


2011

What domestic and international legal efforts can best ensure the freezing of assets and money acquired through acts of piracy?

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WORKING IN PARTNERSHIP WITH PILPG AND THE
PILPG HIGH LEVEL WORKING GROUP ON PIRACY**

OBJECT AND PURPOSE: Legal memorandum to provide assistance to the Kenya Piracy Court and other cooperating state courts and to help to lay the groundwork for a Security Council-created Regional Piracy Court.

ISSUE: What domestic and international legal efforts can best ensure the freezing of assets and money acquired through acts of piracy?

**PREPARED BY: BAKER & MCKENZIE, LLP
MAY 2011**

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. ISSUE

You have asked that we assist the PILPG High Level Working Group (PILPG) on various piracy issues to provide assistance to the Kenya Piracy Court and other cooperating state courts and to help to lay the groundwork for a Security Council-created Regional Piracy Court (“Piracy Court”).¹

We have been asked to provide our opinion with respect to the following question:

What domestic and international legal efforts can best ensure the freezing of assets and money acquired through acts of piracy? (Explore domestic and international efforts to freeze assets of terrorism as a model. Piracy will continue as long as it is profitable).

B. SUMMARY OF CONCLUSION

Freezing assets obtained through acts of piracy will be essential to the success of the Piracy Court. Several international conventions address a range of criminal activities such as terrorism, organized crime and money laundering, and corruption – all of which are defined broadly enough to include acts of piracy or the conversion of assets gained therefrom. These conventions include International Convention for the Suppression of the Financing of Terrorism (ICSFT), United Nations Convention Against Transnational Organized Crime (Palermo Convention, or CTOC), and the United Nations Convention

¹ Memorandum to Angela Vigil, Baker & McKenzie, from Brett Ashley Edwards, PILPG dated March 7, 2011.

Against Corruption (UNCAC). In ratifying these conventions, the States Parties commit themselves to establishing the necessary national legal framework to trace and freeze the proceeds of illegal acts. The conventions also oblige them to facilitate each others' efforts to trace and freeze assets by providing mutual legal assistance.

In addition to these international conventions, there are also several relevant international institutions and agencies set up to aid States in designing the appropriate national legislation, building the required national institutional infrastructure, and facilitating mutual legal assistance to trace and freeze assets related to international criminal activity. These include the Financial Action Task Force (FATF), the Stolen Assets Recovery Initiative (StAR), the Egmont Group of Financial Intelligence Units, and the International Criminal Police Organization (Interpol). Each of these organizations can provide advice and assistance to a Member State in adopting the necessary legislative changes to meet their obligations under the international conventions.

The existing network of the conventions and organizations discussed in this memorandum, as well as domestic laws and institutions already implemented by States to address cross-border movements of funds obtained from or related to illegal acts, render it unnecessary for the Piracy Court to introduce a specialized international convention. If States ultimately wish to adopt a set of international principles specifically targeting piracy in parallel with the establishment of the Piracy Court, then a supplemental protocol to an existing convention may be the means to do this. For example, the CTOC already has three supplemental protocols against trafficking in persons, smuggling of migrants, and illicit manufacture and trafficking in firearms. A supplemental protocol on piracy,

though not necessary in legal terms, could focus international attention and facilitate coordination on the issue.

In the absence of a new convention or a supplemental protocol, we would recommend instead that the constituent documents of the Piracy Court make reference to the international conventions discussed in Part III.A. of this memo and highlight their applicability to acts of piracy; point to the specific provisions of these conventions highlighted in Part III.B. to encourage State participation in the tracing and freezing of assets obtained through acts of piracy; and work with the organizations described in Part III.C. to facilitate the tracing and freezing of such assets at the international and domestic levels. As a further measure, the organizations described in Part III.C. may be encouraged to set up an internal unit specifically responsible for coordinating actions and support on piracy. Or, they could also announce that an existing unit has additional competence for issues related to piracy. In this way, Member States will know where they can direct their inquiries for support and assistance when looking to trace and freeze assets acquired through acts of piracy.

II. FACTUAL BACKGROUND

To effectively protect and reimburse the victims of piracy, the planned the Piracy Court should implement a mechanism to trace and freeze the assets suspected pirates derive from acts of piracy and, in the case such suspects are found guilty, return the assets to their rightful owners. Finding those assets may be difficult, not least because it is unclear where the localized economy in which the pirates operate in Somalia actually

touches the international financial system either formally or informally.² Ransoms are paid in cash, partly because Somalia has no functioning banking system, and partly to hamper anti-money-laundering investigators.³ Once ransom deals are agreed, the money is usually delivered to the pirates by dropping cash from a light aircraft.⁴ But, piracy is now becoming more organized,⁵ and increasingly, pirates accept money using electronic funds transfer.⁶ This could make tracing the funds easier.

