development in Africa: Tackling Illicit Financial Flows for Sustainable Development in Africa', (20 July 2020), TD/B/67/3. UNGA, Report of the Secretary-General on the post-2015 Agenda 'The Road to Dignity by 2030: Ending poverty, Transforming all lives and protecting the planet', (4 December 2014) UN DOC A/69/700. UNGA, 'Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights', (15 January 2016), A/HRC/31/61. GFI, 'Illicit Financial Flows, Human Rights, and the Post-2015 Development Agenda', (Global Financial Integrity, October 2014) ⟨https://www.gfintegrity.org/wp-content/uploads/2016/12/IFFs-HR-Post-2015DevAgenda.pdf⟩ accessed 25 November 2023.

crimes, such as grand corruption.[46] In fact, it has even been suggested both in literature and policy that human rights abuses in supply chains of companies could qualify the turnover as illegal proceeds from a crime.[47]

The relationship between IFF and human rights is only beginning to be seriously examined. Ongoing research argues that IFF disables a State from meeting its obligations to respect, fulfill, and protect the human rights of its citizens. At the same time, these individual rights can lead to obstacles for national enforcement authorities to effectively combat IFF.[48]

3.2. Human rights

Human rights are shared by states that recognize that government power is limited by the right to the protection of human dignity, i.e. by states under the rule of law or states that consider themselves bound by the rule of law. There are both legally binding (treaties: the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR)) and policy human rights instruments (Universal Declaration of Human Rights), which enjoy wide recognition. In international human rights law, the ideological normative foundation is universality.[49] As for the Netherlands, the ECHR is of utmost importance.

One of the most important rights in the context of this paper is the right to privacy. Article 8 ECHR (*Right to respect for private and family life*) states the following:

1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The definition of the right in the first paragraph is complemented by a second paragraph that limits the scope of the right to privacy by authorizing 'interference'. In its judgments the European Court of Human Rights (ECtHR) have stated frequently that "[t]*he essential object of Article 8 is to protect the individual against arbitrary interference by public authorities.*"[50]; One of the aspects of 'respect' that has been highlighted in the case law is the rule of law, one of the fundamental principles of a democratic society. The State must not only abstain from interference with private and family life, but it must also protect individuals from infringements of their right to private and family life that are attributable to others.

The interpretation of article 8 is "*underpinned by the notions of personal autonomy and quality of life.*"[51]; According to the Court's case law, private life encompasses "*a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without interference, of the personality of each individual in his relations with other human beings.*"[52]; Also, the storage of information relating to an individual's private life and the release of such information is governed by article 8.[53] The right to private life protects individuals against disclosure of information concerning them that is in the possession of public authorities.[54]

An interference with article 8 must be 'in accordance with the law', i.e. authorized by a rule recognized in the national legal order. According to William A. Schabas, this includes "'*written law', including various forms of delegated legislation, and unwritten law as interpreted and applied by courts.*" Interference with family and private life, home and correspondence is only permissible if there is a legitimate purpose or aim. Article 8(2) includes a list large enough to cover most government activity. The objective of the 'necessary in a democratic society test' is to consider whether the authorities have struck a fair balance between the competing interests of the individual and of society as a whole. States do have a margin of appreciation – national authorities make the assessment of the necessity of the interference. However, the final assessment of necessity remains subject to review by the ECtHR.

3.3. Human dignity and human security

The rule of law is the implementation mechanism for human rights, turning them from a principle into a reality.[55] In this so-called 'thick' version of the rule of law, which we also advocate in this article, it is held that correct procedure alone cannot bring about 'just outcomes' because the substance of those outcomes matters as much as how they are arrived at.[56] Just outcomes must be reflective of the rights and duties conveyed by existing international treaties and national obligations related to human rights.[57] This thick' understanding of the rule of law resonates strongly in UN human rights instruments.[58]

As follows from the previous section, national authorities must balance the right of the individual against the interest if the State and

[46] See for instance: International Council on Human Rights policy (ICHRP), 'Corruption and Human Rights: Making the Connection', (Versoix 2009) and – for a critical note – Martine Boersma and Hans Nelen (eds.), *Corruption and Human Rights: Interdisciplinary Perspective*, (Intersentia 2010), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1116&context=jil. Working Paper 20: Corruption and human rights | Basel Institute on Governance (baselgovernance.org), Conceptualising Corruption as a Violation of Human Rights in Indonesia: An Introduction | Groningen Centre for Health Law | Rijksuniversiteit Groningen (rug.nl).

[47] See for instance: Kalle. Rose, 'Introducing the 11th principle of the United Nations Global Compact to fulfill sustainability aim: The benefits by including Anti-money laundering' (2019) CBS Law 〈https://research.cbs.dk/en/publications/introducing-the-11th-principle-of-the-united-nations-global-compa〉 accessed 20 November 2023; S. Visser and R.A. Regtering, 'Ondernemen met oog voor mens, milieu en maatschappij: van nobel streven tot witwassen', (2023) (2) TBS&H 〈https://www.bjutijdschriften.nl/tijdschrift/TBSH/2023/2/TBSenH_2295-6700_2023_009_002_002.pdf〉 accessed 20 November 2023. See also Arun Srivastava, Jonathan Pickworth, Nina Moffatt, Konstantin Burkov, Gesa Bukowski and William Knox, 'Compliance officer bulletin: Money laundering and financial crime' (Paul Hastings, 1 December 2021) 〈https://www.paulhastings.com/insights/client-alerts/compliance-officer-bulletin-money-laundering-and-financial-crime-2021〉 accessed 28 November 2023.

[48] See e.g. James Thuo Gathii, Defining the Relationship between Corruption and Human Rights (February 13, 2010). University of Pennsylvania Journal of International Law, Vol. 31, No. 125, 2009, Albany Law School Research Paper No. 33, Available at SSRN: https://ssrn.com/abstract=1342649.

[49] M. Milanovic, *Extraterritorial application of human rights treaties*, Oxford University Press, 2011.

[50] P. and S. v. Poland, no. 57375/08, § 94, 30 October 2012; Nunez v. Norway, no. 55597/09, § 68, 28 June 2011.

[51] Pretty v. the United Kingdom, no. 2346/02, §§ 61 *in fine* and 65. See William A. Schabas, The European Convention on Human Rights. A commentary, Oxford University Press, Oxford, 2017 (Paperback), p. 358–411.

[52] Costello-Roberts v. the United Kingdom, 25 March 1993, § 36, Series A no 247-C.

[53] Leander v. Sweden, 26 March 1987, § 48, Series A no. 116.

[54] C.C. v. Spain, no. 1425/06, § 33, 6 October 2009.

[55] United Nations, 'Rule of Law and Human Rights' 〈https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/〉, accessed 20 November 2023.

[56] Well-known American legal philosopher Ronald Dworkin advocates for this thick conception of the rule of law. On the contrary, the thin version of the rule of law is often narrowly defined as being upheld when formal procedures and requirements have been satisfied.

[57] Erwin van Veen, 'A shotgun marriage: Rule of law in fragile societies', (Clingendael, 22 June 2017), 〈https://www.clingendael.org/publication/shotgun-marriage-rule-law-fragile-societies〉 accessed 20 November 2023; David Marshall (ed), 'The international Rule of Law Movement: A crisis of legitimacy and the Way Forward', (Human Rights Program, Harvard Law School 2014).

[58] Consider for example the Universal Declaration of Human Rights.

the society that it represents. Finding the right balance in balancing is a delicate task.

Human rights law recognize the principle that every human being is equal in dignity and therefore deserves the same protection. Human dignity is an underlying value in the interpretation and application of human rights law. Both ESCR and CPR "*require resources, both can involve violations, both require adaptation and often transformation of institutions and practices, and both are essential for human dignity.*"[59]

Security, in the form of public or national security, appears as a legitimate aim that justifies restrictions upon some human rights. Scheinin rightly stipulates that "*The right to the security of the human person, closely associated with the right to the liberty of person, as well as the right to social security, are worth attention and respect, and can contribute to the humanisation of the security discourse.*"[60]; This is called the notion of human security.

International and regional human rights treaties either specifically enshrine a right to human dignity or, more commonly, reflect in varying ways the close link between dignity and the full range of ESCR and CPR. Or, as Foster puts it, "*if you dig deep enough through other principles, you eventually hit dignity*".[61] There are references to – but not definitions of – both human dignity and human security in the preambles and some articles of the UDHR and the ESCR and CPR Covenants. Although the European Convention on Human Rights makes no explicit mention to of human dignity, the ECtHR has stated that "*the very essence of the Convention is respect for human dignity and human freedom*".[62]

A human rights approach to security would then call for humanisation of the security discourse by asking how can better security delivered to the population as a whole. The notion of human dignity can function both as a shield against State intrusion on dignity and as a rationale for State action to protect it.

