

LESSON FROM SOMALIA: A SPECIAL MODEL OF HANDLING PIRACY *JURE GENTIUM* AND ARMED ROBBERY AT SEA

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Abstract

In this article, the author discusses the issues pertaining to piracy jure gentium and armed robbery at sea. Focus shall be given on the incidence of both crimes occurring offshore Somalia during a certain time period. It is noted that Somalia is unable or unwilling to enforce its law to protect international (commercial) shipping passing through its waters. This inability to enforce the law has been the primary reason, Somalia was forced to seek legal assistance from the international community. By taking lessons from Somalia and comparing these two crimes, the author seeks to propose a model of how to tackle the problem at hand. To be discussed and analysed is a number of United Nations Security Council Resolutions which provide the international community with a guideline how to handle both crimes.

Keywords:

piracy jure gentium, armed robbery at sea, international law of the sea

Abstrak

Tulisan ini akan secara khusus membahas soal perompakan di laut (*piracy jure gentium*) dan perampokan bersenjata di laut, khususnya yang terjadi di lepas pantai Somalia dalam satu periode tertentu. Ditengarai bahwa kedua tindak pidana ini tidak dapat ditangani dengan baik oleh Somalia sebagai negara pantai dan selanjutnya sebab itu pula, untuk menanggulangi kejahatan ini yang mengganggu pelayaran internasional, masyarakat internasional dimintakan bantuannya. Dengan menarik pelajaran dari kasus-kasus yang muncul dan membandingkan pengaturan dua tindak pidana berbeda ini, serta tanggapan masyarakat internasional terhadap keduanya, penulis akan memunculkan model ideal penanganan kedua kejahatan berbeda itu. Secara khusus akan dianalisis sejumlah resolusi Dewan Keamanan PBB yang diterbitkan dalam rangka penanganan persoalan ini.

Kata kunci:

perompakan jure gentium, perampokan bersenjata, hukum laut internasional

Introduction

The piracy attack can be divided in two types of action namely piracy (in this paper the term piracy *jure gentium* will be used to refer to piracy because in some countries, piracy also include the crime of slavery) and armed robbery at sea. Piracy *jure gentium* as stipulated in Article 101 of United Nation Convention on The Law of the Sea is any illegal acts of violence or detention, or any act of depredation,

committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State. Meanwhile armed robbery at sea, based on Article 2 of Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia, is any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, in a place within a Contracting Party's jurisdiction over such offense.

Based on both articles it can be seen that the difference between piracy *jure gentium* and armed robbery at sea is the location of the crime occurred. For piracy *jure gentium*, the location of the crime should happen on the high seas or on a place outside the jurisdiction of any state, whereas the location of the crimes of armed robbery at sea is committed within the place fall under the jurisdictions of a state. One of the most dangerous location where piracy *jure gentium* and armed robbery often occurred is off the coast of Somalia and Somali waters. The selection of Somalia as a case study is due to the handling of piracy *jure gentium* and armed robbery at sea which should have been done differently but the handling in Somalia was mixed. This is shown from the handling of armed robbery at sea which should be the jurisdiction of Somalia but handled by the international community in line with the handling of piracy *jure gentium* on the high seas off the coast of Somalia.

The problem of piracy *jure gentium* and armed robbery at sea in Somalia is one of the worst in the world. Because of that, Somali waters and the surrounding sea area have been included as one of the most dangerous waters in the world. The International Maritime Bureau noted that in 2008 there was an increase in piracy incidents around the world by 11 percent compared to the previous year. Of the total of 48 piracy attacks that was successfully carried out in 2008, 42 of them occurred in Somalia.¹ The hijacking and detention of the ship was then followed by

¹ Christopher Joyner, Navigating Troubled Waters: Somalia, Piracy, and Maritime Terrorism, Vol. 10, Iss. 2, Georgetown Journal of International Affairs; Washington, P.83, Summer 2009.

a request for ransom to free the ship and hostage.² As a result of this problem, there is an economic loss for ships that usually navigate through the area off Somali coast. This loss is not only due to the ransom that must be paid to the pirates but also due to the increase in insurance costs for ships navigating this area or shipping routes that must change further due to piracy in these waters which results in increased operational costs. For example, in 2008 the cost of insurance for ships that navigated through off Somali coast increased 10 times compared to previous year.³