The piracy business is booming, in part, because ransoms keep getting larger.⁷ Ransoms paid in 2010 amounted to US\$238 million, representing an average of \$5.4m per ship, compared with just \$150,000 per ship in 2005.⁸ In 2009 alone, the average ransom rose from around US\$1.5 million at the beginning of the year to US\$3.5 million at the end. In one extreme recent example, Somali pirates earned a payout of US\$13.5 million in April 2011 for the release of just one ship.⁹ This represented a 26,900 percent return on their estimated original expenses of \$50,000.¹⁰ The various actors in a hijacking operation split these profits, with the “big bosses” backing an operation earning a 30 percent share of the take.¹¹

² Tabassum Zakaria, *U.S. Chase of Somali Pirate Assets Faces Rough Seas*, REUTERS (Apr. 21, 2009), <http://uk.reuters.com/article/2009/04/21/us-somalia-piracy-assets-idUKTRE53K36H20090421>.

³ *No Stopping Them*, THE ECONOMIST (Feb 3, 2011), available at <http://www.economist.com/node/18061574>.

⁴ *Id.*

⁵ Zakaria, *supra* note 2.

⁶ THE ECONOMIST, *supra* note 3.

⁷ Robert Young Pelton, *Somali Pirates' Rich Returns*, BLOOMBERG BUSINESSWEEK (May 12, 2011), http://www.businessweek.com/print/magazine/content/11_21/b4229064090727.htm

⁸ *At Sea*, THE ECONOMIST (Feb. 3, 2011), available at <http://www.economist.com/node/18070160>.

⁹ Andrew Mwangura et al., *Pirates Receive \$23.5M for 3 Ships In One Week*, SOMALIA REPORT PIRACYREPORT, (Apr. 18, 2011) http://www.somaliareport.com/index.php/post/565/Pirates_Receive_235M_for_3_Ships_In_One_Week.

¹⁰ *Id.*

¹¹ It is estimated that thirty percent goes to the maritime crew (with a bonus of a Land Cruiser to the first pirate that lands on the ship). The ground crew that watches the ship and hostages for extended periods receives 10 percent. Another 10 percent gets splashed around with local elders, community, and politicians.

While the lower level operatives are probably more likely to spend their earnings in the local economy,¹² those higher up the chain may be more apt to hide or launder their ill-gotten gains, especially as the profits are increasing. Because cash assets are liquid they can be easily moved across borders electronically between banks. Identifying the sources of these assets and their owners requires cooperation between requesting states and receiving states where the assets are deposited.

A jurisdiction where funds have been secreted will not confiscate or repatriate the assets to the country of origin unless evidence is presented that links them to an illegal activity.¹³ The evidence must be admissible in court proceedings.¹⁴ Investigations to gather the required evidence require intense cooperation between law enforcement agencies (e.g., police, national intelligence agencies), Financial Intelligence Units (FIUs) (often operating under the auspices of a Ministry of Finance or a State Treasury), and prosecutors.¹⁵ Freezing and seizing assets fall largely under the auspices of the judicial system and therefore must respect civil and criminal procedural rules.¹⁶ International cooperation tends to raise a number of issues such as banking secrecy; the insistence by some countries on dual criminality; the slow pace of exchange of information between countries, partly because of protocol or differences in procedural systems between

Twenty percent goes to the little backers. And the big boss receives 30 percent. There are at least three big money men—Boyah, Garaad, and Afweyne—who back 50 percent of the initial expenses for an operation. See Pelton, *supra* note 7.

¹² See Jeffrey Gettleman, *Somalia's Pirates Flourish in a Lawless Nation*, NEW YORK TIMES (Oct. 30, 2008), available at <http://www.nytimes.com/2008/10/31/world/africa/31pirates.html?pagewanted=all>.

¹³ Phyllis Atkinson, *Introduction*, in BASEL INSTITUTE ON GOVERNANCE, INTERNATIONAL CENTER FOR ASSET RECOVERY, TRACING STOLEN ASSETS: A PRACTITIONER'S HANDBOOK 19-20 (2009).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

countries; and cost.¹⁷ Countries with significant offshore banking and investment sectors, such as Switzerland, are regularly required to provide mutual assistance in investigations or asset repatriation. But, a request for mutual legal assistance sent to a financial center from an emerging market economy to trace the proceeds of crime can be a frustrating experience for a requesting state, especially when national laws prevent “fishing expeditions.”¹⁸ International conventions therefore promote mutual legal assistance in the absence of bilateral treaties and provide mechanisms for international cooperation for signatory countries.¹⁹ In addition, cross-border cooperation and information exchange can be facilitated by membership in international institutions.

