

ANTI-MONEY LAUNDERING AS INTERNATIONAL STANDARDS AND THE ISSUE OF STATE SOVEREIGNTY

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Abstract

It has been recognized that the anti-money laundering regime comprises of preventive and repressive measures. Regarding the preventive measures, the Financial Action Task Force (FATF) on Money Laundering issued the Forty Recommendations which are regarded as international standards in preventing and controlling money laundering activities. These standards are generally viewed as 'soft law' and have levels of intervention in legislative, financial, and law enforcement of members and non-member countries of the FATF. However, the rule-making as well as the implementation and enforcement strategy of these standards are not involved and approved by non-member countries. This article argues that this policy is contrary to the principle of state sovereignty and regarded as one of state interventions in the domestic affairs of another state. This article seeks to draw the Forty Recommendations as international standards and examines the creation and implementation of these standards from the standpoint of state sovereignty by focusing exclusively on the principle of sovereign equality and non-interference.

Keywords: *Anti-money laundering, international standards, sovereignty, sovereign equality, non-interference.*

I. INTRODUCTION

The internationalization of anti-money laundering regime has been supported by intergovernmental organization, namely, the Financial Action Task Force (FATF) on Money Laundering.¹ The aim of this

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¹ The FATF is an intergovernmental body which was established by the G7 leaders. It was created in 1989 under the auspices of the Organization for Economic Cooperation and Development (OECD) which headquarters in Paris that aim to address international money laundering undertaken by transnational organized crimes. Its main mandate is to protect financial institution from money laundering purposes. The FATF has three primary functions with regard to money-laundering activities: monitoring members' progress in implementing anti-money laundering measures; reviewing and reporting on laundering trends, techniques and countermeasures; and promoting the adoption and

organization is to develop and promote an international response to combat money laundering.² This organization issued the Forty Recommendations which are regarded as international standards.³ In the words of Drezner, the Forty Recommendations are ‘a global anti-money laundering watchdog that issues international standards which have become a blueprint for money laundering laws and regulations around the world’.⁴ These standards are generally viewed as ‘soft law’ rather than ‘binding rules’ and have levels of intervention in the legislative, financial and law enforcement of any countries. Several principles, such as customer identification, record keeping requirement, and suspicious transaction reporting that stem from the principle of the Basle Committee have been elaborated on and implemented by the FATF for its members and non-member countries. From a legal point of view, the question is whether the implementation of international standards to the non-member countries of the FATF infringes upon national sovereignty of these countries?

This article is an effort at detailing anti-money laundering as international standards and examining the creation and implementation of these standards from the perspective of state sovereignty. In part II, the article provides a brief overview of globalization and the movement of international standards. Part III analyzes anti-money laundering as international standards and how these standards work in preventing and controlling money laundering activities. In part IV, the article examines international standards and the challenge for state sovereignty. Finally, part V of this article draws some conclusions about the conditions under which the creation and implementation of international standards to the non-member countries of the FATF clashes with countries’ sovereign right to develop and implement its own policies.

implementation of the FATF anti-money laundering standards globally.

² See about FATF and Terrorist Financing at <http://www.fatf-gafi.org/>.

³ Borrowing from Brunsson, Hülse and Kerwer, ‘standards’ are rules that give advice to many. See Rainer Hülse and Dieter Kerwer, “Global Standards in Action: Insights from Anti-Money Laundering Regulation”, *Organization*, Vol.14(5), 2007, p.626. See Daniel W. Drezner, “Who Rules? State Power and the Structure of Global Regulation”, University of Chicago, 2002, p.10. See also Caroline Bradley, “Private International Law Making for Financial Markets”, Article, Preliminary Draft, 2005, p.9.

⁴ See Daniel W. Drezner (2002), *Ibid*.

II. GLOBALIZATION AND THE MOVEMENT OF INTERNATIONAL STANDARDS

The term ‘globalization’ is understood as a process of interaction and integration among the people, companies, and government of different nations.⁵ Another meaning of globalization is ‘the development of social and economic relationship stretching world-wide’.⁶ Likewise, globalization may be seen as (1) the erosion of economic, political, social, and cultural boundaries between states; (2) changes in identities of peoples and groups moving loyalty away from the state and towards more universal bodies or concerns; (3) changes in strategies whereby actors, state or non-state, look for solutions that involve cooperation at a higher level than the state’.⁷ Thus, it is in this respect that globalization fundamentally refers to the expanding of social relations across the boundaries of jurisdiction of any countries.

The aforementioned definitions show us that globalization may mean many different things in various contexts and there is no agreement what constitutes the term of globalization. However, scholars and practitioners try to explain the evolving meaning of globalization by emphasizing on the key concepts which refer to certain phenomena. Heba Shams, for example, defines globalization as a process of social change which underlines the change in terms of geographic and political dimensions.⁸ According to him, geographic dimension refers to the direct effect of globalization which is expanded beyond an individual state; while political dimension refers to the partial loss of state power in favor of the roles of other actors. Here in this context, globalization can reduce the power of the nation states in making and implementing the law within its territory.