The increase of piracy activities in Somalia is inseparable from the condition of the country which is drowning in civil war and makes the government unable to operate well, including coast guards and Somali navy that can no longer conducted their functions properly. This situation has increased international attention to shipping security through Somali waters and off the Somali coast.⁴ This then underlies the issuance of a number of UN security council resolutions to underlie international cooperation in handling piracy *jure gentium* and armed robbery at sea off the coast and in waters of Somalia. From 2008 to 2011, 9 United Nations Security Council Resolutions were issued relating to this matter. These resolutions were issued based on requests from the Somali government (Transitional Federal Government) to request UN assistance in handling the problems of piracy *jure gentium* off the coast and armed robbery at sea problems in its waters. It can be seen in UN Security Council 1846 (2008) which states that

“Taking note of the requests from the TFG for international assistance to counter piracy off its coasts, including the 1 September 2008 letter from the President of Somalia to the Secretary-General of the United Nations expressing the appreciation of the TFG to the Security Council for its assistance and expressing the TFG’s willingness to consider working with other States and regional organizations to combat piracy and armed robbery at sea off the coast of Somalia”

² Awet Tewelde Weldemichael, Crimes Within Crimes in Somalia: double- dealing Pirates, fraudulent Negotiators, duplicitous Intermediaries and Treacherous Illegal fishers, Vol. 6, Iss. 1, P.54, Journal of Territorial and Maritime Studies;Seoul. 2019.

³ Paul Lansing and Michael Petersen, Ship-Owners and the Twenty-First Century Somali Pirate: The Business Ethics of Ransom Payment, Vol.102, Iss.3, p.510, Journal of Business Ethics, September 2011.

⁴ Anonymous, United States Participation in International Efforts to Combat Piracy, Vol.103, Iss.4, P.750, The American Journal of International Law Washington, October 2009.

Based on these resolutions, countries can work together to handle these two crimes, even those countries can enter Somalia's territorial waters to handle armed robbery at sea which is actually subject to Somali jurisdiction. This is possible and is not considered to violate Somali sovereignty because Somalia has provided authorization for foreign parties to handle the armed robbery at sea into its territorial waters as described in UN Security Council 1816 (2008) that:

“Taking note of the Secretary-General’s letter of 9 November 2007 to the President of the Security Council reporting that the Transitional Federal Government of Somalia (TFG) needs and would welcome international assistance to address the problem.⁵

However, it must be noted that in these resolutions it was also emphasized that this measure was only valid in Somalia and was not intended to be an international custom that could be applied in other regions which had the same problems as in the Malacca-Singapore Strait as stipulated in UN Security Council 1950 (2010) that:

“the authorizations renewed in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations, under the Convention, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law .”

In this paper, the analyzed data on piracy *jure gentium* and armed robbery at sea is focused more on cases conducted in 2006 and 2011. Adverse effects arising from piracy and armed robbery at sea and the lack of capacity of Somalia in handling these crimes forced the Somali government (Transitional Federal Government) to ask for assistance from the international community to deal with these crimes through letters sent by the Somali government to the Council UN Security. It is the basis that a number of Security Council Resolutions were issued which became the basis for the international community to overcome the crime of piracy *jure gentium* and armed robbery at sea and even entered into jurisdiction of Somalia. By looking at the model of handling piracy *jure gentium* and armed robbery at sea

⁵ United Nations Security Council Resolutions 1816 (2008)

carried out in Somalia, it can be seen that this is a special measure and can only be applied in special situations, so that this cannot be a best practice to be applied to same crimes in another place. This is the focus of the study in this paper.

Situation in Somalia

Since 1991 Somalia has failed to form a stable government. This can be seen from the establishment of 14 administrations that failed to improve the conditions of Somalia. The TFG as an official government also failed to stabilize Somalia and was unable to exercise its power outside of Mogadishu.⁶ Islamic leader groups, local politicians, and business groups have more influence in some areas outside of Mogadishu, for example in Puntland and Somaliland. They are able to hold a more stable administration with the transfer of power carried out through general elections rather than those in Mogadishu.⁷ The current official government has weaknesses in establishing and implementing legal policies or rules.⁸ The government is also very limited in terms of human and financial resources so it is impossible to create an effective and stable administration.⁹ This can also be seen from the very weak Somali naval power. Since the outbreak of the war in 1991, most of the marines and military equipments functions have been broken, though the coastline of Somalia is the longest coastal region on the African Continent.¹⁰

Somalia is a failed state, because in *de jure*, this state does exist but in *de facto* it is not able to run the administration effectively.¹¹ As a result of the divisions in Somalia, the state is divided into several parts, namely: firstly, the official Somali government which only controls a few small parts of Somalia, including some of the

⁶ Ken Menkhaus dalam Stiftung Heinrich Böll, Somalia: Current Conflicts and New Chances for State Building, Volume 6, Heinrich Böll Foundation, Berlin, 2008, p.30.