Making a parallel with the discourse relating to the fight against IFF, the notions of human dignity and human security together can contribute as a guiding criterion for policymakers and enforcement agencies when drafting and executing IFF-policies.

4. Challenges to effectively fight IFF in the Netherlands

4.1. Country profile

It follows from the above that countering IFF is expected to strengthen the maintenance of human rights and to the rule of law.[63] Assuming that a link between IFF and human rights could be established, the question then arises how this discourse can have real practical consequences for the national fulfillment of anti-IFF treaty obligations and policy commitments. Promoting a human rights approach that uses the notions of human dignity and human security is one way to take further these policies. Before we make an attempt to do so, we will use the Netherlands as a case-study to map the challenges for international cooperation in the fight against IFF.

The Netherlands is a key logistics, financial, legal and digital hub in Europe. This comes with a downside: criminals use the Netherlands infrastructure in their illegal activities, i.e. by obtaining, transferring and allocating IFF.[64] The foregoing makes the Netherlands a relevant country to zoom in on with regard to the fight against IFF.

The Netherlands is characterized as an open trade-oriented economy and one of the world largest exporters.[65] According to figures of Statistics Netherlands (CBS), one-third of Dutch GDP is earned from exports of goods and services.[66] Another characteristic of the Netherlands is the historically societal tolerance with regard to drug use and trade. For several decades, both national and international studies have shown that criminal networks based in the Netherlands play an important role in the international production of synthetic drugs and cannabis and trade in narcotics. Nowadays, the Netherlands even appears to be a major cocaine hub in Europe.[67] There also seems to be an increase in the associated IFF, via cryptocurrencies and underground banking.[68]

FATF concluded in its 2022 Netherlands' evaluation report that fraud and drug related offences account for more than 90 % of all proceeds of crime.[69] The Netherlands 2020 National Risk Assessment on Money Laundering[70] (NRA 2020) describes the fifteen largest threats regarding money laundering in the Netherlands, including money laundering via structures by trust offices, offshore companies, legal entities, dealers of high value services/goods, trade-based constructions involving services, crypto currencies and underground banking.[71]

FIU-the Netherlands and the Dutch Public Prosecution Service (PPS) recently announced that the phenomenon of international networks of underground banking – mainly in relation to the drug trade – is a key theme for the coming years.[72] However, it follows from the NRA 2020

[59] Stephan P. Marks, 'The Past and Future of the Separation of Human Rights into Categories', (2009) Vol. 24/1, Maryland Journal of International Law 209, 239; David Luban, *Legal Ethics and Human Dignity*, (Cambridge University Press 2007).

[60] Christophe Paulussen and Martin Scheinin (eds.), *Human Dignity and Human Security in Times of Terrorism*, (Asser Press 2020) 18–19.

[61] Charles Foster, *Human Dignity in Bioethics and Law*, (Bloomsbury Publishing 2011) 61.

[62] *Abu Zubaydah v Lithuania* App No 46454/11 (ECtHR 31 May 2018) and Pretty v. the United Kingdom, no. 2346/02, § 65, ECHR 2002-III. See William A. Schabas, The European Convention on Human Rights. A commentary, Oxford University Press, Oxford, 2017 (Paperback), p. 66–67.

[63] UNODC, 'Human rights', ⟨https://www.unodc.org/unodc/en/corruption/human-rights.html⟩, accessed 25 November 2023.

[64] Joras Ferwerda & Edward R. Kleemans, 'Estimating money laundering risks: an application to business sectors in the Netherlands' in *European Journal on Criminal Policy and Research*, 25(1), (Springer 2019) 45–62.

[65] Netherlands is second-largest exporter and importer of goods in EU | CBS > accessed 14 June 2024.

[66] Tom Notten, Leen Preenen, Khee Fung Wong, 'Dutch earnings from international trade', (*CBS 2019*) ⟨https://longreads.cbs.nl/dutch-trade-in-facts-and-figures-2021/dutch-earnings-from-international-trade/⟩ accessed 1 December 2023.

[67] UNODC, 'Global report on cocaine 2023' – Local dynamics, global challenges' (UN Publications 2023) ⟨https://www.unodc.org/documents/data-and-analysis/cocaine/Global_cocaine_report_2023.pdf⟩ accessed 1 December 2023. There is a growing prominence of Netherlands-linked cocaine routes over the past decade. See also Jessica Loudis, 'How the Netherlands became a global Cocaine Hub', (*The Nation, 23 March 2022*) ⟨https://www.thenation.com/article/society/cocaine-trafficking-netherlands/⟩ accessed 1 December 2023.

[68] B. van Gestel and R.F. Kouwenberg, 'Cahier 2021–27 – Tweede Verkennende Studie Liquidaties', (Research and Documentation Centre (WODC), 2020) ⟨https://repository.wodc.nl/handle/20.500.12832/3136⟩ accessed 2 December 2023. See also Anna Holligan, 'Is the Netherlands becoming a narco-state?' (*BBC news, 19 December 2019*) ⟨https://www.bbc.com/news/world-europe-50821542⟩ accessed 1 December 2023.; Jurgen Dahlkamp, Jorg Diehl and Roman Lehberger, 'The slippery Dutch slope from drug tolerance to drug terror'(Spiegel International 20 October 2021) ⟨https://www.spiegel.de/international/europe/narco-state-netherlands-the-slippery-dutch-slope-from-drug-tolerance-to-drug-terror-a-4c064859-9faf-495f-b1f7-c74900910568⟩ accessed 1 December 2023.

[69] FATF, 'Mutual evaluation report: The Netherlands' measures to combat money laundering and terrorist financing' (2022) ⟨https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-netherlands-2022.html⟩ accessed 1 December 2023.

[70] Dutch policy to prevent and combat money laundering is mainly based on the recommendations of the FATF.

[71] For methodological criticism on the NRA, see: Joras Ferwerda & Peter Reuter, *National Assessments of Money Laundering Risks: Learning from Eight Advanced Countries' NRAs*, (World Bank 2022); M.R.J Soudijn, 'De verdachte transacties van drugshandelaren: witwasrisico's', 2023/3, Compliance, Ethics & Sustainability ⟨https://denhollander.info/artikel/17725⟩ accessed 1 December 2023.

[72] FIU 'Annual review of FIU-the Netherlands', (Report 2022), ⟨https://www.fiu-nederland.nl/wp-content/uploads/2023/07/FIU-Annual-review-2022-ENG-

on money laundering that most of the money laundering methods make use of the Dutch (aboveground) financial sector.

The Netherlands has a relatively large and internationally oriented financial sector and is fiscally attractive for large foreign companies.[73] Partly due to the large number of Special Purpose Entities (SPEs)[74] – in 2018, there were 15.000 SPEs registered in the Netherlands[75] – and the large financial flows that they process, the Netherlands is one of the largest recipients and investors worldwide.[76] SPEs are part of complex international financial routes and function as holding companies of shell companies. They have been set up mainly for tax purposes, which comply with the minimum requirements for organisation and registration – they usually have no office, business assets or employees in the Netherlands and carry out their commercial activities in another country.

The Netherlands is regularly called to account by organisations such as the IMF, the OECD and the European Committee for its international position as a conduit country for financial flows.[77] In 2021, the Committee on Conduit Companies flagged that the Netherlands is high on the list of conduit countries or tax-havens.[78] The country ranked 12 out of 141 countries on the Financial Secrecy Index and was responsible for 1.6 per cent of the total financial secrecy risks measured by the index.[79] Also, the Netherlands is in fourth place on the Tax Justice Network's Corporate Tax Haven Index, mainly because a large part of global foreign direct investment (FDI) flows through the Netherlands. The exceptionally high FDI position of the Netherlands in relation to the size of the Dutch economy is an indication that the Netherlands is a popular conduit country for parties wishing to avoid taxation.[80] Amongst others, the Committee concludes that the Netherlands could put more effort into international cooperation to effectively combat the improper use of Dutch legal entities for money laundering and other criminal activities.

4.2. Policies for combating IFF

National laws and policies on IFF are set by the ministries of Justice and Security, Foreign Affairs and Finance. Criminal activity related to IFF is in most cases handled by the law enforcement agencies that are responsible for investigation and prosecuting offences of money laundering, corruption, tax evasion and terrorist financing. These operational agencies implement policies to counter IFF in practice. The Minister of Justice and Security sets the budget of the police and the prosecution service.