As a matter of fact, it is widely acknowledged that globalization has positive and negative impacts.⁹ The positive impact of globaliza-

⁵ See http://www.globalization101.org/What_is_Globalization.html

⁶ Anthony Giddens, *Beyond Left and Right: The Future of Radical Politics*, Polity, Cambridge, 1994, p.4

⁷ Hans-Henrik Holm, “Globalization and What Governments make of It”, European University Institute, Firenze. Paper, Unpublished, p.4.

⁸ Heba Shams, *Legal Globalization: Money Laundering Law and Other Cases*, International Financial Law Series, 2004, p.66.

⁹ M. Sornarajah, “Globalization and Crime: The Challenges to Jurisdictional Prin-

tion is its easy access all over the world, among others, people around the globe are more connected each other, information and money flow more quickly, goods and services produced in one country are increasingly available in others, international travel is more frequent, and international communication is commonplace. On the contrary, the negative impact of globalization is the emergence of crimes beyond borders, such as money laundering.¹⁰ This type of crime is committed across the boundaries of multiple jurisdictions in which the criminal, the proceeds, or documentary evidence have moved from one jurisdiction to another.¹¹ By using the development of technology,¹² in which improve method of transferring enormous amounts across-borders, the criminals also utilize them to make money laundering easier to accomplish and harder to detect.

Here in this context money laundering characterized as a transnational crime¹³ which raises worldwide problems. The characteristics of

ciples”, Singapore Journal of Legal Studies, 1999, p.415.

¹⁰ Heba Shams, *Supra* note 8, p.93.

¹¹ R.E. Bell, “Prosecuting the Money Laundering Who Act for Organized Crime”, Department of the Director of Public Prosecution for Northern Ireland, Paper, Unpublished. Bell argued that the cross-border criminal activity of money laundering might cause more than one jurisdiction involved in it: that is which the crime is committed, that in which the criminal is arrested, that in which the proceeds are located, and the jurisdiction in which the proceeds have been frozen, confiscated, or forfeited.

¹² Andreas Rueda, “International Money Laundering Law and the USA PATRIOT Act 2001”. MSU-DCL Journal of International Law, Vol.10, 2001, p.142. (‘Unsavoury operators can today migrate around the globe as quickly as electronic signals. Millions of dollars can be instantly re-shuffled across countries thousands of miles away at the click of a button. New technology, once more widely available, such as electronic money, will facilitate the transfer of enormous amounts of funds across national boundaries with little interference by domestic authorities’).

¹³ A. Bossard, *Transnational Crime and Criminal Law*, Chicago, 1990, p.5, and Staven David Brown, *The Longer Arm of the Law*, Routledge-Cavendish, London and New York, p.6. The term ‘transnational’ means ‘extending or going beyond national boundaries’. Transnational crime can be defined ‘an activity that is considered a criminal offence by at least two countries’, or ‘a serious crime business model involves setting up in one jurisdiction but operating in another’. Another meaning of transnational crime is ‘criminal activities extending into a violating of laws of several countries’. See Gerhard O.W. Mueller, ‘Transnational Crime: An Experience in Uncertainties’, in Einstein and Amir, *Organized Crime: An Uncertainties and Dilemmas*, University of Illinois, Chicago, 1999, p.15. Passas used the term ‘cross-border crime’ which means ‘conduct, which jeopardizes the legally protected interests in more than one national

such a crime cannot be solved by an individual country in isolation but required a solution at an international level. Referring to the drugs trafficking and the exercise of jurisdiction, in *DPP v Doot Case* (1973), Lord Salmon observed that ‘today, crime is an international problems – perhaps not least, crimes connected with illicit drug traffic – and there is a great deal of cooperation between nations to bring criminals to justice’.¹⁴

It is at this point that collaboration and cooperation between or among countries absolutely needed. Rules, principles and procedures which may involve hard and soft law¹⁵, are needed to constitute by countries. These phenomena lead to the establishment of global governance as a response to the globalization in which it manages. Global governance refers to the ‘collective efforts to identify, understand, or address worldwide problems that go beyond the capacity of individual states to solve’.¹⁶ From this perspective, it can be noted that global governance is a kind of collaboration and cooperation between or among countries in solving any problems beyond the capacity of individual state.

In term of its actors, global governance could be states or non-state actors such as international organizations, intergovernmental organizations, non-governmental organizations (NGO), private entities or other civil actors. In term of its action, global governance created international standards¹⁷ which are then used in governing and guid-

jurisdiction and which is criminalized in at least one of the states concerned’. See also Nikko Passas, “Cross-border Crime and the Interface between legal and Illegal Actors”, *Security Journal*, Vol.16(1), 2003, p.20.