⁷ Sarah Percy and Anja Sortland. The Business of Piracy in Somalia, DIW, Berlin, 2011, p.4

⁸ Colin Warbrick, et al, Piracy Off Somalia: Un Security Council Resolution 1816 And Imo Regional Counter-Piracy Efforts, Vol.57, Iss.3, P.691, The International and Comparative Law Quarterly;Oxford, July 2008.

⁹ International Expert Group on Piracy Off The Somali Coast, Piracy Off The Somali Coast, 2008, p.12, [online] <http://www.asil.org/files/somaliapiracyintlexpertsreoprtconsolidates1.pdf> (accessed on 26th of January 2012).

¹⁰ Apriadi Tamburaka, 47 Hari Dalam Sandera Perompak Somalia, Drama Upaya Pembebasan Kapal dan ABK MV.Sinar Kudus, Cakrawala, Godean, Yogyakarta, 2011, p.46.

¹¹ Lesley Anne Warner, In Somalia, Kenya Risks Death by a Thousand Cuts, Vol.3, Iss.3, Prism : a Journal of the Center for Complex Operations; Washington, Juny 2012, p.105.

capital of Mogadishu, and the Somali Embassy in Indonesia representing this government;¹² secondly, Somaliland, a region that has separated from Somalia since May 1991, encompassing the northwestern region of Somalia which is a former British colony. Somaliland is not officially recognized by the world, but several neighboring states such as Ethiopia have a consulate in the capital city of Somaliland in Hergaisa;¹³ thirdly, Puntland which declared itself to be a semi-autonomous region since 1998 controlled the northeast region; Fourthly, in April 2002 local leaders in Baioda announced the formation of Southwestern State of Somalia;¹⁴ fifthly, an area without government that has been under controlled by various armed militant groups, including Al-Shabaab, an extremist Islamist group suspected of collaborating with Al Qaeda. This region includes former Italian colonies.¹⁵

The number of governments that are formed and the division of regions into several parts with their respective administration, and all the limitations that exist has made it difficult to stabilize the condition of Somalia. This can be seen from various kinds of problems that arise and cannot be handled by the existing government. The various problems that arise include humanitarian issues, border issues with Ethiopia and Eritrea, issues regarding fundamentalist Islam, and include the issue of piracy *jure gentium* and armed robbery at sea.

This condition has made the seize of ships in exchange for ransom increase since the 1990s, mostly occur in territorial waters, with reasons to protect Somali fisheries sources from foreign fishermen and protect waters from toxic waste disposal by foreign ships that navigate through Gulf of Aden from the Suez Canal, which cannot be overcome by the government.¹⁶ This, by Isac Kamola, is explained

¹² Teguh Widodo, Pelajaran Berharga Dari Peristiwa Pembajakan MV Sinar Kudus, Edisi DW/151/2011, Dharma Wiratama. p.55. 2011.

¹³ Supra Number 9, p.10.

¹⁴ Id.

¹⁵ Supra Number 11, p.56

¹⁶ Tullio Treves, Piracy, Law of The Sea, And Use of Force: Developments Off The Coast Of Somalia, 20, (2), The European Journal of International Law, 2009 p.400. also see: Kathryn H Floyd, Somalia's Stability and Security Situation in Review, International Centre For Political Violence and Terrorism Research, 2010, p. 8, [online] <http://www.pvtr.org/pdf/Report/Somalia%27sStabilityandSecuritySituationinReview.pdf> (accessed on 24th of February 2012).

as a result of the flow of capitalism flowing through the Suez Canal, which causes piracy *jure gentium* to be a reasonable response, because what happened caused economic losses to Somalia.¹⁷

Response to Piracy *Jure gentium* and Armed Robbery at sea Outside the Territorial Sea and Somali Waters