The international tackling of organized crime, including IFF, is one of the current priorities of the Ministry of Justice and Security. The Ministry has established various strategic plans and programmes in support of these policy priorities. In 2020, the Directorate-General of Subversive Crime with the Ministry of Justice and Security launched mission to enhance its approach to tackling international organized crime. Reducing IFF is one of the spear points to these efforts. In 2022, the Dutch Minister of Justice and Security wrote: "*Due to globalization and digitalization, illicit cash flows are steadily finding their way around the world, often to and through countries with which international criminal cooperation is more complex. An effective approach to organized crime requires the reinforcement of these international cooperation efforts.*"[81]; Several months later, the Minister added: "*The Netherlands needs to play a more vital role in tackling organized crime internationally.* […] *Whenever possible, we therefore take the initiative and seize our responsibility and role to achieve joint international efforts.*"[82]

Dutch academics observe that in the context of policy prioritization and allocation of government funds, there is a lack of structural interest in the international aspects in the fights against IFF. This can partly be explained by the bottom-up approach where local and regional initiatives are presented, based on local or regional needs – other than international needs.[83] By way of illustration, the focus of the central government policymakers at the Dutch Ministry of Justice is now primarily aimed at tackling cocaine and cocaine-related IFF. This can be explained by recent developments in the Netherlands, showing "*a sliding scale in the extension of excessive violence*"[84]; including contract killings for the purpose of intimidation, e.g. featuring deliberate targeting of people not associated with the criminal world such as a

(*footnote continued*)
web.pdf〉 accessed 2 December 2023; Public Prosecution Service, 'Annual review criminal money flows 2022 – Increased accountability Criminal Money Flows', (PPS The Netherlands 2022), 〈https://www.prosecutionservice.nl/organisation/national-office-for-serious-fraud-environmental-crime-and-asset-confiscation/documents/publications/fp/2023/annual-review-criminal-money-flows-2022/annual-review-criminal-money-flows-2022〉 accessed 2 December 2023.

Although no clear signs indicating underground banking can be derived from FIU reports – as this phenomenon predominantly takes place outside of the financial system – police findings based on seized encrypted communications do provide a great deal of information on international underground banking via the Netherlands.

[73] H.C.J van der Veen, L.F. Heuts, E.C. Leertouwer, 'Cahier - Dutch National Risk Assessment on Money Laundering 2019", (Research and Documentation Centre (WODC), 2019) 〈https://repository.wodc.nl/bitstream/handle/20.500.12832/3105/〉 accessed 2 December 2023.

[74] "*Special Purpose Entities (SPEs) are corporations with a foreign owner, and they are a link in the financial flows of multinational enterprises. The income flows are dividends, interest and royalties coming from abroad and, through the SPE, flowing abroad.*", see Arjan Lejour, Jan Möhlmann, Maarten van 't Riet, 'Conduit country the Netherlands in the spotlight' (CPB Netherlands Bureau, January 2019) 〈https://www.cpb.nl/sites/default/files/omnidownload/CPB-Policy-Brief-2019–01-Conduit-country-the-Netherlands-in-the-spotlight.pdf〉 accessed 20 June 2024.

[75] Arjan Lejour, Jan Möhlmann, Maarten van 't Riet, 'Conduit country the Netherlands in the spotlight' (CBP Netherlands Bureau, January 2019) 〈https://www.cpb.nl/sites/default/files/omnidownload/CPB-Policy-Brief-2019-01-Conduit-country-the-Netherlands-in-the-spotlight.pdf〉 accessed 3 December 2023. SPE's are most often managed by Trust or Company Service Providers. SPE dividends, interest and royalties flowing through the Netherlands amounted to EUR 200 billion in 2016.

[76] Centraal Bureau Statistiek, 'Dutch trade in facts and figures – Exports, imports & investment' (CBS Report 2022) 〈https://longreads.cbs.nl/dutch-trade-in-facts-and-figures-2022/〉 accessed 3 December 2023.

[77] For example, these organisations recently referred to the Netherlands as "a major conduit" (IMF, 2021).

[78] Government The Netherlands, 'Report of the Committee on Conduit Companies - The road to acceptable conduit activities' (Government report 2022) 〈https://www.government.nl/documents/reports/2021/10/03/the-road-to-acceptable-conduit-activities〉 accessed 2 December 2023.

[79] See Tax Justice Network 'Financial Secrecy Index 2022', (TJN 2022) 〈https://fsi.taxjustice.net/〉 accessed 2 December 2023.

[80] This role as a conduit country also has an impact on other countries. For example, it is estimated in the literature that other countries have lost more than 20 billion euros a year in tax revenues due to conduit activities through the Netherlands. Developing countries are particularly sensitive to the consequences of treaty shopping via the Netherlands.

[81] Parliamentary letter dated 26 April 2022 submitted by the Minister of Justice and Security, *Parliamentary documents II 2020/21, 29 911, no. 318*, specifically *Annex 2. Addressing illicit financial flows under the heading Intensifying international cooperation*. (Dutch)

[82] Parliamentary letter dated 28 June 2022 regarding future agenda international offensive against organised crime dated submitted by the Minister of Justice and Security, *Parliamentary documents II 2021/22, 29 911, no. 348*.

[83] Karin van Wingerde et al., 'Getting the ball rolling: de bottom-up organisatie van de versterking aanpak ondermijnende criminaliteit', (2021) 47/4 *Justitiële verkenningen*, 〈https://repository.wodc.nl/bitstream/handle/20.500.12832/3149/〉 accessed 3 December 2023.

[84] B. van Gestel and R.F. Kouwenberg, 'Cahier 2021–27 – Tweede Verkennende Studie Liquidaties', (Research and Documentation Centre (WODC), 2020) 〈https://repository.wodc.nl/bitstream/handle/20.500.12832/3136/〉 accessed 2 December 2023.

criminal defense lawyer and a prominent journalist. It seems that the contract killings are mainly associated with the cocaine market, which has allegedly seen an increase in the associated IFF, primarily through underground banking systems.[85]

4.3. International cooperation in practice

In its 2022 evaluation report concerning the Netherlands, FATF concluded that international cooperation is critical for the Netherlands given its position as a global financial and logistical centre. FATF concluded that the Netherlands actively seeks both informal and formal assistance for cases involving a transnational element.[86] At the same time, there are some challenges. For example, in its 2021 evaluation report the OECD express their concern about obstacles in international cooperation to combat IFF and corruption because of Netherlands legal privilege and data protection rules.

The 2020 National Risk Assessment concluded that, although international data exchange is necessary, "*that is not always easy to realize in practice, partly due to different definitions of money laundering and different legal systems.*" In the PPS' Annual Review of Criminal Money Flows 2022 it is remarked "*that there are quite some jurisdictions that we cannot, or can hardly, cooperate with.* […] *Sometimes it just does not work, even when we can almost literally touch the unlawful money.*"[87]; The report does not detail why it is considered impossible or difficult to work with some jurisdictions. Reasons for that may be numerous, ranging from deficits in the internal organisation,[88] troubled diplomatic relations with some countries,[89] or long delays in obtaining answers. But according to the report, increased privacy standards are complicating cross-border intelligence and evidence gathering: "*Despite the fact that we now have a better view on matters and we know where the assets of criminals are placed, the current legislation does not always allow us to take action.*"[90]

The European EU Data Protection Law Enforcement Directive 2016/680 (Directive) introduced various changes to the legal frameworks for information exchange by police and prosecution service.[91] The exchange of information with third countries was restricted in 2019 in line with the Directive. In a supplementary protocol, the Ministry of Justice and Security was given a stronger role in the process of data-exchanges.[92] These changes also affected the exchange of intelligence by the police. In the Netherlands the police is to adhere to any general and case-specific instructions by the public prosecutor when exchanging information with international partners.[93] There were already various general instructions applicable to the exchange of information before 2019.[94] Yet, an additional lengthy instruction followed the entry into force of the Directive.[95] It is safe to say that the legal framework became very complex and largely out-dated, and procedures are unclear.[96]

4.4. Foundations of national policy

It is our view that Dutch policymakers and legislators seem to focus on national, incidental and current interests. In Dutch political policy on international cooperation to combat IFF, there tends to be a focus on designing a national strategy in which priorities are determined according to a national weighing of national interests.[97] Further, we observe that the Dutch scientific discourse and policy-making processes in relation to IFF-related crime seems to focus on the implications of negative rights, i.e. obligations for states to refrain from interfering with privacy rights and fundamental freedoms, and as a procedural tool, for instance to guarantee a fair (criminal) trial.[98] Also, the attention is often focused on the individual perpetrators and victims, and not so much on the negative consequences to the population as a whole.[99]

In 2021, the Dutch Council of State expressed its concerns about international cooperation that is under pressure. The Council observes that in the Netherlands, there is an ambivalent attitude in public domain towards international treaties and policy commitments. International rules are sometimes cited as an argument for excluding certain policy solutions. For example, it is easier to say that something cannot or should not be done because of European legislation, than to base choices on one's own policy considerations. The Council emphasizes that international agreements provide rights and impose obligations: "*That's the deal: they're two sides of the same coin.* […] *There ain't no such thing as a free lunch. International cooperation not only has advantages.*"[100]

As mentioned in the previous section, we advocate a debate about the more fundamental values and principles of international cooperation in combating IFF, promoting a nuanced human rights perspective – thereby also using the notions of human dignity and human security. In the following section, we will discuss the key human rights in cross-border criminal investigations – including cross-border data-gathering – relating to IFF.