¹⁴ M. Sornarajah, “Extraterritorial Criminal Jurisdiction: British, American, and Commonwealth Perspective”, *Singapore Journal of International and Comparative Law*, Vol.2, 1998, p.22.

¹⁵ Hard law comprises specific rules over which there is potential enforcement by determinative bodies. Soft law refers to norms and standards that are more general than rules and are not legally enforceable but nonetheless guide behavior in practice, similar in nature to principles.

¹⁶ Margaret P. Karns and Karen A. Mingst. *International Organizations: The Politics and Processes of Global Governance* (Boulder, CO: Lynne Rienner Publishers, 2004).

¹⁷ The term ‘standard’ is generally understood as ‘a guide for behavior and for judging behavior’. Webster’s Dictionary defines the concept of ‘standard’ as ‘something that is established by authority, custom, or general consent as a model or example to be followed’. Borrowing from Brunsson, Hülse and Kerwer, ‘standards’ are rules that give advice to many. See Rainer Hülse and Dieter Kerwer, “Global Standards in Action:

ing the conduct and behavior of state and non-state actors in solving their problems.¹⁸ International standards address to the non-binding or voluntary rules.¹⁹ The concept of ‘international standard’ is intended to regulate universally or generally accepted how states, corporations, or individuals behave. The Stockholm School Theories²⁰ gave an example of international standards from the FATF Forty Recommendations. The following section will elaborate anti-money laundering as international standards by emphasizing on its scope, policy, procedure, and process.

III. ANTI-MONEY LAUNDERING AS INTERNATIONAL STANDARDS

The term ‘standard’ is generally understood as ‘a guide for behavior and for judging behavior’.²¹ Webster’s Dictionary defines the concept of ‘standard’ as ‘something that is established by authority, custom, or general consent as a model or example to be followed’.²² Another meaning of ‘standard’ is ‘universal rules that address public policy issues and that can be set by any rule-maker’.²³ The concept of ‘international standard’ is intended ‘to connote some universally, or at least generally accepted, canons of behavior for states, corporations and individuals in the conduct of business and financial affairs’.²⁴ In the context of the anti-money laundering, the FATF Forty Recommendations are regarded as international standards.

Insights from Anti-Money Laundering Regulation”, *Organization*, Vol. 14(5), 2007, p.626. Another meaning of ‘standard’ is ‘universal rules that address public policy issues and that can be set by any rule-maker’. See Rainer Hülse and Dieter Kerwer (2007), *Supra* note 3, p.627. See also Kenneth W. Abott & Duncan Snidal, “International Standards and International Governance”, *Journal European Public Policy*, Vol.8, 2001, p.345.

¹⁸ Herbert V. Morais, “Globalization and Sovereignty: The Quest for International Standards: Global Governande vs. Sovereignty”, *Kansas Law Review*, Vol.50, 2003, p.781.

¹⁹ Herbert V. Morais (2003), *Ibid*, p.808.

²⁰ Herbert V. Morais (2003), *Ibid*.

²¹ Kenneth W. Abott & Duncan Snidal (2001), *Supra* note 17, p.345.

²² *Ibid*.

²³ Rainer Hülse and Dieter Kerwer (2007), *Supra* note 3, p.627.

²⁴ Herbert V. Morais (2003), *Supra* note 18, p.781.

The Forty Recommendations as international standards for the first time were issued in 1990. These standards cover the general framework,²⁵ the improvements of national legal systems,²⁶ the enhancement of the role of financial systems,²⁷ and the strengthening of international cooperation.²⁸ In 1996, the FATF revised the Forty Recommendations (1990) which take into account two factors: the vulnerabilities resulting from technological advances and the profits derived from beyond drugs-related crimes.²⁹ Then, the Forty Recommendations were revised in 2003 which have several substantial changes from the (1996) ones.³⁰ The Forty Recommendations (2003) comprise four sections that involve the legal system; measures to be taken by financial institutions and non-financial businesses and professions to prevent money laundering and terrorist financing; institutional and other measures necessary for combating money laundering and terrorist financing; and international cooperation which involves mutual legal assistance and extradition.