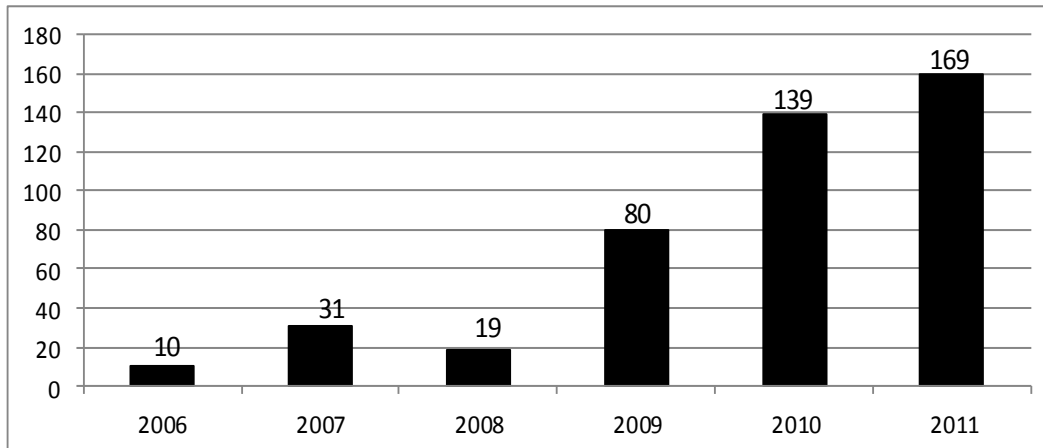
When talking about piracy in Somalia, there are two different concepts that should be understood, namely piracy *jure gentium* and armed robbery at sea. These two concepts are clearly very different and have different legal implications. universal jurisdiction can be applied to piracy *jure gentium* and applies only in the high sea or in areas outside of the jurisdiction of any state, whereas armed robbery at sea occurs in the territory of a state and it is the jurisdiction of the state in which it occurs to handle that crime. The writers often only use the term piracy to refer to any act of piracy conducted by Somali pirates, whether that happens outside the territorial sea of Somalia or that occurs within the territorial waters of Somalia which is the jurisdiction of Somalia.

The annual report of the IMB in 2011 reported that throughout 2011 there were 160 cases conducted in Somalia. The incidents continued to increase compared to previous years. In 2010 there were 139 cases reported, in 2009 there were 80 cases, in 2008 there were 19 cases occurred, in 2007 there were 31 cases, and in 2006 there were 10 cases. It can be clearly seen in the table below.

Based on these data we can see that from 2006 to 2011, the number of piracy *jure gentium* and armed robbery at sea in Somalia has increased 16 times. This is truly an irony because since 2008 there has been international assistance, both technical assistance and the sending of military forces, to overcome the problems of piracy *jure gentium* and armed robbery. Unfortunately, this report does not distinguish between the number of piracy *jure gentium* and armed robbery at sea that occur outside the territorial sea and Somali waters.

¹⁷ Isac Kamola, Capitalism At Sea: Piracy and 'State Failure' in The Gulf of Aden, p.4.

Table 1. Piracy *Jure gentium* and Armed Robbery at sea in Somalia in 2006-2011



Source: International Maritime Bureau Piracy And Armed Robbery Report For The Period Of 1st January – 31st December 2010 and International Maritime Bureau Piracy And Armed Robbery Report For The Period Of 1st January – 31st December 2011 (data have been processed)

Based on these data we can see that from 2006 to 2011, the number of piracy *jure gentium* and armed robbery at sea in Somalia has increased 16 times. This is truly an irony because since 2008 there has been international assistance, both technical assistance and the sending of military forces, to overcome the problems of piracy *jure gentium* and armed robbery. Unfortunately, this report does not distinguish between the number of piracy *jure gentium* and armed robbery at sea that occur outside the territorial sea and Somali waters.

In 2011 there were 237 arrests conducted by Somali pirates reported. This happens because Somali pirates not only operate in Somali waters but also reach the Gulf of Aden, South Red Sea, off the coast of Yemen, off the coast of Oman, the Arabian Sea, off the coast of Kenya, off the coast of Tanzania, off the coast of Madagascar, offshore Mozambique, Indian Ocean, off the west coast of India, and off the west coast of Moldova. In the same year it was also reported that 470 seafarers were taken into hostage, 10 people were kidnapped, 3 people were injured and 8 people were killed by Somali pirates,¹⁸ while the number of ships detained by

¹⁸ International Maritime Bureau, Piracy and Armed Robbery Report, Period of 1st January-31st of December 2011, 2011, p.20.