III. LEGAL DISCUSSION

A. INTERNATIONAL CONVENTIONS

Several international conventions commit their signatories to taking action to combat terrorism, organized crime, and corruption, including the freezing of assets related to these activities. These conventions are the International Convention for the Suppression of the Financing of Terrorism (ICSFT), United Nations Convention Against Transnational Organized Crime (Palermo Convention, or UNTOC) and the United Nations Convention Against Corruption (UNCAC).

As set forth below, while none of these conventions specifically mention “piracy” by name, acts of piracy (or the conversion of assets gained therefrom) fit firmly within

¹⁷ Charles Goredema, *Recovery of Proceeds of Crime: Observations and Practical Challenges in Sub-Saharan Africa*, in BASEL INSTITUTE ON GOVERNANCE, INTERNATIONAL CENTER FOR ASSET RECOVERY, TRACING STOLEN ASSETS: A PRACTITIONER’S HANDBOOK 32 (2009).

¹⁸ Daniel Thelesklaf, *Using the Anti-Money Laundering Framework to Trace Assets*, in BASEL INSTITUTE ON GOVERNANCE, INTERNATIONAL CENTER FOR ASSET RECOVERY, TRACING STOLEN ASSETS: A PRACTITIONER’S HANDBOOK 62 (2009).

¹⁹ *Id.*

the scope of each. As such, the Piracy Court should rely upon them and their provisions in its efforts to trace and freeze the assets of suspected pirates.

1. International Convention for the Suppression of the Financing of Terrorism

The International Convention for the Suppression of the Financing of Terrorism resulted from a French initiative backed by the G-8.²⁰ Adopted in 1999, it entered into force on April 10, 2002. The Convention contains three main obligations for States Parties.²¹ First, States Parties must establish the offense of financing of terrorist acts in their criminal legislation.²² Second, they must engage in wide-ranging cooperation with other States Parties and provide them with legal assistance in the matters covered by the Convention.²³ Third, they must enact certain requirements concerning the role of financial institutions in the detection and reporting of evidence of financing of terrorist acts.²⁴

Acts of piracy fit firmly within the definition of a terrorist offence to which the Convention is applicable. The scope of the ICSFT is set forth in Article 2, which states in the relevant part:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in

²⁰ INTERNATIONAL MONETARY FUND [IMF], SUPPRESSING THE FINANCING OF TERRORISM: A HANDBOOK FOR LEGISLATIVE DRAFTING 5 (2003).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

the knowledge that they are to be used, in full or in part, in order to carry out:

- (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; . . .

Among the treaties listed in the annex is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.²⁵ This Convention, in turn, defines an offence as, *inter alia*, seizure of a ship by force or threat thereof or an attempt to do so.²⁶ Accordingly, the Piracy Court may rely on the provisions of the ICSFT in its efforts to cooperate with States Parties to the same to trace and freeze the assets of suspected pirates.

2. United Nations Convention Against Transnational Organized Crime (Palermo Convention)

The United Nations Convention against Transnational Organized Crime is the main international instrument in the fight against transnational organized crime.²⁷ Adopted in 2000, it entered into force on September 29, 2003. The Convention signifies the recognition by U.N. Member States of the seriousness of the problems posed by transnational organized crime, as well as the need to foster and enhance close international cooperation in order to tackle those problems.²⁸ Ratifying States commit themselves to taking a series of measures against transnational organized crime, including the creation of domestic criminal offences (participation in an organized criminal group,

²⁵ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221.

²⁶ *Id.*, Arts. 2, 3

²⁷ UNODC, *United Nations Convention against Transnational Organized Crime and its Protocols*, <http://www.unodc.org/unodc/en/treaties/CTOC/index.html> (last visited May 4, 2011).

²⁸ *Id.*

money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.²⁹

The broad scope of the Palermo Convention encompasses nearly all, if not all, potential acts of piracy. The Convention directly applies to any “serious crime” that is transnational in nature and involves an “organized criminal group.” A serious crime is defined as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”³⁰ An offence is transnational if it, *inter alia*, “is committed in one State but has substantial effects in another State,” or “is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State.”³¹ And an “organized criminal group” is defined as “three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences.”

As such, assuming that any act of piracy prosecuted by the Piracy Court would be punishable by at least four years, only purely domestic acts of piracy, or those committed by lone individuals or pairs of individuals, would not be covered under the Palermo Convention. Such acts would presumably be rare and/or not under the jurisdiction of the Piracy Court in any case. Accordingly, the Piracy Court may rely on the provisions of the Palermo Convention in its efforts to cooperate with States Parties to the same to trace and freeze the assets of suspected pirates.

