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**In what ways should provisions and agreements governing
surrender and legal assistance of a Security Council-created
Piracy Court differ from a War Crimes Tribunal?**

Brett Ashley Edwards

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**THIS MEMORANDUM IS A PRODUCT OF BAKER & MCKENZIE
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: In what ways should provisions and agreements governing surrender and legal assistance of a Security Council-created Piracy Court differ from a War Crimes Tribunal?

**PREPARED BY: BAKER & MCKENZIE, LLP
AUGUST 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 United Nations Security Council-created Regional Piracy Court ("International Piracy Court" or "IPC").¹

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

In what ways should provisions and agreements governing surrender and legal assistance of a Security Council-created Piracy Court differ from a War Crimes Tribunal?

B. SUMMARY OF CONCLUSION

In general, the surrender and legal assistance regime of the IPC should follow that of the International Criminal Court ("ICC"), with its principal of complementarity. The ICC surrender and legal assistance model was built on the experience of the International Criminal Tribunal for Yugoslavia ("ICTY") and the International Criminal Tribunal of Rwanda ("ICTR") and addressed criticisms levied against the ICTY and ICTR, particularly in the areas of respect for state sovereignty and protection of the individual rights of the accused. While the ICC surrender and legal assistance regime is arguably

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

weaker than that of the ICTY and ICTR², the IPC will likely more closely resemble the ICC, which is intended to be a permanent court addressing ongoing violations, rather than an ad hoc criminal tribunal with a limited mandate to address specific crimes occurring during a definite period of time in a specific jurisdiction. Furthermore, like the ICC, the IPC is intended to address "situations where national courts are unwilling or unable to prosecute perpetrators" and the legal assistance provisions of the IPC should not constrain, but rather encourage, prosecutions of piracy by national courts.³ However, procedures addressing the issuance of warrants and requests for surrender for the IPC must differ from existing provisions for the ICC to address the unique factual situation of the piracy problem and facilitate surrender of pirates apprehended at sea.

II. FACTUAL BACKGROUND

Piracy is the original universal jurisdiction crime.⁴ Accordingly, under the doctrine of universal jurisdiction, any nation can prosecute piracy offenses, even over the objection of the defendants' and victims' home states. In addition, a majority of states have the obligation to repress piracy under the United Nations Convention on the Law of the Sea ("UNCLOS").⁵ Yet, despite individual states' efforts to prosecute pirates, an

² Göran Sluiter, *The Surrender of War Criminals to the International Criminal Court*, 25 LOY. L.A. INT'L & COMP. L. REV. 605, 650 (2003).

³ Richard Dicker & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, Human Rights Watch World Report 2004, available at <http://www.hrw.org/es/node/68116>.

⁴ Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 184 (2004), citing *United States v. Layton*, 509 F. Supp. 212, 223 (N.D. Cal. 1981) ("[Universal] jurisdiction had its origins in the special problems and characteristics of piracy. It is only in recent times that nations have begun to extend this type of jurisdiction to other crimes.").

⁵ United Nations Convention for the Law of the Sea, part XII, art. 100 (Dec. 10, 1982) ("All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."), available at

international naval force dedicated to counter piracy operations⁶ and an attempt by the international community to set up a dedicated piracy court in Kenya⁷, hundreds of pirates and suspected pirates, including many who have been detained while attacking merchant ships, have been released without trial.⁸ Clearly, there is a need for pirates to be tried before an independent and transparent international judiciary similar to the IPC.

There are, however, two significant obstacles to creating a successful system for prosecuting pirates stemming from the factual situation of piracy off the Horn of Africa that must be considered when drafting statutory provisions governing the obligations of surrender and legal assistance of state parties to the IPC. One problem eviscerating any court or tribunal's ability to succeed in the prosecution of piracy in the region of Somalia is the practice of 'catch and release' of pirates. The other is the lack of an effective government as well as strong judicial and correctional institutions.

Catch and release arises because arresting bodies are either unwilling or unable to accept suspected pirates or because jurisdictions are not prepared to prosecute them.

Many suspected pirates have been transferred to the judicial authorities and were being

http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (last accessed July 27, 2011).