Somali pirates starting from 31 December 2011 were 11 ships.¹⁹ In the same period in 2010 they arrested 28 ships to be exchanged for ransom.²⁰

Piracy *jure gentium* and armed robbery at sea that occur outside the territorial sea and Somali waters have caused enormous losses to the shipping industry that passes waters outside the territorial sea of Somalia, and the Somali government are unable to overcome this problem. In a report compiled by one earth future regarding economic losses due to piracy it was reported that an increase in ransom was issued to redeem ships detained and held hostage by Somali pirates year after year. In 2005 the average ransom ranged from \$ 150,000, in 2009 the average ransom increased to \$ 3,400,000, and in 2010 the average ransom was \$ 5,400,000.²¹ In 2010 there were two huge ransom payments to Somali pirates. In November 2010, \$ 9,500,000 was paid to Somali pirates as ransom for an oil tanker from South Korea, Sambo Dream.²² Meanwhile, in January 2010, a ransom of \$ 7,000,000 was paid for the release of a super tanker ship from Greece, MV Maran Centaurus, which transports \$ 160,000,000 of oil from Saudi Arabia to the United States.²³

Table 2. Ransom in 2009 and 2010

Year	Average Ransom	Total Number of Successful Hijackings	Cost of Ransoms
2009	\$3,4 million	52	\$177 million
2010	\$5,4 million	44	\$238 million
Cost of Ransoms 2009 and 2010			\$415 million

Source: One Earth Future Working Paper On The Economic Cost Of Maritime Piracy Desember 2010

From the table 2 it can be seen that there has been a drastic increase in the amount of ransom paid to Somali pirates. The total of ransom paid in 2009 was \$

¹⁹ Id

²⁰ Id

²¹ Anna Bowden, et al, The Economic Cost of Maritime Piracy, One Earth Future Working Paper, 2010, P.9, [online] http://oceansbeyondpiracy.org/sites/default/files/documents_old/The_Economic_Cost_of_Piracy_Full_Report.pdf, (Accessed on 21st of Januari 2011).

²² Somali pirates receive record ransom for ships' release, 2010 [online] <http://www.bbc.co.uk/news/world-africa-11704306>, (accessed on 3rd of February 2012).

²³ Supra Number 15, P.9.

177,000,000 had increased to \$ 238,000,000 in 2010. In addition to the increase in ransom fees given, the piracy *jure gentium* and armed robbery at sea also had an impact on increasing ship insurance carrying cargo, especially those that go through high risk zones.²⁴ The increase of costs also occur due to changes in the route that must be navigated by ships to avoid piracy.²⁵

The increase of risk of piracy *jure gentium* and armed robbery outside the territorial sea and Somali waters is not matched by the ability of the Somali government to deal with it. This situation raises international concern about the problems of piracy *jure gentium* and armed robbery at sea that occur in areas outside the territorial sea and Somali waters, so that an action is needed to handle these crimes. In 2008 there were around 20 warships sent by international community to counter the piracy *jure gentium* off the coast of Somalia and even to counter armed robbery at sea in Somalia's territorial sea.²⁶ Through a letter addressed to the Security Council, the official Somali government recognized by the United Nations, the TFG, has requested that the international community to help them in dealing with the problems of piracy *jure gentium*, even armed robbery at sea that actually occurs in Somali territorial waters which subject to Somali jurisdiction.²⁷

Several multinational military operations have been carried out off the coast of Somalia to combat piracy *jure gentium* in the region. At the end of 2008, multinational naval forces, CTF-150, began the operations to eradicate piracy *jure gentium* in the Gulf of Aden, the Arabian Sea and the Indian Ocean. Then in January 2009, CTF-150 was replaced by CTF-151, which is also a multinational naval force that combines military power, information exchange, and coordinated patrols. The European Union placed destroyers and naval patrol vessels outside the territorial

²⁴ Supra Number 15, p.10-12.

²⁵ Supra Number 15, p.13-14.

²⁶ Douglas Guilfoyle, Counter-Piracy Law Enforcement and Human Rights, Vol.59, Iss.1, The international and Comparative Law Quarterly;Oxford, January 2010, p.141.

²⁷ United Nations Security Council Resolutions 1816 (2008). United Nations, 2008, "Security Council, Resolution 1816 (2008) Adopted by the Security Council at its 5902nd meeting on 2nd of June 2008 ", [online] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/361/77/PDF/N0836177.pdf?OpenElement>, (accessed on 29th of March 2012)

sea of Somalia. Asian countries such as Pakistan, Japan and Turkey also contributed to the CTF-151, while China, Russia and India even though they were not officially involved in this multinational patrol but still participated in securing areas outside the territorial sea of Somalia.²⁸