²⁹ *Id.*

³⁰ *CTOC*, Art. 2(b)

³¹ *Id.*, Art. 3.2(b)

3. United Nations Convention Against Corruption

UNCAC is the first global legally binding instrument in the fight against corruption.³² Adopted in 2003, it entered into force on December 14, 2005. The Convention attaches particular importance to strengthening international cooperation to combat corruption and includes innovative and far-reaching provisions on asset recovery, as well as on technical assistance and implementation.³³ UNCAC is innovative in two respects.³⁴ First, it is the first international instrument that aims to function as a multilateral mutual legal assistance treaty.³⁵ Second, it is the first convention to refer to the recovery of assets as a priority in the fight against corruption.³⁶ The convention calls for the prevention and detection of transfers of the proceeds of crime.³⁷ This is of special relevance for prosecutors and investigators, as it provides the tools necessary for efficient financial investigations.³⁸ It can be used in conjunction with other international tools. For example, UNCAC Article 52 should be read in accordance with the FATF's Forty Recommendations and Nine Special Recommendations (*see infra*).³⁹ Together, these rules allow States to audit transactions even when the assets are transferred overseas.⁴⁰

UNCAC does not directly prescribe civil forfeiture as a method of retrieving proceeds of crime, but it does advocate measures that create a conducive environment for

³² United Nations Office for Drugs & Crime [UNODC] & United Nations Interregional Crime and Justice Research Institute [UNICRI], *Technical Guide to the United Nations Convention Against Corruption* (2009), available at http://www.unodc.org/documents/treaties/UNCAC/Publications/TechnicalGuide/09-84395_Ebook.pdf.

³³ *Id.*

³⁴ Yara Esquivel, *The United Nations Convention Against Corruption and Asset Recovery: The Trail to Repatriation*, in BASEL INSTITUTE ON GOVERNANCE, INTERNATIONAL CENTER FOR ASSET RECOVERY, TRACING STOLEN ASSETS: A PRACTITIONER'S HANDBOOK 117 (2009).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 117-118.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

civil forfeiture.⁴¹ The Convention stipulates for a pro-active system of due diligence, information documenting and suspicious activity reporting, which can make it easier for agencies tasked with civil forfeiture to discharge their obligations. A critical element in freezing assets is the importance of cooperation between developed countries, especially the financial center jurisdictions (which often serve as havens for stolen assets) and the developing countries from which assets are stolen.⁴² A recurring and serious impediment to cooperation has been the difference in legal systems between these two sets of countries.⁴³

UNCAC is not applicable to acts of piracy, but is applicable to the laundering of the proceeds of any crime.⁴⁴ The convention defines laundering as either “the conversion or transfer of property . . . for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate act to evade the legal consequences of his or her action;” or “the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime.”⁴⁵ Therefore UNCAC would apply in any case in which an individual converts, transfers, or uses the proceeds of an act of piracy. Accordingly the Piracy Court may rely on the provisions of UNCAC in its efforts to cooperate with States Parties to the same to trace and freeze the assets of suspected pirates.

⁴¹ Goredema, *supra* note 17, at 31.

⁴² World Bank & UNODC, *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan* 15 (June 2007) [hereinafter *StAR Action Plan*], available at <http://www.unodc.org/documents/corruption/StAR-Sept07-full.pdf>.

⁴³ *Id.*

⁴⁴ UNCAC, Art. 23.

⁴⁵ *Id.*, Arts. 3, 23.

B. OBLIGATIONS RELEVANT TO TRACING AND FREEZING ASSETS UNDER INTERNATIONAL CONVENTIONS

The conventions described in the previous section set forth a number of obligations relating to the tracing and freezing of assets. As outlined below, the most relevant provisions relate to (a) the obligation of States Parties to freeze assets; (b) the obligation to create a domestic framework for freezing assets; and (c) the obligation to cooperate with other States Parties to trace and freeze assets.

We recommend that the Piracy Court familiarize itself with these provisions, highlight them in any constituent documents, and call on them to remind States Parties to these conventions of their existing obligations.

1. The Obligation to Freeze Assets

First, all of the conventions cited above obligate States Parties to take appropriate measures to freeze assets used in the acts concerned:

- ICSFT Article 8 requires each State Party to take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing any of the Convention's offences as well as the proceeds derived from such offences, for purposes of possible forfeiture.
- UNCAC Article 52 requires States to take reasonable steps to determine the identity of the beneficial owners of funds deposited into high value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on

behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates (e.g., due diligence).

- UNCAC Article 40 requires States Parties to ensure that their bank secrecy laws do not obstruct domestic criminal investigations of offences established in accordance with the Convention. *See also* ICSFT Article 12, CTOC Article 12.

2. The Obligation to Create a Domestic Framework for Freezing Assets

The conventions discussed not only obligate States Parties to freeze assets obtained through illegal acts (including piracy), but further mandate with various levels of specificity the domestic framework these States must implement in order to trace and freeze assets related to illegal activities.