⁶ Combined Marine Forces Public Affairs, *New Counter-Piracy task Force Established*, NAVY.MIL, Jan. 8, 2009, http://www.navy.mil/search/print.asp?story_id=41687 (last visited July 27, 2011).

⁷ Mombasa's fast-track piracy court set up in June 24th was effectively disarmed when the high court of Mombasa ruled Kenya did not have jurisdiction outside of its national waters. Julia Zebley, *Kenya court rules no jurisdiction over international piracy cases*, Jurist (November 09, 2010, 2:31 p.m. ET), <http://jurist.org/paperchase/2010/11/kenya-court-rules-no-jurisdiction-over-international-piracy-cases.php>.

⁸ Security Council Press Release 10164, January 25, 2011, www.un.org/News/Press/docs/2011/sc10164.doc.htm; LAUREN PLOCH ET AL., CONGRESSIONAL RESEARCH SERVICE, *PIRACY OFF THE HORN OF AFRICA* 27 (2011), available at <http://www.fas.org/sgp/crs/row/R40528.pdf>; IMO, Reports on Acts of Piracy and Armed Robbery Against Ships, Annual Report 2009, Ref. T2-MSS/2.11.4.1; MSC.4/Circ.152 (29 March 2010) at annex 2 (Statistics on recent attacks).

detained in 13 countries.⁹ However, as of May 2010, more than 9 out of 10 captured pirates have not been prosecuted.¹⁰ It seems that the prosecution of pirates became an exception rather than a rule. For example, the European Union Naval Force Somalia recently released two pirate suspects to Somalia because of "insufficient evidence to secure a prosecution."¹¹ In the United Kingdom, the Royal Navy is "regularly allowing Somalian pirates to go free because of the risk they would claim asylum if prosecuted in Europe."¹² From mid-August to mid-December 2010, the command of the Atalanta force captured 51 pirates who were immediately freed.¹³ An IPC that effectively and comprehensively addresses piracy would seek to suppress the number of state catch and releases through successful prosecution with the aid of participating states.

To avoid the practice of 'catch and release' and prosecute piracy suspects effectively, there has to be a strong and efficient government in place that is capable to provide a solid body of legislation and judicial authorities for the prosecution process. It is difficult to conclude anything other than that Somalia is a "failed state." Since the overthrow of the government of Siad Barre in 1991, a lack of rule of law and ineffective governance has had a "profound negative impact on the population."¹⁴ The United

⁹ Security Council Report S/2011/30 at 20 (January 25, 2011).

¹⁰ *Id.*

¹¹ Official Website of the European Union Naval Force Somalia, *EU NAVFOR Warship Disrupts Suspected Pirate Whaler*, April 4, 2011 <http://www.eunavfor.eu/2011/04/eu-navfor-warship-disrupts-suspected-pirate-whaler/> (last visited July 28, 2011).

¹² Nick Britten, *Navy Regularly Releases Somali Pirates, Even When Caught in the Act*, November 29, 2009, *The Telegraph*, <http://www.telegraph.co.uk/news/worldnews/piracy/6684210/Navy-regularly-releases-Somali-pirates-even-when-caught-in-the-act.html> (last visited July 28, 2011).

¹³ Agence France-Presse press release, December 29, 2010.

¹⁴ Report to UN Secretary General on possible options to prosecute and imprison pirates at 8, S/2010/394 (26 July 2010).

Nations agencies working in Somalia report that prosecution courts in Somalia remain extremely weak, and on land, only UNDP and other UN agencies are helping "to strengthen the prevention, detecting and prosecution of gangs involved in piracy."¹⁵ Moreover, Somalia is a member of the Islamic Courts Union, a group of Sharia courts who united to oppose the administration of the Somali government, partly to consolidate resources and power and partly to aid in handing down decisions across, rather than within, clan lines.¹⁶ The Islamic Courts Union mainly consisting of Islamic militias is now seen by many Somalia's citizens as the provider of daily services in a continually unstable country.¹⁷ However, some U.S. officials claim Somali Islamists could be harboring terrorists.¹⁸ As a result, law enforcement in Somalia is mainly provided by militia groups acting as police and judiciary. Such minimum level of law and order translates into a lack of rule of law in Somalia and an insecure environment making a domestic judicial system very weak and unstable.