[85] UNODC, 'Global report on cocaine 2023' – Local dynamics, global challenges' (UN Publications 2023) ⟨https://www.unodc.org/documents/data-and-analysis/cocaine/Global_cocaine_report_2023.pdf⟩ accessed 1 December 2023.

[86] FATF, 'Mutual evaluation report: The Netherlands' measures to combat money laundering and terrorist financing' (2022), 181. ⟨https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-netherlands-2022.html⟩ accessed 1 December 2023.

[87] Public Prosecution Services 'Jaaroverzicht Criminele geldstromen 2022' (PPS Report 2022), ⟨https://www.om.nl/documenten/jaarverslagen/om/map/2019-en-verder/jaaroverzicht-criminele-geldstromen-2022⟩ accessed 7 December 2023.

[88] In 2021, the Inspection of Ministry of Justice and Security issued a very critical report on the functioning of the national information unit (DLIO) of the Dutch police, including on the functioning of its unit for international cooperation. See Rapport onderzoek Landelijke Eenheid deelrapport DLIO | Rapport | Inspectie Justitie en Veiligheid (inspectie-jenv.nl).

[89] See for instance the case Rechtbank Rotterdam 14 September 2021, ECLI:NL:RBROT:2021:9183 on transnational money laundering. Money was received under suspicious circumstances from person in 'high risk jurisdictions'. The court acknowledged that it would be near impossible to obtain witness statements for those people, but without those statements the prosecution could not proceed.

[90] Public Prosecution Services 'Jaaroverzicht Criminele geldstromen 2022' (PPS Report 2022), ⟨https://www.om.nl/documenten/jaarverslagen/om/map/2019-en-verder/jaaroverzicht-criminele-geldstromen-2022⟩ accessed 7 December 2023.

[91] Article 17a of the Police Information Act (WPG) and 16a of the Judicial and Criminal Information Act (WJSG).

[92] Protocol Samenwerking bij Internationale Rechtshulp.

[93] Article 5.1.7(2) of the Dutch Code of Criminal Procedure.

[94] Aanwijzing 552i, Aanwijzing Wet politiegegevens en de rol van de officier van justitie.

[95] Besluit houdende wijziging van de Ambtsinstructie voor de politie, de Koninklijke marechaussee en andere opsporingsambtenaren, *Stb* 2021, 46.

[96] The most general instruction to the police, *Aanwijzing 552i*, has never even been adapted to the large revision in 2017 of the Criminal Code of Procedure. Also, it should have been adapted already to the new Directive (EU) 2023/977 on exchange of information between police in the EU.

[97] Hans Nelen et. al, 'De aanpak van ondermijning ondermijnd. Over conceptuele verwarring en bestuurlijke drukte', *Tijdschrift over Cultuur & Criminaliteit* (2023) 13/1.

[98] Michiel Luchtman, *Transnationale rechtshandhaving. Over fundamentele rechten in de Europese strafrechtelijke samenwerking*, (Boom juridisch 2017), and Jannemieke Ouwerkerk, *Herijking van Uniestrafrecht. Over grondslagen voor strafrechtelijke regelgeving in de Europese Unie* (oratie Leiden), (Boom juridisch 2017).

[99] In other jurisdictions, studies have been carried out into the damage of crime for the entire population. See for example 'The Cambridge Crime Harm Index (CCHI)' (CCHI, may 2020), ⟨https://www.crim.cam.ac.uk/research/thecambridgecrimeharmindex⟩ accessed 2 December 2023.

[100] Raad van State, *Jaarverslag 2021*, p. 19–22, ⟨https://www.raadvanstate.nl⟩ accessed 18 December 2023.

5. Balancing human rights in combating IFF

5.1. Limitations to international cooperation

As we have seen in the previous section concerning the Netherlands, key to financial investigations into IFF is access to data. To conceal IFF it is attractive to rout those through financial secrecy jurisdictions and jurisdictions with a weak enforcement culture or low participation in cooperation arrangements, and provide obscurity by involving legal entities in many different jurisdictions in the same scheme. This reality likely requires law enforcement and judiciaries to obtain information and evidence in IFF investigations from remote jurisdictions.

As we have shown above, human rights policies demand active international cooperation in IFF investigations to obtain data and implement measures in other jurisdictions. Reversely, the core role of European human rights law has always been to define the limits of that same international cooperation. This provokes the question as to the impact of these restricting norms on cooperation with third nations.

It has been contended that human rights in the crime suppression treaties were 'unarticulated[101] or even 'neglected',[102] but in the European context a balanced approach has developed in the case law of the Strassbourg court. We will show how realistic standards were put in place, taking into account the fundamental necessity of working with countries with a different understanding of human rights. That traditionally balanced approach seem to have been undermined in 2016 when new rules were introduced to bolster the right to privacy in the field of cooperation in criminal matters between EU member states and third countries.

5.2. Traditional balance of human rights and international cooperation

European human rights law has provides a clear framework to international cooperation in criminal matters. The ECtHR has developed a balanced approach to the extraterritorial dimension of human rights.[103] As to the absolute rights under the convention, including the right to life and right not to be subjected to torture and ill-treatment, the court established in its case law on extradition that no state may expose a person to a real risk those right being violated. Yet, the court also indicates that not every possible form of ill-treatment will be considered under this standard.[104]

As to other possible human rights violations after extradition, including the right to a fair trial, the court does not apply a general obligation to deny extradition. Only if extradition would amount to a flagrant denial of justice in the other state, extradition is prohibited. This norm has subsequently also been incorporated into its case law on international exequatur procedures.[105] The standard of a flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures. In the Othman case the court expressed that a flagrant denial of justice would amount to a *nullification, or destruction of the very essence, of the right guaranteed by* the right to a fair trial.[106]

As to sentencing practices, for instance, the court maintains a strict standard that only in rare cases it may be considered that a foreign sentence is grossly disproportionate, making that its execution should be denied.[107]

Whilst this case law has been mostly developed in cases in which a state was *providing* assistance to another state, it applies *mutatis mutandis* as well to the sending of requests to another state.[108] Clearly, the benchmark set for international cooperation in criminal matters by the ECtHR demands a continuous awareness of the risk of working with other jurisdictions. However, the case law of the Court limits the catalogue of human rights to be taken into account and sets a threshold to the seriousness of the potential violation in order for it to become relevant. It demands a realistic assessment of the real risks involved and it acknowledges that standards may differ around the world.[109]

The right to privacy, through the lens of the right to private life (Article 8 ECHR) does apply as well in the context of international cooperation. Nevertheless, a violation of that right by a third country was held by the ECtHR to fall entirely outside the scope of the Convention.[110] The Court did remark that it is not allowed to circumvent national safeguards by requesting data from a foreign state. Nevertheless, if that is not the case, the implementation of measures in the foreign state falls outside the responsibility of the Member State to the ECHR. In fact, a violation of the right to privacy during the investigation will in itself not lead to the conclusion that the right to a fair trial was violated. That being the case, there was even no necessity to assess the respect for the right to privacy in foreign jurisdictions whilst seeking cooperation.[111] Ultimately, this is embodied in the rule of non-inquiry, which generally bars arguments on possible privacy violations in foreign jurisdiction from entering into the court room.[112]

There is yet another part of the case law from Strasbourg that illustrates how the Court strikes a balance between human rights and the need for international cooperation. In its case law on the length of pretrial detention, the Court has expressed its understanding that

[101] Robert J. Currie, 'Human rights and international mutual legal assistance: resolving the tension', (2000) *Criminal Law Forum* 11, p. 153.