- UNCAC Article 31 mandates the establishment of a basic regime for domestic freezing and confiscation of assets as a prerequisite for international cooperation and the return of assets.
- UNCAC Article 14 mandates the establishment of domestic regulatory and supervisory regimes for banks and nonbank financial institutions in order to combat money laundering, including through international cooperation, and recommends measures to monitor the cross-border movement of cash and monetary instruments in order to prevent the transfer of illicit assets abroad.
- CTOC Article 12 concerns confiscation and seizure. States Parties shall adopt measures to enable confiscation of proceeds of crime and property, equipment

or other instrumentalities used in or destined for use in offences covered by the Convention. States Parties shall also adopt measures to enable the identification, tracing, freezing or seizure of any of these items. If the proceeds of crime have already been transformed or converted into other property, such property shall be liable to confiscation. If the proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall be liable to confiscation up to the assessed value of the intermingled proceeds. Income or other benefits derived from proceeds of crime shall also be liable to confiscation. Each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act on the ground of bank secrecy. Article 12 also allows States Parties to consider requiring offenders to demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation.

- ICSFT Article 18 obligates States Parties to adapt their domestic legislation to require financial institutions and other professions involved in financial transactions to identify their usual or occasional customers and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider (i) adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions; (ii) requiring financial institutions to

take measures to verify the legal existence and the structure of the customer;

(iii) adopting regulations imposing on financial institutions the obligation to report all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith; and

(iv) requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international.

3. The Obligation to Cooperate

Finally, the conventions discussed in Part II obligate their States Parties to cooperate with one another to trace and freeze assets obtained through illegal acts.

- ICSFT Article 12 requires States Parties to afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings, including assistance in obtaining evidence in their possession necessary for the proceedings. States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy.
- CTOC Article 13 Mandates that a State Party receiving a request for confiscation shall submit the request to its competent authorities and take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities. Such requests shall contain a description of the property to be confiscated and a statement of the facts relied upon by

the requesting State Party sufficient to enable the requested State Party to seek an order under its domestic law.

- UNCAC Article 43 obligates States Parties to extend the widest possible cooperation to one another in the investigation and prosecution of offences defined in the Convention. Thus the Convention requires that when requested, States Parties must take measures to identify, trace, and freeze or seize proceeds of crime, property, equipment, or other instrumentalities.
- UNCAC Article 46 provides that States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings, including for the purpose of the return of assets.

C. INSTITUTIONS FACILITATING IMPLEMENTATION OF MEASURES TO TRACE AND FREEZE ASSETS FROM ILLEGAL ACTS

In addition to international conventions, which establish obligations for the States Parties to establish a legal framework permitting cross-border cooperation on combating terrorism, organized crime, and corruption, there are several international institutions that provide members with additional assistance in this regard. This assistance comes in the form of decision-making and policymaking forums to implement various aspects of the international conventions, structures to facilitate the exchange of law enforcement and intelligence information, and technical assistance in drafting the required legislation and setting up and strengthening the necessary institutions

This section focuses on the FATF, StAR, Egmont Group, and Interpol and highlights their potential role in assisting the Piracy Court and States to trace and freeze

assets obtained through piracy. We recommend that the Piracy Court work closely with these organizations.⁴⁶

1. Financial Action Task Force

The G-7 established the FATF at their 1989 summit in Paris in response to mounting concern over money laundering.⁴⁷ The FATF is an inter-governmental body set up to develop and promote policies, both at national and international levels, to combat money laundering and terrorist financing. Since its creation, the FATF has spearheaded the effort to adopt and implement measures designed to counter the use of the financial system by criminals,⁴⁸ which can be appropriate for combating piracy.

The FATF has thirty-four members, including most of the G-20 nations, and two regional organizations.⁴⁹ It has a number of associate members, including the Eastern and Southern Africa Anti-Money Laundering Group (ESAAML)⁵⁰ and the Middle East and

⁴⁶ Other potentially relevant international organizations not discussed in the memorandum include the Basel Committee on Banking Supervision, Basel Institute on Governance/International Centre for Asset Recovery, Camden Asset Recovery Interagency Network (chaired by Europol), Council of Europe and the Council of Europe Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures, Europol, Organization for Economic Cooperation and Development, and Wolfsberg Group, a group of eleven international banks aiming to develop industry standards against money laundering.

⁴⁷ Financial Action Task Force [FATF], *About the FATF*, http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236836_1_1_1_1_1,00.html (last visited May 1, 2011).