As a principal part of the anti-money laundering policy, the work of the FATF recommendations to the members and non-member countries involves three enforcement mechanisms, namely, self-assessment, mutual evaluation, and the NCCT initiative. The first mechanism, self-assessment, is annually monitors the progress of the FATF members

²⁵ The Forty Recommendation on Money Laundering (1990), Recommendation 1-3

²⁶ *Ibid*, Recommendations 4-7

²⁷ *Ibid*, Recommendations 8-29

²⁸ *Ibid*, Recommendations 30-40

²⁹ Several changes that have been integrated in the Forty Recommendations (1996) are: the extension of predicate offences beyond narcotics trafficking to include all serious crimes; the mandatory reporting of suspicious transactions; the application of the recommendations to the bureaux de change, all other non-bank financial institutions, and non-financial businesses or professions; the expansion of customer identification to the legal entities; the need to pay special attention when dealing with shell corporations and new technologies; the encouragement of the use of “controlled deliveries” techniques; and finally, the monitoring of cross-border cash movements.

³⁰ The changes are: specifying a list of crimes must underpin the money-laundering offences; the expansion of the customer due diligence process for financial institutions; enhanced measures for correspondent banking and politically exposed persons; the extension of its measures to non-financial business and professions; the inclusion of key institutional measures; the improvement of transparency requirements on beneficial ownership of legal persons; the reliance on third parties and introduced business; and the prohibition of shell banks.

in implementing the Forty Recommendations. In this exercise, each member is required to complete a standardized questionnaire, showing to what extent the recommendations have been implemented. This information is compiled and analyzed with the result presenting a view of the overall progress of the members in implementing the Forty Recommendations. Based on this the FATF may give suggestions for further enhancement of their anti-money laundering and terrorist financing.

The second mechanism is the mutual evaluation process.³¹ It is a method that evaluates the performance of the anti-money laundering and terrorist financing systems of member countries based on the implementation of the Forty Recommendations. This method is carried out by on-site examination of a Team which consists of selected experts in the field of legal, financial, and law enforcement from various countries. The Team reviews and analyzes data submitted by the government, and verifies the information through on-site visit and interviews. Subsequently, the secretariat of the FATF issues a draft confidential report that the Team and the evaluated countries will discuss. The final report is a confidential assessment that is issued after it has been discussed in the FATF Plenary meeting. This report describes how good the member countries are adhering to the recommendations and identifies areas for further enhancement.

The third mechanism is a policy for assessing the implementation of anti-money laundering measures by non-member countries.³² Non-member countries that do not comply with the Forty Recommenda-

³¹ The mutual evaluation has had three rounds since 1992; every member was evaluated once in each round. The focus of each round differs depending on the targets. The first round was conducted between 1992 and 1995 and focused on monitoring the progress of the FATF members in implementing the Forty Recommendations. The second round occurred between 1996 and 1999; its focus was on the effectiveness of each country's anti-money-laundering laws and systems. The third round of mutual evaluation started in January 2005 and focused exclusively on the compliance with the revised parts of the recommendations, the areas of significant deficiencies identified in the second round, and the effectiveness of countermeasures.

³² The rationale for this policy is to encourage countries and territories not only to speed up the implementation of anti-money laundering legislations, but also to improve existing countermeasures. See Financial Action Task Force on Money Laundering, Annual Report. The Annual Report Issue on Non-Cooperative Countries and Territories has existed since 2001.

tions will be categorized as Non Cooperative Countries or Territories (NCCTs).³³ This approach consists of ‘peer pressure’, is based on ‘naming and shaming’. The countries which are categorized as the NCCT appear in the FATF’s blacklist. The aim of the initiative, according to the FATF, is ‘to increase the protection of the world’s financial system by securing adoption by all financial centers of effective measures to prevent, detect, and repress money laundering’.³⁴ The policy to put into effect the Forty Recommendations in the non-member states is based on an assumption that ‘Any discrepancy between national measures to fight money laundering can be used potentially by traffickers, who would move their laundering channels to the countries and financial systems where no or weak regulations exist on these matters’.³⁵

This is the reason why the FATF has obliged non-member states to implement the Forty Recommendations. It has become evident that even though the members have strengthened their systems, the criminals try to seek other jurisdictions that have weaknesses in their money laundering countermeasures.³⁶ As a consequence, money laundering may affect not only non-members with weaknesses in their legislations but also the member states though they have taken perfect money-laundering countermeasures.

In February 2000, the FATF issued a report describing how to identify non-cooperative jurisdictions.³⁷ In the FATF’s report (2000), fifteen countries were identified as non-cooperative in the fight against money laundering. In 2001, FATF added eight countries to the list including

³³ The concept of Non Cooperative Countries and Territories (NCCTs) has existed during the FATF meetings in 1999/2000. During this period, the FATF established 25 criteria and identified jurisdictions which meet the criteria. They cover prevention, detection and penal provisions, and they include such items as financial regulations (e.g. supervision of financial institutions, excessive secrecy, customer identification requirements, and other regulatory requirements), judicial and administrative international cooperation, and the issue of resources.

³⁴ Annual and Overall Reviews of Non-Cooperative Countries and Territories, 10 June 2005, p.15.

³⁵ Financial Action Task Force on Money Laundering, Annual Report 1989/1990, at 16. See also Heba Shams (2004), *Supra note 8*, p.223.