The lack of correctional capacities in Somalia is also an obstacle to prosecuting pirates. The burden on the prison system, with sentences that can be as high as 20 to 30 years or even life imprisonment, discourages Somalia from initiating the prosecution of pirates who have not been apprehended in its territorial waters.¹⁹ Moreover, according to a United Nations Development Program study, less than 5% of the 76 judges and 6

¹⁵ United Nations in Somalia, http://www.unctsom.org/how_we_work.html (July 27, 2011).

¹⁶ PBS NewsHour, *Islamist Control of Mogadishu Raises Concern of Extremist Future for Somalia*, June 8, 2006, http://www.pbs.org/newshour/updates/africa/jan-june06/somalia_06-08.html (last visited July 28, 2011).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Security Council Report, S/2011/30 at 36 (January 25, 2011).

prosecutors in the region have had legal training, and, due to such ignorance, the judges apply customary law, including Sharia law, instead of applicable statutory law.²⁰ Finally, due to the poor judicial system, pirate leaders currently have more power than the beleaguered Somali government.²¹ Pirate gangs operating along Somalia's 1,900-mile-long coastline have become "increasingly audacious over the past two years, hijacking dozens of merchant ships and their crews to earn ransoms that can top \$1 million per ship."²² The pirate leaders were also able to establish the world's first pirate stock exchange in Somalia that is "open 24 hours a day and allows investors to profit from ransoms collected on the high seas, which can approach \$10 million for successful attacks against Western commercial vessels."²³ As a result, due to the weak court system and political institutions, the Somalian government is currently not capable to lower the influence of militia groups and pirate leaders.

The abovementioned factual circumstances show that a specialized international piracy tribunal is required. An IPC would be politically and legally justifiable, since an independent court would strengthen the rule of law in Somalia and other countries in the region as well as contribute to the potential cooperation of states with each other. An IPC and its fledged legislative framework would be crucial for strengthening the cooperation among states and prevention of inconsistent handling of pirates.

²⁰ Security Council Report, S/2011/30 at 38 (January 25, 2011).

²¹ JSL Times, *Somali Pirates Release UAE-Owned Oil Tanker*, July 28, 2011, <http://www.jsltimes.com/somali-pirates-release-uae-owned-oil-tanker> (last visited July 28, 2011).

²² *Id.*

²³ Avi Jorisch, *Today's Pirates Have Their Own Stock Exchange*, The Wall Street Journal, June 16, 2011, <http://online.wsj.com/article/SB10001424052702304520804576341223910765818.html> (last visited July 29, 2011).

III. LEGAL DISCUSSION

A. DEFINITIONS

The surrender and legal assistance regime of the IPC will be key to its success because like any other international organization of international court, the IPC will only be able to fulfill its mandate if it receives the necessary assistance from cooperating states. For purposes of this memorandum, "legal assistance" refers to the obligation of a state to cooperate in the investigation and prosecution of persons brought before the IPC. Thus, the terms legal assistance regime and cooperation regime will be used interchangeably. "Surrender" refers to the physical transfer of persons to the IPC, and is a key and contentious aspect of legal assistance since it "deprives individuals of liberty and exposes them to a foreign criminal justice system."²⁴

This memorandum borrows the definition of surrender from the understanding of the use of the term "surrender" in the context of the ICC, ICTY, ICTR and other international tribunals. The concept of "surrender" was introduced by the ICTY and ICTR to distinguish the turnover of war criminals to the international tribunals from "extradition."²⁵ The difference between extradition and surrender is that extradition applies to the transfer of persons between states, while surrender applies to the transfer of a person to an international tribunal.²⁶ The concept of surrender was introduced in an effort to prevent existing national extradition laws and international treaties from

²⁴ Sluiter, *supra* note 1, at 606.

²⁵ *Id.* at 608.