⁴⁸ *Id.*

⁴⁹ Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, European Commission, Finland, France, Germany, Greece, Gulf Co-operation Council, Hong Kong, Iceland, India, Ireland, Italy, Japan, Netherlands, Luxembourg, Mexico, New Zealand, Norway, Portugal, Republic of Korea, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

⁵⁰ Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Seychelles, Tanzania, Uganda, Zambia, Zimbabwe. See <http://www.esaamlg.org/>.

North Africa Financial Action Task Force (MENAFATF).⁵¹ A number of international organizations are FATF observers, including the Egmont Group, Interpol, and UNODC.⁵²

Over the last twenty years, FATF has developed a comprehensive set of recommendations on how countries should fight money laundering.⁵³ The current international anti-money laundering framework consists of the following main elements: (1) criminalization of money laundering; (2) due diligence measures for financial institutions and designated non-financial businesses and professions; (3) requirement to report suspicious transactions to the FIU; (4) record keeping; and (5) supervision of financial institutions and designated non-financial businesses and professions.

The FATF addressed all of these elements in its Forty Recommendations⁵⁴ and Nine Special Recommendations on Terrorist Financing.⁵⁵ Together these Recommendations provide an enhanced, comprehensive and consistent framework of measures for combating money laundering and terrorist financing.⁵⁶ The

⁵¹ Algeria, Bahrain, Egypt, Mauritania, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Iraq, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen. See <http://www.menafatf.org/>.

⁵² FATF, *Members & Observers*, http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236869_1_1_1_1_1,00.html (last visited May 1, 2011).

⁵³ Thelesklaf, *supra* note 18, at 62.

⁵⁴ FATF, *FATF 40 Recommendations* (2004), available at <http://www.fatf-gafi.org/dataoecd/7/40/34849567.PDF>.

⁵⁵ FATF, *FATF IX Special Recommendations* (2008), available at <http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf>.

⁵⁶ E.g., countries should criminalize money laundering, and apply that crime to the widest range of predicate offences, including piracy (Recommendation No. 1); countries should allow their authorities to confiscate property and proceeds from money laundering or predicate offences (No. 3); secrecy laws should not inhibit implementation of the Recommendations (No. 4); financial institutions should undertake due diligence to verify the identity of their customers and the nature of their business (Nos. 5 & 7); financial institutions should maintain all necessary records on transactions for at least five years. (No. 10); countries should establish a Financial Intelligence Unit (FIU) to serve as a national coordination center for the receiving (and, as permitted, requesting), analysis and dissemination of a suspicious transaction report and other information regarding potential money laundering or terrorist financing. (No. 26); countries should ensure involvement of law enforcement authorities (No. 27); competent authorities should obtain documents for use in investigations and prosecutions, including powers to compel the production of records held by financial institutions, for the search of persons and premises, and for the seizure and obtaining of

Recommendations set minimum standards for action for countries to implement the detail according to their particular circumstances and constitutional frameworks.⁵⁷ The Forty Recommendations have been endorsed by over 130 countries.⁵⁸ The International Monetary Fund and the World Bank recognize the Forty Recommendations and Nine Special Recommendations as being the international standard for combating money laundering and the financing of terrorism. The Recommendations consider piracy as a designated category of offences.⁵⁹ Thus, the Recommendations can be particularly useful as a guide when considering measures against piracy.⁶⁰

The FATF's *International Best Practices for Freezing of Terrorist Assets*⁶¹ provides additional non-binding guidance for national authorities to implement Special Recommendation III to freeze terrorist assets. These best practices are instructive for ensuring that similar measures apply to combating piracy. The guidance covers the

evidence (No. 28); there should be mutual cooperation to identify, freeze, seize and confiscate property and proceeds from money laundering or predicate offences (No. 38). Regarding the Special Recommendations, each country should implement measures to freeze without delay funds or other assets of terrorists (Special Recommendation No. III); countries should also take other specific means of stopping the movement of liquid assets around the world, including transmission of funds through an informal money or value transfer system (No. VI); wire transfers (No. VII); non-profit organizations (No. VIII); and cash couriers (No. IX).

⁵⁷ FATF 40 Recommendations, *supra* note 54, at 2.

⁵⁸ *Id.*

⁵⁹ *Id.* at 15.

⁶⁰ According to FATF, Kenya is classified as a “jurisdiction not making significant progress.” Despite Kenya’s high-level political commitment to work with the FATF and ESAAMLG to address its anti-money laundering and counter-terrorist financing (AML/CFT) deficiencies, the FATF is not yet satisfied that Kenya has made sufficient progress in implementing its action plan, and certain strategic AML/CFT deficiencies remain. Kenya should work on addressing these deficiencies, including by: (1) adequately criminalising terrorist financing (No. II); (2) ensuring a fully operational and effectively functioning Financial Intelligence Unit (No. 26); (3) establishing and implementing an adequate legal framework for identifying and freezing terrorist assets (No. III); (4) raising awareness of AML/CFT issues within the law enforcement community (No. 27); and (5) implementing effective, proportionate and dissuasive sanctions in order to deal with natural or legal persons that do not comply with the national AML/CFT requirements (No. 17). The FATF encourages Kenya to address its remaining deficiencies and continue the process of implementing its action plan. FATF, *Improving Global AML/CFT Compliance: Update Ongoing Process* (Feb. 25, 2011),

http://www.oecd.org/document/49/0,3746,en_32250379_32236992_47221809_1_1_1_1,00.html.