³⁶ Reiner Hulsse and Dieter Kerwer (2007), *Supra note 3*, p.632.

³⁷ See Financial Action Task Force on Money Laundering, Report on Non-Cooperative Countries and Territories (2000).

Egypt, Hungary, Indonesia, and Nigeria. The list changes each year based on the countries' compliance. Some countries are removed from the list, some remain, and new ones are added. The FATF demands of its members that they apply recommendation 21 to the countries on the list, which states that 'financial institutions should pay special attention to business relation and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply these recommendations'.³⁸ As a result of the NCCT initiative, many countries have improved their anti-money laundering (AML) system to overcome the serious deficiencies of their systems.

To decide whether any jurisdiction should be removed from the list, the countries in question have met the minimum standard required by the FATF. Two special measures can be taken in dealing with countries that do not sufficiently apply the Forty Recommendations. The first measure is special due diligence to be exercised by financial institutions in their dealings with individuals and entities from such countries; and the second one is special record keeping and reporting requirements regarding suspicious or unusual transactions emanating from these countries.³⁹

A research regarding the effectiveness of this sanction in forcing non-member countries to meet the minimum standards of the FATF forty-recommendations has been conducted by Sharman.⁴⁰ His research on the Seychelles, Antigua & Barbados, and the Cook Islands has proven that these governments improved their anti-money laundering laws in a relatively short time. Based on this research, a country's association to crime and corruption has a detrimental effect on the reputation of the NCCT.⁴¹ Here in this context, the NCCTs list has 'a shaming character'

³⁸ Guy Stessens (2001), "The FATF 'Black List' of Non-Cooperative Countries or Territories", 14 *Leiden Journal of International Law*, p.205.

³⁹ Heba Shams (2004), *Supra* note 8, p.223.

⁴⁰ J.C. Sharman, "The Global Anti-Money Laundering Regime and Developing Countries: Damned if They Do, Damned if They Don't?", p.p.9-13. Available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/0/0/7/5/pages100752/p100752-28.php. See also J.C. Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy*, (Ithaca and London: Cornell University Press, 2011).

⁴¹ *Ibid*. In his research on the Cook Islands, Sharman noted that: 'In 1999 the offshore industry made a net contribution of \$NZ 1,4 million to government revenues, but by 2004 this contribution had fallen to \$NZ 400,000'. This reflects a drop in the number

and ‘economic consequences’ which could then lead to the economic and financial problems.⁴² In this case, it can be argued that the blacklisting method used in the FATF policy causes diffidence, disinvestment, and threatening electronic banking links in the financial systems of the targeted countries.

IV. INTERNATIONAL STANDARDS AND THE CHALLENGE TO THE STATE SOVEREIGNTY

So far, it has been demonstrated that the anti-money laundering regime comprises of preventive and repressive measures. Regarding the preventive measures, the Financial Action Task Force (FATF) on Money Laundering plays a significant role in implementing and enforcing the Forty Recommendations. Nonetheless, in the implementation level, the Forty Recommendations have also been distributed to non-member countries. The rule-making as well as the implementation and enforcement strategy of these Recommendations are not involved and approved by non-member countries.⁴³ From a legal point of view, a basic concern that needs to be asked is whether the implementation of the Forty Recommendations on the non-members clashes with a country’s sovereign right to develop and implement its own policies? Some commentators argued that this implementation is regarded as one of state intervention in the domestic affairs of another State.⁴⁴ This section

of offshore banks, a halving in the number of IBCs, and decline in the number of asset protection trusts, which local industry and government sources attributed directly to the blacklisting.

⁴² Marie Wilke, “Emerging Network Structures in Global Governance: Inside the Anti-Money Laundering Regime”, 77 *Nordic Journal of International Law*, 2008, p.515. See also Sharman, *Supra* note 40, p.9.

⁴³ Morais, for example, identified two areas seen as considerable problems: being the legislative process used to formulate such standards and the strategies used to implement and enforce them. See Herbert V. Morais (2003), *Supra* note 18, p.807.

⁴⁴ Jared Wassel, Paper, “The Financial Action Task Force: A Study in Balancing Sovereignty with Equality in Global Administrative Law”. See also Eleni Tsingou, “Who Governs and Why? The Making of the Global Anti-Money Laundering Regime”, Draft Paper, Centre for the Study of Globalization and Regionalization, University of Warwick, United Kingdom, p.4. See also Tod Doyle, “Cleaning Up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law”, *Houston Journal of International Law*, Vol.24, 2002.

examines sovereignty from the anti-money laundering regime standpoint, focusing exclusively on the principles of sovereign equality and of non-interference. To begin with, it is needed to explore the meaning and scope of sovereignty.