²⁶ *Id.* at 607.

hindering the prosecution of criminals by the international tribunals.²⁷ The debate over the use of the term "surrender" during the Rome Statute of the International Court ("Rome Statute" or "ICC Statute") negotiations show that in terms of legal assistance, the ICTY, ICTR, and the ICC were intended to be superior to the states.²⁸

B. JURISDICTION: CONCURRENT V. COMPLEMENTARY

Before statutory provisions governing legal assistance for IPC can be contemplated, a jurisdictional threshold question must be answered: what will be the IPC's relationship with national courts? There are two existing models: (1) the concurrent jurisdiction with "primacy clause" model of the ICTR and ICTY, and (2) the complementary jurisdiction model of the ICC.²⁹ The statutory provisions of the statutes governing the ICTY and ICTR explicitly state that "[a]t any stage of the proceedings, the [international tribunal] may require national courts to defer to the competence of the [international tribunal]."³⁰ This primacy clause gives these tribunals a priority right to try cases that fall under their subject matter jurisdiction over a national court that has concurrent jurisdiction. Because the experience of the ICTY and ICTR gave rise to criticism from states that felt their sovereignty was being eroded, the ICC Statute was drafted with much more deference to its state parties' national courts.

²⁷ *Id.* at 608 ("[T]he ICTY and ICTR statutes and rules consistently avoid the term 'extradition,' and instead use the word 'transfer' or surrender").

²⁸ *Id.*

²⁹ Oscar Solera, Complementary jurisdiction and international criminal justice, *INTERNATIONAL REVIEW OF THE RED CROSS*, vol. 84, no. 845 at 147-48 (March 2002), available at <http://www.icrc.org/eng/assets/files/other/145-172-solera.pdf>.

³⁰ Statute of the International Criminal Tribunal for Rwanda, art. 8, *as amended and adopted* Jan. 31, 2010 [hereinafter ICTR Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 8, *as amended* July 7, 2009 [hereinafter ICTY Statute].

Under the ICC model of complementary jurisdiction, the ICC is competent to try a case that falls under its subject matter jurisdiction unless a state claims jurisdiction. However, national courts are not granted absolute priority. The ICC is permitted to reclaim jurisdiction if the prosecuting state is either "unwilling or unable to genuinely carry out the investigation or prosecution."³¹ This model of jurisdiction expresses the intention for the ICC to be a court of last resort, meaning it will not take a case that is being investigated or prosecuted by a state, but it may take a case if the state is unwilling or unable to genuinely carry out the prosecution. The ICC is "designed to operate where there is no prospect of international criminals being duly tried in domestic courts."³²

The IPC should function more similarly to the ICC, as opposed to the ICTY or other criminal tribunals for several reasons. First, the IPC should function as a court of last resort. Uniquely, piracy has long been established as a universal jurisdiction crime, and as a matter of international law, any state has the ability to prosecute pirates. The establishment of the IPC should not diminish individual state's obligations to prosecute pirates. Piracy is a worldwide problem that affects all mankind. Under the ICC model, the obligation to prosecute pirates remains an international obligation for all states.³³

Further, the ICC's complementary jurisdiction model, which gives deference to national courts, better respects traditional notions of state sovereignty. This is important because the experience of creating the ICC shows that states perceive their relationship with a permanent international criminal court as different from that to an ad hoc tribunal

³¹ Rome Statute, art. 17(1)(a)-(b).

³² Solera, *supra* note 29, at 148.

³³ *Id.* at 158.

with more limited geographic and temporal jurisdiction.³⁴ The IPC will likely more closely resemble the ICC in its lack of durational or regional boundaries. The ICC model will be less controversial and more likely to garner support from the international community.

Finally, the ICC model of complementary jurisdiction is best suited to respond to the piracy problem because it encourages cooperation from individual states. For example, Germany is currently prosecuting Ignace Murwanashyaka and Straton Musoni for their roles in ordering mass murder and rape in the Congo under the doctrine of universal jurisdiction.³⁵ Meanwhile, a third suspect, Callixte Mbarushimana, who was living in France, was not brought to trial domestically in France but has been extradited to the ICC for prosecution. "This co-operative burden-sharing in prosecuting individuals for serious international crimes will greatly advance the fight against impunity," said UN Secretary-General Ban Ki-moon in January.³⁶ The IPC should not hinder prosecution of pirates by individual states who wish to do so, especially since the IPC is largely being established to fill a gap left by the non-prosecution of pirates by individual states. Moreover, given the fact that the IPC will have limited resources, the IPC's ability to encourage states to deal with piracy in their own national courts will be central to its ability to succeed in its mission of suppressing the piracy problem.