⁶¹ FATF, *International Best Practices: Freezing of Terrorist Assets* (June 23, 2009), <http://www.fatf-gafi.org/dataoecd/30/43/34242709.pdf>.

issues of establishing clear authorities and procedures for identifying and designating persons or entities involved in money laundering; ensuring due process to allow for review, de-listing, and unfreezing; handling post-designation issues, such as prohibiting dealing in assets of designated persons or entities; and ensuring compliance and access to frozen assets.⁶²

2. Stolen Asset Recovery Initiative (StAR)

The World Bank has promoted the fight against corruption through its Governance and Anti-Corruption (GAC) Strategy, which recognizes the need for global action on stolen asset recovery. The United Nations Office for Drugs and Crime (UNODC) is the designated custodian of the UNCAC. Together, these two international organizations jointly launched StAR.⁶³ StAR has three main objectives: (1) persuade all countries to ratify and implement UNCAC; (2) build partnerships aimed at enhancing legislative, investigative, judicial, and enforcement capacity in developing countries to enable them to successfully recover the stock of stolen assets kept either in the home country or secreted abroad, while deterring new flows; and (3) help developing countries to monitor the use of recovered assets.⁶⁴ Although StAR was originally designed for helping countries recover assets stolen by corrupt officials (sending countries) and deposited or laundered abroad (receiving countries), the initiative's principles of mutual legal assistance to freeze and recover the assets are equally applicable to piracy.

StAR recognizes that one of the biggest challenges facing developing countries trying to track down and freeze assets is in getting other countries to act in response to

⁶² *See id.*

⁶³ *StAR Action Plan, supra* note 42, at 6.

⁶⁴ *Id.* at 6-7.

their requests.⁶⁵ These requests are usually made before criminal or civil investigations have been initiated, often without knowing bank account transaction information.⁶⁶ Thus, under StAR, the World Bank and UNODC seek to establish a uniform request methodology for victim governments to use in making simultaneous international requests for assistance in freezing stolen assets.⁶⁷ In a related initiative, the World Bank and UNODC are promoting the StAR Focal Point List to help sending countries know whom to contract in receiving countries for immediate assistance in the case of an emergency.⁶⁸ Given the speed of electronic communications, including wire transfers, and the perishability of evidence, real-time assistance is required to take immediate action before the money and evidence disappears.⁶⁹ Through StAR, the World Bank and UNODC are able to provide short-term immediate technical assistance to individual countries for actions such as filing a request for mutual legal assistance, how to approach receiving countries, and advising on contracts with lawyer and forensic accountants to work with the relevant country authorities.⁷⁰ They can also provide longer-term institution-building interventions to enhance the capacity of a country's criminal justice system, including strengthening FIUs and helping agencies comply with all the FATF Recommendations.⁷¹

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 34.

⁷¹ *Id.* at 32, 34.

3. Egmont Group

Financial Intelligence Units cooperate internationally through the Egmont Group. The Egmont Group began in 1995 when a number of FIUs began cooperating in an informal organization.⁷² FIUs are central, national authorities responsible for receiving, analyzing, and disseminating to competent authorities, disclosures received from the respective financial sectors.⁷³ The goal of the Egmont Group is to provide a forum for FIUs to improve support to their respective national anti-money laundering and anti-terrorist financing programs. This support includes (a) expanding and systematizing international cooperation in the reciprocal exchange of financial intelligence information; (b) increasing the effectiveness of FIUs by offering training and personnel exchanges to improve the expertise and capabilities of personnel employed by FIUs; (c) fostering better and secure communication among FIUs through the application of technology, presently via the Egmont Secure Web (ESW); and (d) promoting the establishment of FIUs in those jurisdictions without a national anti-money laundering/terrorist financing program in place, or in areas with a program in the beginning stages of development.⁷⁴ The exchange of information between FIUs is an important part of the procedures necessary to freeze assets.

While almost all European and North American jurisdictions are members of the Egmont Group, including the smaller jurisdictions of Jersey, Guernsey, the Isle of Man, Andorra, Monaco, and the Cayman Islands, very few African nations are members. Kenya, Somalia, and the Seychelles are not members. To promote the establishment of

⁷² Egmont Group, Homepage, <http://www.egmontgroup.org/> (last visited on May 1, 2011).