A. Defining Sovereignty

According to the definition proposed by Oppenheim in 1905, sovereignty comprises the power of a state to exercise supreme authority over all persons and things within its territory and citizens.⁴⁵ The core elements of state sovereignty were codified in the 1933 Montevideo Convention on the Rights and Duties of States. In accordance with this convention, three requirements of sovereignty involve a permanent population, a defined territory, and a functioning government. In reviewing the relevant literature, the term ‘sovereignty’ has multiple definitions and a variety of forms. In the simple term, sovereignty is ‘the right of a government to have a complete control over its area’.⁴⁶ Another meaning of sovereignty is ‘a legal equality that places the state above the authority of all external laws’.⁴⁷ Likewise, sovereignty can be defined as ‘the highest authority within the state and a prerequisite for granting equal status with other states in international relations’.⁴⁸ According to the Black’s Law Dictionary, sovereignty is ‘the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation’.⁴⁹ From this perspective, sovereignty is perceived as ‘the power of any state to do everything to govern itself’.⁵⁰ In other words, a state is sovereign if ‘the exercise of power internally to the state is not subject to the external

⁴⁵ Benadict Krugbury, “Sovereignty and Inequality”, *European Journal of International Law*, Vol.9, No.4, 1988, p.559.

⁴⁶ See <http://simple.wikipedia.org/wiki/Sovereignty>.

⁴⁷ Jayatha Dhanapala, “Globalization and the Nation State”, *the Colorado Journal of International Environmental Law and Policy*, 2001, p.1.

⁴⁸ Ivan Simonovic, “State Sovereignty and Globalization: Are Some States More Equal?”, *Georgia Journal of International and Comparative Law*, Vol.28, No.3, 2000, p.381.

⁴⁹ Black’s Law Dictionary, 6th Edition.

⁵⁰ <http://legal-dictionary.thefreedictionary.com/National+sovereignty>.

superior power'.⁵¹

The above definitions produce several assumptions concerning the sovereignty of states which are relevant to international law. Wang, for example, pointed out the three-fold capacity of a state: 'absolute supremacy over internal affairs within its territory, absolute right to govern its people, and freedom from any external interference in the above matters'.⁵² The question of when any state is sovereign has been answered by Brownlie with proposing three conditions: first, a jurisdiction *prima face* exclusive over a territory and permanent population living there; second, a duty of non-intervention in the area of exclusive jurisdiction of other states; and third, the dependence of obligations arising from customary law and treaties on the consent of the obligor.⁵³

It is at this point that any state is sovereign if it has the ability to make and implement laws within its territory, can function without any external power and assistance, and does not recognize any authority other than itself in the world of independent states. Sovereignty can be differentiated into two distinct dimensions: internal and external sovereignty. The former refers to the authority exercised within its nation-state territorial borders. The latter refers to state's status as equal to and independent of other sovereign states in the international order.⁵⁴

B. Anti-Money Laundering and the Principle of Sovereign Equality

As noted earlier, the Forty Recommendations of the FATF are regarded as 'international standards'. Drezner pointed out that the Forty Recommendations as 'a global AML watchdog that issues international standards which have become a blueprint for money laundering laws and regulations around the world'.⁵⁵ These standards were established

⁵¹ Neil MacCormick, *Beyond Sovereignty*, *Mod.Law Review* 1, Vol.56, 1993, p.56. See also Kris Hintersee, *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context*, the Hague/London/New York: Kluwer Law International, 2002, p.360.

⁵² Guiguo Wang, "The Impact of Globalization on State Sovereignty", *Chinese Journal International Law*, Volume 3, 2004, p.473.

⁵³ Ian Brownlie, *Principles of Public International Law*, 1990, p.287.

⁵⁴ Heba Shams (2004), *Supra* note 8, p.193.

⁵⁵ Drezner (2002), *Supra* note 3. See also The Forty Recommendations (2003), Intro-

by industrial countries which joined the group of G7 nations. On paper, the Forty Recommendations are voluntarily and non-binding rules. Each country must take measures as deemed necessary and should be taken in accordance with its legal principles or within the framework of its laws and regulations. Practically speaking, however, these recommendations come down to coercion. The FATF provides detailed guidelines on how to formulate and implement measures to combat money laundering. From this perspective, there is a problem regarding the position of non-member countries.

Some commentators argue that this condition is contrary to the principle of 'sovereign equality' where every sovereign state possesses the same legal right as any other state.⁵⁶ The basic notion of the sovereign equality of states was expressed by a French delegate to the Hague Conference of 1907: 'Each nation is a sovereign person, equal to others in moral dignity, and having, whether small or great, weak or powerful, an equal claim to respect for its rights, an equal obligation in the performance of its duties'.⁵⁷ U.S. Chief Justice Marshall articulated the acceptance of the principle of sovereign equality in American jurisprudence in the case of the *Antelope* (1825): "No principle of general law is more universally acknowledged, than the perfect equality of nations."⁵⁸ Writing in 1928, A.D. McNair described the slavish acceptance of the concept of sovereign equality by international lawyers during the nineteenth century in religious terms: "to have doubted it would have been to lay hands on the art of the covenant."⁵⁹

duction, which reads '... the Forty Recommendations have been endorsed by more than 130 countries and are the international anti-money laundering standard'.