³⁴ Solera, *supra* note 29, at 149.

³⁵ Rwanda: Ignace Murwanashyaka and Straton Musoni tried. (May 4, 2011, 12:59 ET) <http://www.bbc.co.uk/news/world-africa-13275795>).

³⁶ *Id.*

C. PROPOSED STATUTORY PROVISIONS

To clearly articulate our recommendations as to what statutory provisions should govern surrender and legal assistance for the IPC, this section provides draft statutory language addressing each issue. Note that these provisions are only intended to serve as a starting point for further drafting. The language for these proposed provisions has been adopted directly from international agreements and the statutes and rules of procedure and evidence of existing war crimes tribunals and international courts and crafted to fit the objectives of an IPC. In drafting these provisions, we have reviewed the relevant statutes, as well as, rules of procedure and evidence of the ICC, ICTY, ICTR, the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone and the Special Tribunal for Lebanon. In addition we have borrowed certain provisions from the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Marine Navigation ("SUA Convention"). Although there are many differences between governing statutes among international tribunals and courts, commonalities arising from a comparative analysis of these tribunals provide a comprehensive drafting framework for an IPC. The following provisions could govern surrender and legal assistance of the IPC:

1. Jurisdiction

Article 1 Jurisdiction

- (1) The International Piracy Court and national courts of all state parties shall have original and concurrent jurisdiction to prosecute persons for violations of international piracy law committed on the high seas and in coastal waters.**
- (2) The jurisdiction of the International Piracy Court shall be complementary to national courts. At any stage of the proceedings, the International Piracy Court may formally require national courts to defer to the competence of the International Piracy Court in accordance with**

Article 2 of the present Statute and the rules of procedure and evidence of the International Piracy Court. States Parties shall, in accordance with the provisions of this statute, comply with requests for arrest and surrender.

Article 2 Preconditions to the Exercise of Jurisdiction

- (1) A State that becomes a Party to this Statute thereby accepts the jurisdiction of the International Piracy Court with respect to the crimes referred to in (definitions).**
- (2) This court shall defer jurisdiction to national courts exercising universal jurisdiction so long as that court:
 - (a) is willing to exercise jurisdiction and**
 - (b) is determined to be competent to exercise jurisdiction by the International Piracy Court.****

Articles 1 and 2 describe the jurisdictional model of the court. As discussed in Section III. B. above, the IPC, like the ICC, should take a complementary role to national courts in order to respect the sovereignty of the individual states as well as take advantage of the established universal nature of the crime of piracy. Article 2(2) will allow the IPC to exercise jurisdiction in cases of non-prosecution in states ill-equipped for prosecution such as Somalia and in cases where the international community feels a certain jurisdiction is unwilling or unable to fairly or adequately prosecute pirates, such as in certain regions of Somalia where piracy ringleaders may be affiliated with and protected by state authorities.³⁷

³⁷ See Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1853 (2008), S/2010/91, at 7 (“Several candidates in the leadership contest of January 2009, which saw Abdirahman Faroole accede to the Puntland presidency, accepted significant campaign contributions from pirate leaders. Several notorious pirate leaders remain at liberty in Puntland, and senior officials have at times intervened to secure the liberty of kinsmen detained during the course of counter-piracy operations.”).

2. Duty to Arrest

Article 3 Duty of Arrest

- (1) Any State Party upon being satisfied that the circumstances so warrant, in accordance with its law and this statute, shall take persons suspected of piracy into custody or take other measures to ensure such persons' presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted.**
- (2) The State Party conducting the arrest shall immediately make a preliminary inquiry into the facts, in accordance with its own legislation and this statute.**
- (3) Any person regarding whom the measures referred to in paragraph 1 are being taken shall be entitled to:**
 - (a) communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a stateless person, the State in the territory of which he has his habitual residence;**
 - (b) be visited by a representative of that State.**

To combat the catch and release of pirates, the statute of the IPC should make the arrest of pirates an obligation. Those making the arrest are in the best position to make an initial inquiry. This initial inquiry will ensure efficient prosecution along with the efficient use of other resources of the court. However, such arrest and preliminary inquiry should not contravene international norms of due process. The consular rights provisions proposed here are borrowed from the SUA Convention.³⁸ The statutory language of Article 3 is also modeled on that of the SUA Convention because it provides a comprehensive and employable model for which states can be held accountable.³⁹