[102] Neil Boister, 'Human Rights Protection in the Suppression Conventions', (2002) *Human Rights Law Review* 2(2), p. 226.

[103] See for a general treatise on the extraterritorial effects of human rights for instance: Marko Milanović, *Extraterritorial application of human rights treaties: law, principles, and policy*. Oxford University Press (2011), and: Kate Westmoreland, 'Sharing Evidence across Borders: the Human Rights Challenge', in: (2012) *Australian year book of international law* 30 (1), p. 161.

[104] Fehér v. Hungary App no 69095/10 (ECtHR 2 July 2013), para 18–19, with further references.

[105] *Drozd and Janousek v France and Spain* App no 12747/87 (ECtHR 26 June 1992), in which the Court prohibited the execution of a *grossly disproportionate* sentence imposed by a foreign court of law.

[106] ECtHR, *Othman (Abu Qatada) v the United Kingdom* App no 8139/09 (ECtHR 17 January 2012), para. 260.

[107] *Harkins and Edwards v the United Kingdom* App no. 9146/07 and 32650/07 (ECtHR 17 January 2012). Radha Dawn Ivory researched how the 'flagrant denial of justice' standard may affect asset recovery in corruption cases: 'The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases', in: *Utrecht Law Review* 9(4), 2013, 147.

[108] In the framework of his PhD research, De Jonge assesses the response of national judicial authorities to transnational organized crime, in the light of the positive obligations to engage in cooperation. See: Boudewijn de Jonge, 'Transnational crime without transnational prosecution', *Transnational Criminal Law Review* 2 (2023) 1–15.

[109] See in more detail: Currie, *supra* note 101, p. 154–155.

[110] *Big Brother watch and others v the United Kingdom* App no 58170/13, 62322/14 and 24960/15 (ECtHR, 25 May 2021), para. 495.

Article 17 of the International Covenant on Civil and Political Rights does include a right to privacy. Nevertheless, there are no standards on a global level on how data protection by police and judiciary should be addressed. On occasion relevant information may be found in reports by the UN Special Rapporteur on the right to privacy. The best source of country-specific reports on human rights remains: ⟨www.ecoi.net⟩.

[111] Currie provides various illustrative cases from high courts in Canada, Belgium and United Kingdom, *supra* note 101. For an overview of the application of the principle of non-inquiry in the context of admissibility of evidence within the EU, see for instance: Elodie Sellier and Anne Weyembergh, *Criminal procedural laws across the European Union –A comparative analysis of selected main differences and the impact they have over the development of EU legislation* (European Parliament, 2018).

[112] For the Netherlands, its Supreme Court confirmed and detailed the principle of non-inquiry as to the results of mutual legal assistance in her 2010 ruling and recently confirmed that approach. Supreme Court of the Netherlands, ECLI:NL:HR:2010:BL5629 (5 October 2010) and ECLI:NL:HR:2023:913 (13 June 2023).

international cooperation can be a lengthy and complex process, sometimes justifying long periods of pretrial detention.[113] In a case of money laundering the Court found a pretrial detention of 5 years acceptable, in the light of the cross-border evidence gathering that had to take place in five other countries.[114] In its considerations, the Court explicitly attaches weight to the obligation of the state to effectively suppress money laundering.

In our view, its case law reveals a realistic balancing of interests by the Court. It acknowledges the importance of combatting IFF-related crime and that this may requires intense and lengthy cross-border cooperation. It might be that the cross-border dimension is a hindrance for authorities but that same complexity may also negatively affect the position of a defendant: a trial may be delayed for years due to necessary cross-border cooperation, privacy concerns are hardly an obstacle to that cooperation, and custody may be become very lengthy. It shows that the rights of the individual suspect may be balanced against the wide range of international obligations and commitments of the state to suppress IFF, as we described in Section 2 *supra*. As it turns out, there is little room left for the thought that in that balancing act IFF-related crime is 'victimless' crime that is 'just about money'.

5.3. The inception of the right to privacy in international cooperation

The introduction of EU Data Protection Law Enforcement Directive 2016/680[115] (Directive) brought about a paradigm shift. Not only was the right to privacy introduced as a crucial threshold to cooperation with third countries, it is the national enforcement and judicial authorities themselves that are now to assess the foreign privacy safeguards.

The introduction of the Directive brought law enforcement and judiciary in the EU for the first time a harmonized framework for data protection. This was a novelty. The previous directive (95/46/EC) on data protection excluded all law enforcement activities from its scope. Within the EU the Directive assures a high-level of protection of personal data, it provides various rights to data subjects and requires data processing to be proportionate.

The Directive also regulates the sharing of data with authorities of non-EU Member states. In short, it introduced a three categories of third countries with respect to data transfers. The first category concerns data transfers to a third country where that country is subject of an adequacy decision by the European Commission on the level of data protection in that country. When such a adequacy decision has not yet been issued, a state may agree on a legally binding instrument with a third country that covers data protection. If neither an adequacy decision nor such binding instrument is present, an individual assessment on the balance between the necessity and (possible) violation of the rights of the data subject needs to be made.[116] This assessment should be done on a case-by-case basis, taking account of the relevant national law and its application in the third county. Similar provisions have been included in the Europol Regulation[117] and Eurojust Regulation.[118] The text of the provisions on data sharing with third countries of both regulations go even beyond the provision of the Directive, since they foresee specific oversight over sharing personal data with third countries. Though allowing for a certain degree of flexibility, the provisions show how privacy rights are now incorporated in the framework for cooperation with third states.[119]

Whilst these EU laws do not rule out the sharing of data with third countries, it is clearly far beyond a mere test whether the sharing of data is proportionate. Consequently, the process of cooperation in criminal investigations with third states has been provided with additional hurdles in the form of new restrictions, increased oversight, formalities and protocolization.

The design of the system of three categories in itself has already been described by Drechsel as "deeply flawed".[120] She describes in detail how in the absence of adequacy decisions law enforcement commonly have to rely on negotiated binding agreements and the self-assessed safeguards. Both are regarded as holding insufficient safeguards. In fact, it remains difficult to see how law enforcement officials can assess the adequacy of privacy safeguards in third countries at all.[121]

Whilst Drechsel emphasizes the potential violation to the right to privacy, it is equally worrisome that law enforcement seems to be seriously hampered by this complex Directive. Various studies indicate that the mere introduction of these new rules have had a negative impact on operational cooperation between law enforcement authorities in the EU and those in third countries.

For example, in a 2021 survey, Dutch, German and Danish law enforcement authorities all reported severe issues with the implementation of the Directive.[122] The respondents experienced the lack of clarity and heavy procedures as obstacles. Similar problems are reported on the exchange of data between the FIUs. Daudrikh reports that the FIUs experience doubts on what sort of data exchanges are allowed and reports fewer data exchanges with third countries.[123] FIU data exchanges may now fall partially within the 2016 Directive and

[113] *Velečka and others v Lithuania* App no 56998/16 (ECtHR 26 March 2019), para. 103.

[114] *Arewa v Lithuania* App no 16031/18 (ECtHR 9 March 2021).

[115] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, [2016] OJ L 119/89.

[116] The Directive was drafted in the wake of the Snowden affair, which gave rise to many concerns over large scale data collection and the reliability of data protection outside the EU. The EU Parliament initially proposed to restrict data transfers in absence of adequacy decisions to *very limited number of individual cases and subject to strict conditions*. European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Committee on Legal Affairs, Opinion of 16 April 2013, JURI_AD(2013)502007 in 2012/0010(COD).

[117] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on Europol, [2016] OJ L 153/53, article 25.

[118] Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on Eurojust, [2018] OJ L 295/138, articles 56–59.

[119] Chloé Briere, Cooperation of Europol and Eurojust with External Partners in the Fight Against Crime: What are the Challenges Ahead?, *DCU Brexit Institute Working Paper No. 1–2018*, p20.

[120] Laura Drechsel, 'The Achilles heel of EU data protection in a law enforcement context: international transfers under appropriate safeguards in the Law Enforcement Directive', *Cybercrime: New Threats, New Responses: Proceedings of the XVth International Conference on Internet, Law & Politics*. Universitat Oberta de Catalunya, Barcelona, 1–2 July 2020, Huygens Editorial, available at: ⟨https://cris.vub.be/ws/portalfiles/portal/52959124/⟩ accessed 17 December 2023.