Since the rise of piracy *jure gentium* that occurred in international shipping lines outside the territorial sea of Somalia and armed robbery at sea that occurred in its waters, since 2008 nine United Nation Security Council (UNSC) resolutions have been issued relating to the handling of piracy *jure gentium* and armed robbery at sea outside territorial sea and Somali waters, namely, UNSC Resolution 1816 (2008), UNSC Resolution 1838 (2008), UNSC Resolution 1846 (2008), UNSC Resolution 1851 (2008), UNSC Resolution 1897 (2009), UNSC Resolution 1918 (2010), UNSC Resolution 1950 (2010), UNSC Resolution 2015 (2011), and UNSC Resolution 2020 (2011). Each of these resolutions will be discussed below.

a. UNSC Resolution 1816 (2008)²⁹

This resolution stated that piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters had become a threat to the international community, this was indicated by:

- 1) These crimes threaten the distribution of humanitarian aid to Somalia quickly, safely, and effectively;
- 2) These crimes threaten the safety of commercial navigation lines and international navigation;
- 3) These crimes aggravate the crisis situation in Somalia, which threaten international security and peace in the region.

Therefore within a period of 6 months since this resolution was issued, states could cooperate with TFG to combat piracy *jure gentium* and armed robbery

²⁸ Yvonne M. Dutton, *Bringing Pirates To Justice: A Case For Including Piracy Within The Jurisdiction Of The International Criminal Court*, One Earth Future Foundation, 2010, p.13.

²⁹ United Nations, 2008, "Security Council, Resolution 1816 (2008) Adopted by the Security Council at its 5902nd meeting on 2 June 2008", [online] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/361/77/PDF/N0836177.pdf?OpenElement>, (accessed on 29th of March 2012)

at sea outside the territorial sea and Somali waters. In Article 7 of this resolution states are not only given the authority to take action against piracy *jure gentium* and armed robbery at sea in area outside the territorial sea of Somalia, but states that cooperate with TFG are also given the authority to enter Somali waters and take action against the crime referred to as intended for this crime on the high seas. Under Article 8, states that take part in cooperating with the TFG in combating pirates are asked to take appropriate steps so that in carrying out their actions in accordance with Article 7, it does not affect the right of innocent passage of ships from other states.

The reasoning for carrying out these actions, as contained in this resolution, are based on 2 things:

- 1) Lack of capacity of TFG in handling piracy *jure gentium* and armed robbery at sea or in conducting patrols to secure international navigation lanes off its coast or territorial waters;
- 2) There is approval from the TFG to request international assistance to secure territorial waters and international waters off the coast of Somalia from piracy *jure gentium* and armed robbery at sea. This was conveyed by a permanent representative of Somalia at the United Nations to the President of the UN Security Council in a letter dated February 27, 2008.

Under Article 11, states, particularly flag states, coastal states and ports, states of origin of victims, and states of origin of perpetrators of piracy *jure gentium* and armed robbery at sea, as well as other states that have jurisdictions relevant to cases occurred, are asked to cooperate to determine jurisdiction over crimes that have occurred, and in investigations conducted against these crimes.

This resolution also stipulates in Article 9 that authorization for states to take action to prevent piracy *jure gentium* and armed robbery at sea committed in Somalia only applied in connection with the situation in Somalia alone and not to be a precedent for applied in other regions.

b. UNSC Resolution 1838 (2008)³⁰

This resolution still uses the same considerations as UN Security Council Resolution 1816 (2008) in handling crimes of *piracy jure gentium* and *armed robbery at sea* outside the territorial sea and Somali waters. The addition contained in this resolution is about safeguards conducted by states to secure the convoy of the World Food Program (WFP) in delivering aid to Somalia and there is security carried out by the European Union to its member states carrying out activities off the coast of Somalia.

Article 9 emphasizes the renewal of the implementation period for handling *piracy jure gentium* and *armed robbery at sea* as implemented in Article 7 of the UN Security Council Resolution 1816 (2008). The implementation of these actions will be carried out in a period of 6 months, and states also, based on Article 4, will still be given the same authority to enter Somali territorial waters and take the necessary measures to deal with these crimes the way it is conducted in the high seas. In addition to eradicating *piracy jure gentium* and *armed robbery at sea* outside the territorial sea and Somali waters, states and regional organizations were also asked to protect the WFP in providing humanitarian assistance to Somalia. Therefore, Article 7 states that states and regional organizations must coordinate their actions.