³⁸ UN Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 7, sect 3 (1)-3 (2) (March 10, 1988). <http://cns.miis.edu/inventory/pdfs/aptmaritime.pdf>

³⁹ *Id.* at art. 7(3)(1)

3. Notice of Arrest

Article 4 Duty to provide notice of arrest

When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify the [secretary general] of the International Piracy Court along with any interested States, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of Article 3 shall promptly report its findings to the said States along with this court and shall indicate whether it intends to exercise jurisdiction to prosecute.

The IPC's model of complementary jurisdiction makes it a court of last resort. So long as a State is deemed willing and competent to prosecute a suspected pirate the Court will defer to that State's jurisdiction. However, in order to make that finding of willingness and competence the Court must be made aware of the arrest. Other interested states must also be made aware of the arrest, because they may wish to exercise their universal jurisdiction over the suspected pirate if the arresting state does not wish to do so. The language for this provision is modeled after Article 7(5) of the SUA Convention.⁴⁰

4. Cooperation and Judicial Assistance

Article 5 Cooperation and judicial assistance

- (1) If prosecution is so warranted and the arresting state is unable or unwilling to prosecute, the arresting state shall**
- (a) cooperate with the International Piracy Court in the investigation and prosecution of persons accused of committing violations of international piracy law or**
 - (b) cooperate with such other State Parties as have indicated the intent to exercise jurisdiction in the investigation and prosecution of persons accused of committing violations of international piracy law.**

⁴⁰ *Id.* at Art. 7(5).

(2) State Parties shall comply without undue delay with any request for assistance or an order issued by the International Piracy Court, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Piracy Court or other state exercising jurisdiction.

(3) The International Piracy Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes piracy as defined in the Statute of the International Piracy Court.

Article 5 articulates specific types of assistance states are obligated to provide to the court. Some of this assistance will already be covered during the preliminary inquiry under Article 3(2); however, the assistance state parties are obligated to provide is not limited to the preliminary inquiry, and cooperation with the court is continuous. These provisions are similar to those currently used by the ICTY and ICTR. Both international criminal tribunals currently call upon states to assist in surrender of suspected criminals, as well as to cooperate with the International Criminal Police Organization.⁴¹

Article 5(c) is based on Article 93(1) if the ICC Statute and authorizes the IPC to cooperate with and provide assistance to state parties prosecuting crimes under the jurisdiction of the IPC.⁴² This provision should be included to emphasize the cooperative and complementary nature of the IPC in relation to national courts.

⁴¹ See ICTY Statute, art. 29.

⁴² Sluiter, *supra* note 2, at 613.

5. Requests for Cooperation

Article 6 Requests for cooperation: general provisions

(1)

(a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession. Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

(2) Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession. Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

(3) The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

(4) In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

(5)

(a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or the Security Council.

(6) The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

(7) Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or to the Security Council.

Article 6 is procedural and puts forth steps to request cooperation from states. The language presented here is based on Article 87 of the ICC Statute. These steps are included to ensure efficiency, fairness, and safety. One criticism to the ICC Statute is that it is weak on enforcement. However, Article 6(7) leaves open the possibility for various sanctions by the Security Council. These possibilities include fines and loss of vote in the General Assembly.⁴³ The ICTY and ICTR Statutes are even more vague on the subject of sanctions, and only provide for a right to notify the Security Council of failure to cooperate.

It would be ideal to incorporate more specific provisions regarding sanctions and enforcement of cooperation obligations to the IPC statute in order to ensure state cooperation due to the unique economic and social role piracy currently plays in volatile proposed member states such as Somalia. However, due to the lack of strong institutions, it would be difficult to implement these sanctions in a failed state such as Somalia. It is worth noting, however, that even if no specific sanctions will be drafted in the IPC statute, the member states will still be subject to the UN Security Council's sanctions due to the nature of the IPC created by the Security Council. Since member states will adhere

⁴³ See ICC Statute, *supra* note 1, at 82–83.

to the IPC statute, it will be binding on all member states. Moreover, even if viewed in the light of the general principles of international law, the authority of the UN Security Council is derived from the UN Charter and, by virtue of Article 25 of the UN Charter, all decisions made by the UN Security Council are binding upon all UN member states.⁴⁴ As a result, the UN Security Council can refer to the IPC a criminal piracy case and ask all UN member states to cooperate in the IPC's investigation process. Moreover, if the UN Security Council adopts a resolution under Chapter VII of the UN Charter ("Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression"), it is binding on all UN member states.⁴⁵ All states must then comply, and all states will have obligations to cooperate.