[121] Laura Drechsel, Wanted: LED adequacy decisions. How the absence of any LED adequacy decision is hurting the protection of fundamental rights in a law enforcement context, (2021) *International data privacy law* 11/2, 192.

[122] Heinrich Winter et al., *De verwerking van politiegegevens in vijf Europese landen*, (Research and Documentation Centre (WODC), 2020) ⟨https://repository.wodc.nl/handle/20.500.12832/3025⟩ accessed 17 December 2023. See in particular pages 27, 81, 102 and 111.

See also, on the ambiguities surrounding data transfer through Foreign Liaison Officers: Christina Eckes and Dominique Barnhoorn, 'Commercial Data Transfers and Liaison Officers: What Data Protection Rules Apply in the Fight against Impunity When Third Countries Are Involved?' in: L. Marin and S. Montaldo (eds), *The Fight Against Impunity in EU Law* (Bloomsbury Publishing 2020).

[123] Yana Daudrikh, 'IV. AML Directive: Problems related to exchange of information between Financial Intelligence Units', (2022) *Journal of Administrative Sciences* 2, 23.

partially within the GDPR.[124] In fact, as was remarked in relation to the FIU of Bangladesh, the framework inhibits practically all exchanges of information with that authority.[125] The collaboration of the FIUs through Europol became also problematic.[126] This development contrasts strongly with the aim of the FIUs, as laid down by the Egmont Group, to exchange information freely, spontaneously or upon request.[127] Due to the fact that exchange is often taking place on the basis of reciprocity, we may expect that the EU authorities also have troubles to receive information from third states.

We had a unique possibility to study the impact of the increased privacy rules on international cooperation by studying the Dutch internal statistics on cooperation. In the Netherlands requests for assistance from both police and the public prosecutors are registered in one central database. We compared the number of requests sent to seven randomly selected countries inside the EU to those sent to seven countries outside the EU.[128] A change in the volume of requests can be caused by many reasons, including changes in budget, policy decisions, crime patterns or administrative processes. Thus such statistics should be interpreted carefully. However, if we assume these factors equally affect the interest in working with EU and non-EU countries, the variation is of interest to us.

The statistics show an overall drop in registered requests after the entry into force of the Directive.[129] The number of requests to the selected non-EU countries dropped significantly more than to the selected EU countries. To the non-EU countries the number of requests dropped by 45 %, whilst to the EU member states 6 % less requests were sent. In periods before the entry into force of the Directive, no significant variation between the selected EU and non-EU member states is seen. Yet after the introduction of the new privacy standards, in each consecutive year the volume of requests to third countries decreased much stronger. Whilst further analysis of the se statistics is needed, the significant difference does provide us with some evidence of the negative impact of the Directive on the willingness or possibilities to work with third states.

The interviews with Dutch investigation officers and public prosecutors conducted by one of the authors offer some explanation for the above. Respondents recognize the increased challenges around information exchange with third countries after the entry into force of the Directive. Some respondents have experienced how lengthy discussions on privacy standards in a third country stalls or even prevent sending out requests in recent cases. Many more mention how the increased privacy standards have caused uncertainty in investigative practice. If it is difficult to share information at a police level with a third country in support of an outgoing information request, as a consequence this also limits the possibilities for sending a request for judicial assistance to a third country.

It is remarkable that the evaluation by the European Commission of the Directive has not addressed these concerns at all.[130] It does report on the perceived positive impact on data subject's rights, but there is not a single word on the actual impact of the Directive on effective cooperation. Whilst protection of the right to privacy may have been bolstered by the Directive, one may wonder at what cost this has been achieved.

5.4. Diverging standards of human rights protection

The introduction of the Directive bound cooperation in criminal investigations to a much stricter framework than before. Whilst respect to some of the core rights under the ECHR was part of the test, privacy standards were not. The adequacy of privacy safeguards in a third state were never to be actively considered; that has now changed. The fundamental nature of that change comes to light when the rationales behind the traditional approach as to the extraterritorial dimension of the respect for right to life, freedom from torture and ill-treatment and right to fair trial, are compared to those of the recently prioritized respect for privacy.

The first important limitation to the extraterritorial effects of the ECHR has always been its strict application as a treaty solely to the Contracting Parties, in accordance with article 1 of the Convention. The ECtHR has repeated at several occasions that: *the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States.*[131]

Under the ECtHR standards, the principle of non-inquiry prevented practitioners from having to consider the local law under which evidence is collected or to anticipate on future possible violations of human rights, unless there are grounds to believe that a flagrant denial of justice or severe risks to gross human rights violations. This approach has largely prevented arguments on the interpretation of foreign law entering into the national court room.

This approach of the ECtHR contrasts strongly with the approach by the EU in its Directive. The Directive is indeed based on the idea that data sharing should only take place if privacy safeguards are at a comparable level in the third country. To a certain degree, the Directive promotes exportation of our privacy norms. It has been questioned whether the EU will indeed be able to impose its standards on different countries.[132] Until now, only one adequacy decision has been issued in the field of the Law Enforcement Directive.[133]

[124] Teresa Quintel, 'Follow the Money, if you can - Possible solutions for enhanced FIU cooperation under improved data protection rules', (2019) *Europarättslig tidskrift* 1, 35.

[125] Zahurul Haq, 'How does the General Data Protection Regulation (GDPR) affect financial intelligence exchange with third countries?' (2022) *Journal of Money Laundering Control*, ahead-of-print.

[126] Foivi Mouzakiti, 'Cooperation between Financial Intelligence Units in the European Union: Stuck in the middle between the General Data Protection Regulation and the Police Data Protection Directive', (2020) *New Journal of European Criminal Law* 11:3, p. 351.

[127] Incorporated in Recital 54 of the EU Directive that harmonizes the rules on the FIUs within the EU. Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, [2015] OJ L 141/73.

See for an extensive study on a system for spontaneous exchange between FIU's - FCInet, based on privacy-by-design: Willem Geelhoed and Roelf Anton Hoving, *Enhanced Exchange of Information in Financial Investigations*, (2021) University of Groningen.

[128] Canada, Indonesia, Pakistan, Panama, South-Africa, United Arab Emirates, United States as non-EU Member States, and for the EU: Austria, Cyprus, Finland, Ireland, Poland, Romania, Spain. The data is available at request

[129] To be precise, the first year after introduction of the Directive, the volume of cooperation did not change at all. Although the Directive entered into force in May 2018, the internal guidelines for police and prosecution were only issued by late 2019. From 2019 onward, the cooperation with the non-EU countries decreased by 20 %, 38 %, 41 % and 7 % *more* than the cooperation with the selected EU-countries.

[130] European Commission, 'First report on application and functioning of the Data Protection Law Enforcement Directive (EU) 2016/680 ('LED')' COM/2022/364 final.

[131] See: Karen da Costa, 'The Spatial Reach of the European Convention on Human Rights', in: The Extraterritorial Application of Selected Human Rights Treaties (Brill Nijhoff 2013), 93–253.

[132] Cedric Ryngaert and Mistale Taylor, 'The GDPR as global data protection regulation?', in: (2020) *AJIL Unbound* 114, p 9. Taylor discusses the limitations from public international law to the application of the GDPR, and points out that residence in the EU of the datasubject is commonly a prerequisite to enjoy protection under the GDPR. Interestingly, residency is not a factor of importance in the LED in relation to data transfers to outside the EU. See: Mistale Taylor, 'Limits That Public International Law Poses on the European Union Safeguarding the Fundamental Right to Data Protection Extraterritorially', *Transatlantic Jurisdictional Conflicts in Data Protection Law: Fundamental Rights, Privacy and Extraterritoriality* (Cambridge University Press 2023) 86.

[133] According to the website of the European Commission:

Another crucial underpinning of the extraterritorial dimension of the ECtHR case law in the field of criminal cooperation has been the urge to avoid impunity. At multiple instances, the ECtHR acknowledged that imposing a too strict regime on the cooperation with third countries, would risk the creation of safe havens.[134] Indeed, it has put emphasis on the obligation to mutually cooperate in investigation of alleged serious human rights violations to prevent impunity.[135]

A firm respect for human rights should not allow for the creation of safe havens, where no cooperation can be obtained from. The approach that it is unacceptable that safe havens are seeing the light, should inspire the debate on privacy standards in relation to IFF as well.