Article 8 of this resolution remain emphasizes that measures to deal with the handling of *piracy jure gentium* and *armed robbery at sea* based on this resolution are only applied in relation to the situation in Somalia and do not become a precedent to be applied in other regions.

c. UNSC Resolution 1846 (2008)³¹

In this resolution it can also be seen that the considerations used are the lack

³⁰ United Nations, 2008, "Security Council, Resolution 1838 (2008) Adopted by the Security Council at its 5987 th meeting, on 7 October 2008", [online] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/538/84/PDF/N0853884.pdf?> (accessed on 29th of March 2012).

³¹ United Nations, 2008, "Security Council, Resolution 1846 (2008) Adopted by the Security Council at its 6026th meeting, on 2 December 2008", [online] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/630/29/PDF/N0863029.pdf?OpenElement>, (accessed on 29th of March 2012)

of TFG capacity in securing its territory and international navigation lanes off its coast, threats to international peace and regional security, and agreements given by the TFG through a letter dated 20 November 2008 to the President of the UN Security Council that asked for international assistance in combating crime piracy *jure gentium* and armed robbery at sea outside the territorial sea and waters of Somalia, and allowing states and regional organizations that collaborate with the TFG to carry out their actions into territorial waters Somalia.

Article 6 of this resolution states that initiatives carried out by Canada, Denmark, France, India, the Netherlands, Russia, Spain, Britain and America, as well as regional and international organizations in combating piracy *jure gentium* and armed robbery at sea outside the territorial sea and waters of Somalia, including in protecting WFP ships, especially on the European Union's decision dated 10 November 2008, to extend for 12 months from December 2008, naval operations to protect WFP ships that deliver humanitarian aid to Somalia and other ships vulnerable to piracy attacks, and fight piracy *jure gentium* and armed robbery at sea in Somalia.

States and regional organizations that take part in this operations, based on Article 7, are expected to coordinate with each other in carrying out their actions, and also coordinate with IMO, the international shipping community, the flag states, and the TFG. This coordination also includes exchanging information bilaterally or through the United Nations.

Article 10 emphasizes that the measures of combating piracy *jure gentium* and armed robbery at sea carried out under this resolution is only valid for 12 months from the issuance of this resolution. In Article 19 it is stated that the renewal of the period of operation is carried out based on the request of the TFG.

As stated in Article 9 of UNSC Resolution 1816 (2008) and Article 8 of UNSC Resolution 1838 (2008), Article 11 of This resolution also states that actions taken based on this resolution to combat piracy *jure gentium* and armed robbery at sea outside the sea territorial and territorial waters of Somalia are only applied in relation to the situation in Somalia and are not intended to be a customary international law.

d. UNSC Resolution 1851 (2008)³²

Consideration about the lack of capacity of the TFG, threats to international peace, and authorization given by TFG to states as well as international and regional organizations, is still the main basis for implementing measures to combat piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters. Other considerations listed in this resolution are about increasing cases of piracy *jure gentium* outside the territorial sea of Somalia in the past 6 months. The piracy has spread to the coast of Kenya and east of Tanzania.

In this resolution states as well as regional and international organizations taking part in this operation were asked to:

- 1) Establish an agreement or arrangement regarding the investigation and prosecution of prisoners of convicted piracy *jure gentium* and armed robbery at sea;
- 2) Establish an international collaboration mechanism to be a way to make contact regarding any aspects of combating piracy *jure gentium* and armed robbery at sea among states as well as international and regional organizations that take part in this operation;
- 3) Establish a center to coordinate the exchange of information relevant to piracy and armed robbery off the coast and territorial waters of Somalia (Article 5).

Article 10 restates that the act of eradicating piracy *jure gentium* and armed robbery at sea conducted under this resolution is only applied in relation to the situation in Somalia and is not intended to establish a customary international law. The authority given to countries and international and regional organizations under this resolution is only applied for a period of 12 months.

³² United Nations, 2008, "Security Council, Resolution 1851 (2008) Adopted by the Security Council at its 6046th meeting, on 16 December 2008", [online] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/655/01/PDF/N0865501.pdf?OpenElement>, (accessed on 29th of March 2012)

e. **UNSC Resolution 1897 (2009)**³³

This resolution also uses consideration of TFG's lack of capacity, threats to international peace and regional security, and TFG approval, as a basis for consideration in taking measures to combat piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters. The agreement given by the TFG so that states as well as international and regional organizations can take such actions was submitted by letter dated November 2nd and 6th of 2009 by permanent representatives of Somalia at the United Nations to the President of the UN Security Council that asked for international assistance in handling piracy *jure gentium* and armed robbery outside the territorial sea and Somali waters. In the same letter TFG also requested that the period of authorization granted to states as well as international and regional organizations in collaboration with TFG be renewed 12 months away.