⁵⁶ One of the fundamental rights of a state is equality with all other states. This right is given general recognition by long-standing state practice. See also Thomas H. Lee, "International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today", *Law & Contemporary Problems*, Vol.67, 2004, p.148.

⁵⁷ Edwin DeWitt Dickinson. *The Equality of States in International Law*, Cambridge: Harvard University Press, 1920. Cited in Kurt Taylor Gaubatz, "Democratic States and Sovereign Equality Norm", Article, Department of Political Science, Stanford University, California, 2004, p.4.

⁵⁸ Supreme Court of the United States, 23 U.S. 66 1825 U.S. Lexis 219. Cited in Kurt Taylor Gaubatz (2004), *Ibid*, p.6.

⁵⁹ Arnold D. McNair. "The Equality of States" *Michigan Law Review*, Vol.26, No.2, 1927), p.134. Cited in Kurt Taylor Gaubatz (2004), *Ibid*, p.6.

Equality of state in international law means ‘whatever is lawful for one nation is equally lawful for any other, and whatever is unjustifiable in the one is equally so in the other’.⁶⁰ In the context of the FATF Recommendations as international standards, Morais, for example, argued that this condition is due to a lack of authority to require non-members to observe the standards.⁶¹ He wonders whether it is appropriate for industrial countries to determine the scope and context of ‘international standards’ and their implementation in non-member states dominated by developing countries.⁶² He even noted that external pressures to adopt standards threatened the sovereignty of non-members and regarded as a new form of Western ‘imperialism’.⁶³

From a legal point of view, the above conditions contradict with various international legal instruments. If we look into the Charter of the United Nations, particularly Article 2(1), we will find the statement that each member state is deemed equal in sovereignty. No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal affairs of any other states. In addition, with the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, a General Assembly resolution adopted by the United Nations in 1970, sovereign equality became one of the basic principles of international law: ‘All states enjoy sovereign equality’, it reads: ‘They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature’. Furthermore, states are not only equal in how legal norms apply to them, but they are also equal in how they participate in the creation of international normativity.

Then, there is the UN Vienna Convention of 1988 on Drug Traf-

⁶⁰ See Balazs Fekete, “Recent Trends in Extraterritorial Jurisdiction- The Sarbanes-Oxley Act and Implications on Sovereignty”, *Acta Juridica Hungarica*, Vol.49, No.4, 2008, p.410. See also Stephane Beaulac, ‘An Inquiry into the International Rule of Law’, European University Institute, Working Paper MWP 2007/14, Max Weber programme, Italy, 2007, p.16. Quoted from E. de Vattel, *The Law of Nations; or Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns*, trans. By J. Chitty, Philadelphia: Johnson Law Booksellers, 1863, p.lxii.

⁶¹ H.V. Morais (2003), *Supra* note 20, p.806.

⁶² *Ibid.*

⁶³ *Ibid.*

ficking confirming that each State shall carry out their obligations under this convention in conformity with the fundamental provisions of their respective domestic legislative systems, and in a manner consistent with the principles of sovereign equality and territorial integrity of States.⁶⁴ In the same vein, these principles also exist in the UN Convention against Transnational Organized Crime of 2000.⁶⁵ Article 4 promulgated that States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States. In addition, the convention states that nothing in the Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

C. International Standards and The Principle of Non-Interference

In carrying out its mission to implement the Forty Recommendations in non-member countries, the FATF has entered all aspects of governmental functions including legislative, executive, and judicial affairs.⁶⁶ Regarding the legislative affairs, the FATF encourages countries to create laws and regulations in accordance with its Directive. In this context, the FATF intervenes in the legislative function to support the implementation of its recommendations. Gil Galvao⁶⁷ argued that this intervention compels the targeted countries to establish a legislative framework to criminalize money laundering and to prevent, investigate, and prosecute this type of crime. Concerning the executive affairs, the FATF urges countries to have their competent authorities to implement the Forty Recommendations. In this context, the FATF encourages the targeted countries to support and develop, as far as possible, the knowl-

⁶⁴ See the UN Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, 1988, Article 2(1) and (2).