In particular in IFF investigations, it should be added that money flows are frequently routed through off-shore jurisdictions to which the suspect holds no other link than his money. It is easy to have a Trust or Company Service Provider (TCSP) opening corporate entities in off shore jurisdictions without the need to ever physically go to that country. Cryptocurrencies move around the world with the speed of light. And even traditional banking offers the possibility to open accounts at distance, without the holder ever visiting the country where the account is officially located. It seems doubtful that there is any real risk to the person of a suspect, if data is shared with such an off shore jurisdiction, when he never is to set foot in that jurisdiction. It seems hardly acceptable that the voluntary choice to forward or park money in a jurisdiction with a questionable human rights track record, effectively inhibits law enforcement to trace and freeze that money if there are no real risks to core human rights at stake.

In its line of reasoning not to accept the existence of safe havens for fugitives escaping justice, the ECtHR even accepted that in exceptional serious cases, states operate outside their own legal framework to secure the apprehension and bringing to justice of notorious suspects.[136] As the ECtHR does not accept safe havens for fugitives due to gaps in the cooperation framework, it should similarly not be accepted that safe havens for money laundering are created due to gaps in privacy protection.

In that context, the choices made by the suspect should be taken into account. It should be repeated that money is often intentionally routed through countries with weak enforcement regimes. If a person choses deliberately to arrange his finances through jurisdictions with a weaker rule of law system – or, more precisely – weaker privacy laws, it seems not quite reasonable to use that very lack of privacy safeguards in preventing money flow and asset tracing or recovery.

A sufficient margin to collaborate with states with lower privacy standards should be allowed for. Whereas in extradition law, the risk of impunity have brought us a balanced approach toward the cooperation with third countries,[137] it seems that in data protection law there is ample room for reconsideration. Whilst in the extradition law, the Strassbourg Court expects creativity to seek assistance even in the absence of formal diplomatic relations,[138] in relation to privacy law the absence of a formal framework is now firmly a red flag. A too strict adherence to EU privacy standards will effectively bring about impunity, or in the context of IFF: the effective hindrance of evidence-gathering. Privacy rights should be balanced in this context of co-operation against the obligations to suppress serious human rights violations, corruption and other serious crime.

6. Recommendations

Good societies carefully balance individual rights and social responsibilities, autonomy and the common good, privacy and concerns for public safety, rather than allow one value or principle to dominate. Although we cherish privacy in a free society, we also value other goods such as public safety. In principle and in practice, there is no escaping the basic tension between our profound desire for privacy and our deep concern for public safety. We need to treat privacy as an individual right that is to be balanced with concerns for the common good. Based on article 8(2) ECHR, it is only justified to implement measures that diminish privacy (i) in accordance with the law, (ii) for a legitimate aim (e.g. public safety) and (iii) if necessary in a democratic society. How can common goods such as public safety be better served without unnecessarily undermining privacy?

In this article we examined whether a human rights-based framework can do more justice to a balanced approach to tackling IFF, taking into account international positive and negative obligations for states. Based on our research, we suggest the following recommendations.

1. *Perspective: human rights as a whole*

In the context of this contribution, the guarantee of the right to the protection of privacy, as laid down in Article 8 ECHR and Articles 7 en 8 of the EU Charter of Fundamental Rights – as well as in the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[139] and the EU General Data Protection Regulation are worth mentioning[140] – protects the negative freedom of the citizen and entails a negative obligation for the state, i.e. to abstain from abusing its powers, such as by interfering unjustly or arbitrarily with the privacy of its citizens.[141] Gathering evidence about persons and legal entities in order to combat IFF undeniably interferes with the right to protection of privacy.

At the same time, our case study shows that high – or even increased – privacy standards are complicating cross-border intelligence and evidence gathering. We conclude that both the Directive and subsequent national instructions have complicated international cooperation too much. This has real consequences for the effectiveness of tackling IFF.

The balance between the interest of investigating and prosecuting IFF-related crimes on the one hand and safeguarding the privacy rights of individuals on the other should be recalibrated once again, because Netherlands anti-IFF policy, as it is now, does not accord with the substantial international obligations for states deriving from human rights to take effective action against IFF.[142]

We advocate an approach in which the Netherlands, when making political and operational policy decisions on combating IFF, adopts international standards and effort obligations arising from human rights

(*footnote continued*)

〈https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en〉 accessed 18 December 2023.

[134] *Soering v the United Kingdom* App no 14038/88 (ECtHR 7 July 1989), para 89, and: *Sanchez-Sanchez v the United Kingdom* App no 22854/20 (ECtHR 3 November 2022), para 94.

[135] *Güzelyurtlu and others v Cyprus and Turkey* App no 36925/07 (ECtHR 29 January 2019), para 232–235.

[136] *Öcalan v Turkey* App no 46221/99 (ECtHR 12 May 2005), para 88. A similar line of reasoning can be found in *Sanchez Ramirez v France* App no 28780/95 (ECtHR 24 June 1996).

[137] See for an elaborate review of the impunity argument in relation to the EU: Luisa Marin and Stefano Montaldo (eds) *The Fight Against Impunity in EU Law* (Hart Publishing 2020).

[138] See *supra* note 135, para 237.

[139] Convention for the protection of individuals with regard to Automatic Processing of Personal Data (adopted 28 January 1981 entered into force 1 October 1985) CETS 108.

[140] Council Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281/31.

[141] Bart van der Sloot, 'Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data"'(2015) 31(80) *Utrecht Journal of International and European Law* 25.2.

[142] For instance, the international pressure to comply or political motives could be key underlying factors for forming specific IFF-policy.

as a starting point. That perspective should also be incorporated into the privacy debate, and in particular on cross-border data-collection. Without due regard to obligations of effort to combat IFF, a debate on privacy safeguards in international cooperation is incomplete.

Human rights recognise the principle that every human being is equal in dignity and therefore deserves the same protection. Promoting a human rights approach that uses the notions of human dignity and human security is one way to take further these policies. The notions of human dignity and human security call for people-centred, comprehensive, context-specific, and prevention-orientated responses that strengthen the protection and empowerment of all people and all communities.[143]

We argue that in principle, cross-border evidence-gathering in IFF-related criminal cases will serve ordinary people and their interest everywhere – and thus serve a legitimate aim. International cooperation and cross-border data exchange of information are indispensable for these cases. It is thus essential to engage with cross-border data exchange mechanisms regarding tackling the secrecy space.[144] On the basis of the principle of proportionality, it must of course be assessed in each case whether the use of the material collected from abroad is in reasonable proportion to the interference with the interests and rights of those involved.

In our view the starting point should be that financial data *can* be shared with and can be requested from any third state jurisdiction, *unless* there is a real risk that core human rights of a person involved in the case would be violated as a result of that cooperation. In any case, it is important that the ECtHR remains a guardian of the right to the protection of privacy.

As the ECtHR has always warned against safe havens for fugitives, this should inspire to seek as much cooperation as possible with the current financial safe havens. Obtaining data from jurisdictions with weak privacy regimes should not be unduly obstructed by restrictions pursuant to the Directive. Such restrictions, ironically, could even strengthen the profile of safe havens since we would not be able to work with those authorities. There is only a limited extraterritorial responsibility for privacy.

2. *Further evaluation of the impact of EU privacy rules on cross-border data gathering*

Safe havens for dirty money should be prevented, and creative modalities should be found to obtain information out of those safe havens. As we showed, the cooperation should also take place with countries with a different appreciation of human rights and lower privacy standards, in order to prevent those countries turning into financial safe havens for bad money.

As noted before, the evaluation of the new restrictive EU privacy Directive did not look into the wider effects of those rules on effective cooperation. The next evaluation should be published in 2026,[145] it may be hoped that this time the experiences of practitioners and its effects on efficiency will be assessed. Likewise, the evaluation of EU member states under UNTOC and UNCAC could pay attention to the impact of the restrictive privacy rules on cooperation with other contracting states.

3. *Proactive long-term IFF-policies justifying international commitments*

The key challenge remains national implementation of the treaty obligations and policy commitments through real support for capacity building, e.g. by dedicating the necessary political capital and resources.[146] National policy implementation in the Netherlands has been taking place for a long time according to certain fixed principles and the same pattern, focusing on national interests and short-term priorities, often as a reaction on security incidents in society. Given the fundamental problems in relation to IFF, it is necessary to reconsider vision. It would show progressive insight and courage not to continue pursuing that path. The discussion should be conducted less on the basis of existing structures or protocols and the aim to connect everything, but rather on the content and objectives aimed at specific interventions. This implies that on a national level, proactive and long-term policies that adhere to and fulfil international commitments are crucial.[147]

Also, based on our case-study, we see that at a policy level it seems difficult to use the available knowledge of enforcement authorities (the (fiscal) police and the prosecution service), as well as the available findings of academic empirical research, in order to increase the efficiency and effectiveness of the approach to tackling IFF. Feedback to policymakers from enforcement authorities is crucial to avoid policy requirements which are impractical or difficult to implement. Enforcement authorities should be honest and transparent about which policies it cannot implement. They need to better identify the operational challenges and the resistance. In other words, we consider it necessary for enforcement authorities to play a more visible and independent role in policymaking on curbing IFF.