6. Availability of Domestic Procedures

Article 7 Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation, which are specified under this statute.

In order to ensure cooperation member states need to take steps domestically to facilitate the smooth functioning of the IPC.⁴⁶ Indeed, in 2010 the Security Council unanimously adopted Resolution 1918 calling on all states to criminalize piracy. Certain states, such as the United States, if it becomes a state party or enters into an ad hoc

⁴⁴ U.N. Charter, art. 25.

⁴⁵ U.N. Charter, Ch. VII.

⁴⁶ Language based upon Rome Statute of the International Criminal Court, U.N. Doc. A/Conf/87/9), available at, <http://untreaty.un.org/cod/icc/statute/romefra.htm> (accessed 6/27/11).

cooperation agreement with the IPC, may need to pass implementing domestic legislation before they may comply with their obligations to the IPC.

D. UNRESOLVED ISSUES

The pirates on the high seas, although the most visible pirate in the media, are the lowest level of an intricate organized crime structure that reaches all the way to government officials.⁴⁷ As discussed above in Section II Factual Background, we assume that the IPC may be called on to prosecute, not only the persons physically engaged in attacking ships at sea, but also the criminal masterminds and ringleaders of piracy operations. The draft provisions we have put forth in this memo, which attempt to specifically address trying persons captured at sea, admittedly fall short of providing a comprehensive solution because they fail to solve the problems associated with discovering, extraditing and gathering evidence against the land-based pirate leaders, organizers and financiers. Obtaining surrender of persons to the IPC and legal assistance from state parties in the cases of pirate masterminds with inevitably implicate the traditional political problems of extraditing persons in positions of power.

The aforementioned issues regarding the surrender and extradition of those involved in the on-shore operations of pirate networks are intricate and complex. Prospective solutions for prosecuting land-based pirates most likely fall outside the scope of problems that can be addressed by statutory provisions governing surrender and legal assistance. One concern is evidentiary. The banking system in Somalia, hawala, is

⁴⁷Additionally, these pirates on the high seas only take about 30% of the ransom money, whereas the rest goes to the leaders that are organizing the crimes. Robert Young Pelton, "Sea Dog Millionaires," Bloomberg Businessweek, May 16th, 2011.

Approximately 10% of the ransom money is distributed to the local community and politicians. *Id*

premised on verbal banking transactions that are accompanied by the trust and honor of the banker. As such, there is little to no paper trail tracing the ransom money once it enters Somalia. The money is distributed to those involved and amongst the community; it vanishes without a trace.⁴⁸ If the court's focus also included the prosecution of the financial organizers of piracy, there would need to be a legal structure for the transfer of evidence that potentially reaches beyond the network of state parties to potentially non-agreeing states holding funds and financial statements stemming from piracy operations. Additionally, there would need to be a firm legal basis for the organizational crimes surrounding piracy, as these probably do not fall within the accepted definition of the universal crime of piracy as armed robbery at sea.

IV. CONCLUSION

As set forth in this memorandum, we believe that International Piracy Courts surrender and legal assistance regime should be premised on the principle of complementarity introduced by the ICC. Accordingly, the IPC specific provisions governing cooperation from state parties should be modeled loosely on those of the ICC. The statutory provisions should be particularly focused on a state's duty to arrest and assist with prosecution of suspected pirates as well as fostering international cooperation between national courts and the IPC. However, while the statutes and rules of existing international criminal tribunals provide a solid foundation for the drafting of a legal assistance regime, many unresolved issues remain due to the complexity of modern piracy operations and the sophistication of their criminal actors.

⁴⁸ Mary Harper, *Chasing the Somali Piracy Money Trail*, BBC News May 24th, 2009. <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/8061535.stm> (accessed 7/14/11)