⁶⁵ See *Ibid*, Article 4

⁶⁶ Tod Doyle (2002), *Supra note 44*, p.p.300-301

⁶⁷ Gil Galvão, Countering Money Laundering: The FATF, the European Union, and the Portuguese Experience, Past and Current Developments, Resource Material Series No.58, Work Product of the 117th International Seminar: “Current Situation and Countermeasures against Money Laundering”, UNAFEY.

edge and skill of their competent authorities in controlling and combating the complexities of money laundering activities. Moreover, the targeting countries are urged to cooperate on the international level in the fields of investigation, prosecution, and adjudication. Finally, in the judicial affairs, the FATF asks countries to employ a judiciary to carry out the FATF aims. If we look at recommendation 17 of the FATF 2003, we will find that the FATF Policies intervene in judicial affairs of targeted countries. According to this recommendation, countries should provide sanctions in criminal, civil, and administrative fields to address natural and legal persons who fail to comply with anti-money laundering requirements.

In such areas, many of the FATF policies intervene in the targeted countries' affairs and thus, it is contrary to the basic principle of non-interference. Tod Doyle⁶⁸, for example, identified a number of international legal instruments that contained the doctrine of non-interference. Those instruments are the Montevideo Convention of 1933, the United Nations Charter of 1945, the Vienna Convention of 1969, and the 20th session of the UN General Assembly. The Montevideo Convention on the Rights and Duties of States, particularly article 8, maintains that 'No state has the right to intervene in the internal or external affairs of another'. At the same time, this condition also violates Article 2(7) of the UN Charter which mentioned 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any State...'. Moreover, if we look into the UN Vienna Convention on the Law of treaties, especially in its Preamble, we will find the commitment to the principle of sovereign equality, independence of all states, and non-interference in domestic affairs of states. Finally, the policy of the FATF is contradicts with the 20th session of the U.N. General Assembly, which declares that 'No state has the right to intervene, directly or indirectly, for any reasons whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are condemned'.

Furthermore, the UN Vienna Convention on the Law of Treaties of

⁶⁸ Tod Doyle (2002), *Supra* note 45, p.301.

1966, especially Article 34, maintains that the treaty does not create either obligations or rights for a third state without its consent. According to this convention, States are only bound by rules that they themselves make and consent to abide by. In other words, no state can be held bound to a rule if it has no consented to it.

Here in this context there has been interrelationship between territoriality principle and state sovereignty.⁶⁹ The very essence of sovereignty began with the nation-state which, by definition, is competent to prescribe conduct that occurs in whole or in part within its territory.⁷⁰ It would thus seem that territoriality principle can be said as the manifestation of the sovereign powers of any state within its own territory. From this perspective, no nation could apply its criminal laws to conduct occurring within the physical territory of another nation.

Finally, returning to the implementation of the Forty Recommendations, the FATF provides sanctions for countries who do not comply with its recommendations. One of the sanctions imposed on non-members puts the non-compliance states to the published blacklist countries. This measure violates article 41 of the UN Charter which maintained that ‘nothing in the Charter prevents any member state from imposing sanctions without the backing of the Security Council’.

V. CONCLUSION

The process of globalization that leads to the formation of global governance is characterized by the formulation of ‘global standards’. Global standards are needed to manage a problem that cannot be re-

⁶⁹ I. Brownlie, *Principles of International Public Law*, Oxford, 2003, pp.105-6. (‘The notion of jurisdiction is closely intertwined with such concept as sovereignty and territoriality’).

⁷⁰ Rolin M. Perkins, “The Territorial Principle in Criminal Law”, *Hasting Law Journal*, Vol.22, 1071, pp.1155, 1157. In the case of *Schooner Exchange v. MacFaddon*, Chief Justice Marshall made a statement about this relationship: “The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction”. See also Wendell Berget, “Criminal Jurisdiction and the Territorial Principle”, *Michigan Law Review*, Vol.30, 1931-1932, p.240, 242.

solved by one country in isolation. It is necessary to arrange cooperation between or among states which passed the boundaries of an individual state. The Forty recommendations of the FATF as international standards have been recognized a crucial role in preventing and combating money laundering. These standards were established by industrial countries which joined the group of G7 nations. However, the rule-making as well as the implementation and enforcement strategy of these Recommendations are not involved and approved by non-member countries. These recommendations came down to coercion and distributed to the non-member countries of the FATF. The FATF provides detailed guidelines on how to formulate and implement measures to combat money laundering. Each country must take measures as deemed necessary and should be taken.

From a legal point of view, a basic concern that needs to be addressed is that the implementation of the Forty Recommendations on the non-members clashes with a country's sovereign right to develop and implement its own policies. Even, this implementation is regarded as one of state intervention in the domestic affairs of another state. In term of conclusion, this condition is contrary to the principle of 'sovereign equality' where every sovereign state possesses the same legal right as any other state. It is also contrary to the principle of 'non-interference' because no nation could apply its laws and regulations to conduct occurring within the physical territory of another nation.

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