4. *Proactive cross-border IFF-investigations justifying international commitments*

The commitment to fighting IFF should have an impact on how investigations are directed. Offences relating to IFF are often complex cases to investigate and prosecute. They can therefore place significant demands on investigators and prosecutors in terms of time, resources and technical expertise. In our opinion one critical benchmark should be the ratio of legal assistance that is requested from the jurisdictions were the IFF relate to. As IFF often relate to jurisdictions with optimal conditions to conceal money, such as countries with weak enforcement regimes, efforts to obtain information should be paired with those challenges. Maintaining, analyzing and publishing better statistics on international legal assistance will provide more inside into the regions and countries that are key to an effective international strategy to combat IFF. That analysis should be pivotal to decisions on where and how to intensify cooperation efforts.[148]

A reasonably wide definition of extraterritorial jurisdiction by the legislator encourages the investigating authorities to conduct complex IFF-related cross-border investigations, including cross-border data-gathering. Two examples to illustrate this, are the following.

[143] See UN General Assembly (2012) Resolution adopted by the General Assembly on 10 September 2012, UN Doc. A/RES/66/290. Para 3.

[144] UNOCD and OECD, 'Coherent policies for combatting Illicit Financial Flows', (*United Nations, July 2016*) 〈https://www.un.org/esa/ffd/wp-content/uploads/2016/01/Coherent-policies-for-combatting-Illicit-Financial-Flows_UNODC-OECD_IATF-Issue-Brief.pdf〉 accessed 11 December 2023.

[145] Council Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences of the execution of criminal penalties, and on the free movement of such data OJ L 119/89.

[146] Office of Justice programs, 'Strategy to combat Transnational Organized Crime: Addressing converging threats to national security', (OJP, 25 July 2011) 〈https://www.ojp.gov/ncjrs/virtual-library/abstracts/strategy-combat-transnational-organized-crime#:~:text=The%20strategy%20provides%20five%20key,and%20sever%20stat%2Dcrime%20alliances%3B〉 accessed 7 December 2023.

[147] Hans Nelen et. al, 'De aanpak van ondermijning ondermijnd. Over conceptuele verwarring en bestuurlijke drukte', *Tijdschrift over Cultuur & Criminaliteit* (2023) 13/1, 16.

[148] Data on outgoing Letters of Request may not well reflect the needs for cooperation. One explanation is that Dutch criminal prosecution is based on the proportionality principle. If it is not expected that a letter of request will be answered in a reasonable time, there is ample room for the public prosecutor to close that line of investigation. On that ground, links to 'difficult' jurisdictions may simply be left untouched.

A court in The Hague convicted in 2020 a Polish national for laundering money through a Czech bank account with a Russian strawman, of money that originated in the Slovak Republic. The nexus to Dutch soil was limited to the defendant having recently moved to The Netherlands and accessing the bank accounts from his Dutch home. Over the acts prior to his change of domicile, subsidiary jurisdictions was obtained because the Czech Republic formally transferred their proceeding to the Netherlands. Even though the interest of the Dutch legal order may have been limited, it exemplifies the commitment to a shared responsibility for the fight against IFF.[149]

On the contrary, it has been widely reported in the Dutch newspapers how an investigation into IFF connected to Russian oligarchs was halted in 2011. Large amounts of suspicious money were flowing through financial institutions in the Netherlands. The fear of the diplomatic and political consequences of that investigation, reported led the prosecution to halt the investigation.[150]

Although it is difficult to define general rules on when national enforcement authorities should initiate criminal proceedings for IFF, and even more as the application of extraterritorial jurisdiction, the commitment to the fight against IFF should encompass a willingness to take up investigations also when national interest may be limited.

Likewise, the SDG and human rights commitments should inspire judicial authorities to take serious their responsibility for sharing information as evidence with foreign authorities. Even when information may lack relevance to the national proceeding for which it is gathered, it may prove crucial to address connected crimes in other countries. For instance, both UNTOC and UNCAC provide for the possibility to spontaneously share information, for criminal and administrative aims.

7. Conclusion

The main purpose of this article is to examine the added value of the human rights perspective in the fight against IFF, more specifically in relation to the national legal-normative and practical frameworks for cross-border data-gathering in these type of criminal investigations.

IFF is perceived as an international and urgent problem that poses a threat to the rule of law, the enjoyment of human rights and – ultimately – human dignity and human security: combating IFF has become a global cause.[151] State obligations to combat IFF arise from IFF-related legal instruments and policy commitments and human rights that require governments to take positive action.

Data access and exchange form the bedrock of evidence gathering for (criminal) enforcement action.[152] Legal instruments and policy commitments call on states to effectively cooperate and exchange information in the global fight against IFF. International instruments increasingly incorporate more general and positive good governance standards in this regard.[153] However, until now, there are no clear international criteria or benchmarks for assessing the effectiveness of IFF policies and criminal enforcement – including international information-exchange – in practice.[154]

It follows from our case study that Dutch policymakers and legislators seem to focus on national, incidental and current interests in combating IFF, not so much on – (empirical) research-based – long term policies. Also, the focus within the Dutch scientific discourse and policy-making processes in relation to IFF-related crime and human rights is clearly on negative rights, i.e. obligations for states to refrain from interfering with privacy rights and fundamental freedoms, and as a procedural tool, for instance to guarantee a fair (criminal) trial.[155] Moreover, it follows from our case study that in contemporary enforcement practice, it is problematic to cooperate and exchange information with third states, in particular because of strict data protection laws. Finally, the many non-binding international and national anti-IFF policy commitments for states do not have real consequences for investigative and enforcement agencies in the Netherlands in terms of real support for capacity building. Because of that, there are insufficient incentives for those agencies to take complex cross-border IFF-cases as a priority, especially when national interests may be limited.

In conclusion, we think it is essential for national policy-makers and enforcement agencies to include considerations based on international commitments, as well as universal human rights and underlying notions of human dignity and human security, in policy-making processes and criminal enforcement cases related to IFF.

CRediT authorship contribution statement

Tessa van Roomen: Writing – original draft. **Boudewijn de Jonge:** Writing – review & editing, Writing – original draft.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

[149] Rechtbank Den Haag 2 October 2020, ECLI:NL:RBDHA:2020:9629.

[150] Merijn Rengers and Carola Houtekamer, 'Onderzoeken naar bekende Russische oligarchen stilgelegd' *(NRC, 15 April 2022)* ⟨https://www.nrc.nl/nieuws/2022/04/15/onderzoeken-naar-bekende-russische-oligarchen-stilgelegd-a4113871⟩ accessed 14 december 2023.

[151] Council on Foreign Relations, 'Global Governance to Combat Illicit Financial Flows Measurement, Evaluation, Innovation', (*CFR, 11 October 2018*), ⟨https://www.cfr.org/report/global-governance-combat-illicit-financial-flows⟩ accessed 2 December 2023.

[152] But also to secure the enjoyment of the right to freedom of expression and information of journalists, researchers, human rights advocates and other civil society actors who want to uncover and report on IFF and corruption. They will have the right to access to "public data" and at the same time require effective protection based on international human rights standards plus defendants a fair trial.

[153] Quentin Reed and Alessandra Fontana, 'Corruption and illicit financial flows. The limits and possibilities of current approaches', (2011) (2) Anti-Corruption resource Centre ⟨https://www.u4.no/publications/corruption-and-illicit-financial-flows-the-limits-and-possibilities-of-current-approaches-2.pdf⟩ accessed 7 December 2023.

[154] Ronald F. Pol, 'Anti-money laundering: The world's least effective policy experiment? Together, we can fix it', (2020) Vol. 3/1, 73–94, Policy design and practice.

[155] Michiel Luchtman, *Transnationale rechtshandhaving. Over fundamentele rechten in de Europese strafrechtelijke samenwerking*, (Boom juridisch 2017) and Jannemieke Ouwerkerk, *Herijking van Uniestrafrecht. Over grondslagen voor strafrechtelijke regelgeving in de Europese Unie* (oratie Leiden), (Boom juridisch 2017), 42–43.