⁷³ *Id.*

⁷⁴ Egmont Group, *Membership*, <http://www.egmontgroup.org/membership> (last visited on May 1, 2011).

FIUs in Africa, the Egmont Group outlined an African Outreach & Assistance Strategy 2010-2012.⁷⁵

The Egmont Group agreed on a “Principles of Information Exchange Between Financial Intelligence Units”⁷⁶ which reflect the group’s intention to make their pursuit of the enhancement of information exchange a priority and to overcome the obstacles preventing cross-border information sharing.⁷⁷ FIUs are therefore invited to do everything possible to ensure that national legal standards and privacy laws are not conceived so as to inhibit the exchange of information between or among FIUs.⁷⁸ The group’s *Best Practices for the Exchange of Information Between Financial Intelligence Units* describes legislative measures and practical measures to facilitate cooperation between FIUs and improve the efficiency of mutual assistance.⁷⁹ The groups’ recently released *White Paper on Enterprise-wide STR Sharing* addresses how financial groups that operate in multiple jurisdictions can share information on suspicious transactions with other parts of their organization when confidentiality is paramount to avoid tipping off those suspected of illicit activity.⁸⁰

⁷⁵ See Egmont Group, *African Outreach & Assistance Strategy 2010-2012* (Sept. 2010), <http://www.egmontgroup.org/library/egmont-documents/>.

⁷⁶ Egmont Group, *Principles of Information Exchange Between Financial Intelligence Units* (June 13, 2001) <http://www.egmontgroup.org/library/egmont-documents/>.

⁷⁷ Egmont Group, *Best Practices for the Exchange of Information Between Financial Intelligence Units 1* (Nov. 15, 2004), <http://www.egmontgroup.org/library/egmont-documents/>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Egmont Group, *Enterprise-wide STR Sharing: Issues and Approaches* (Feb. 2011), <http://www.egmontgroup.org/library/egmont-documents/>.

4. Interpol

National police authorities cooperate through Interpol. Interpol is the world's largest international police organization, with 188 member countries.⁸¹ It facilitates cross-border police co-operation, and supports and assists all organizations, authorities and services whose mission is to prevent or combat international crime.⁸² Interpol has four main functions: (a) managing a global police communications system known as I-24/7, which enables police in all of its member countries to request, submit, and access vital police data instantly in a secure environment; (b) managing a range of databases with crime-related data, such as names and photographs of known criminals, wanted persons, fingerprints, and DNA profiles; (c) providing police support services in six priority crime areas and operating a 24-hour Command and Co-ordination Centre; and (d) providing focused police training initiatives for national police forces, and on-demand advice, guidance and support in building dedicated crime-fighting components to enhance the capacity of member countries to combat serious transnational crime and terrorism effectively.⁸³ Interpol's six priority crime areas are corruption, drugs and organized crime, financial and high-tech crime, fugitives, public safety and terrorism, and trafficking in human beings.⁸⁴

Interpol can be helpful as a general mechanism for police cooperation. Its official policy on maritime piracy affirms that Interpol works with the police, military and private sector in member countries and the United Nations, International Maritime Organization

⁸¹ Interpol, *INTERPOL: An Overview*, Factsheet COM/FS/2010-01/GI-01 (Jan. 2010), <http://www.interpol.int/Public/ICPO/FactSheets/GI01.pdf>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

and Europol to (1) improve the collection, preservation, analysis and dissemination of piracy-related evidence and intelligence; and (2) develop police and judicial investigative and prosecution capabilities on a regional level.⁸⁵ Gathering proper evidence that meets the burden of proof is important for successfully freezing assets after a temporary freeze has been instituted.

IV. CONCLUSION

Freezing the proceeds of acts of piracy is not an issue specifically dealt with currently under many national laws, or international law. The international community, however, has already committed significant resources to fight cross-border crime, the cross-border funding of crime, and the use of cross-border transactions to hide the proceeds of crime. Several international conventions address a range of criminal activities including terrorism, organized crime and money laundering, and corruption. The conventions define these crimes broadly enough to include acts of piracy or the conversion of assets gained from such acts.

As set forth in this memorandum, therefore, we would recommend that the Piracy Court need not “re-invent the wheel” regarding the tracing and freezing of assets obtained through acts of piracy. Instead, we would recommend that the Piracy Court build upon the well-established national and international framework for freezing assets from other criminal activity and should rely upon the expertise of international agencies and institutions already devoted to this problem.

⁸⁵ Interpol, *Maritime Piracy*, Factsheet COM/FS/2010-12/DCO-03 (Dec. 2010), <http://www.interpol.int/Public/ICPO/FactSheets/DCO03.pdf>.