This resolution also recognized Somali rights relating to natural resources outside its territorial boundaries, including regarding fisheries. For this reason states and organizations, including the IMO, provide technical assistance to Somalia, regional authorities, and nearby coastal states, to develop their capacity to ensure maritime security, including combating piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters. In carrying out this matter, this resolution emphasized the need for coordination through Contact Groups on Piracy off the Coast of Somalia (CGPCS).

Article 8 remain emphasized that the authorization granted under this resolution to states as well as international and regional organizations are only applied in relation to the crisis situation in Somalia and not to create customary international law.

³³ United Nations, 2009, "Security Council, Resolution 1897 (2009) Adopted by the Security Council at its 6226th meeting, on 30 November 2009", [online] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/624/65/PDF/N0962465.pdf?OpenElement>, (accessed on 29th of March 2012)

f. UNSC Resolution 1918 (2010)³⁴

This resolution also uses consideration of TFG's lack of capacity, threats to international peace and regional security, and TFG approval, as a basis for consideration in carrying out measures to eradicate piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters. The interesting thing included in this resolution is regarding the release of people suspected of conducting piracy without going through a judicial process. By taking that into consideration, the resolution stipulates that to create conditions in which pirate can be dealt responsibly, it is agreed that failure to prosecute people responsible for the occurrence of piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters is damaging efforts to fight piracy by the international community; countries were asked to criminalize piracy in their national law, prosecute people suspected of piracy, and provide prison sentences to perpetrators of piracy off the coast of Somalia.

g. UNSC Resolution 1950 (2010)³⁵

As with previous resolutions, this resolution also used the lack of TFG capacity, the threat that arose towards international peace and regional security due to piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters, as well as the approval of TFG, is still the main consideration in this resolution. Based on a letter dated October 20th of 2010, permanent representatives of Somalia at the United Nations have asked the President of the UN Security Council to send international assistance in combating the crimes of piracy *jure gentium* and armed robbery at sea off the coast and its territorial waters. In the same letter, TFG also gave approval to renew the implementation period of collaboration with states as well as international and regional organizations in

³⁴ United Nations, 2010, "Security Council, Resolution 1918 (2010) Adopted by the Security Council at its 6301st meeting, on 27 April 2010", [online] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/331/39/PDF/N1033139.pdf?OpenElement>, (accessed on 29th of March 2012)

³⁵ United Nations, 2010, "Security Council, Resolution 1950 (2010) Adopted by the Security Council at its 6429th meeting, on 23 November 2010", [online] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/649/02/PDF/N1064902.pdf?OpenElement>, (accessed on 29 Marer 2012)

combating piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters for another 12 months

Regarding the situation in Somalia, Article 2 emphasizes that ongoing instability in Somalia plays a role in the problems of piracy *jure gentium* and armed robbery at sea outside the territorial sea and its waters. This is compounded by the limited capacity of existing government and national legislation in facilitating the detention and prosecution of people suspected of piracy, which has hampered the efforts by the international community to fight piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters, even in this resolution also stated the involvement of children in this crime. Therefore, a comprehensive handling is needed to deal with this problem, which based on this resolution can be achieved through creating stability and peace in Somalia, strengthening state institutions, economic and social development, respecting human rights and rules of law. Article 8 emphasized that this resolution is only applied in relation to the situation in Somalia and is not intended to underlie the formation of customary international law.

h. UNSC Resolution 2015 (2011)³⁶

This resolution emphasized the importance of criminalizing piracy *jure gentium* and armed robbery at sea in national laws to support implementation of the prosecution and imprisonment of the perpetrators of these crimes, in addition in Article 16 stated that the need for the establishment of the anti-piracy court in Somalia and other states in the region. Therefore, international assistance is needed in forming the court, including the assistance of human resources in carrying out the court's operations.

To support this, Article 17 emphasized the importance of anti-piracy courts to have jurisdiction over suspects arrested at sea, people who facilitate crimes of piracy *jure gentium* and armed robbery at sea, including those who plan, organize, facilitate, fund and receive the benefits of the crime.

³⁶ United Nations, 2011, "Security Council, Resolution 2015 (2011) Adopted by the Security Council at its 6635th meeting, on 24 October 2011", [online] <http://daccess-ddsny.un.org/doc/UNDOC/GEN/N11/561/03/PDF/N1156103.pdf?OpenElement> (accessed on 29th of March 2012)

Complementing the enthusiasm to combat piracy *jure gentium* and armed robbery at sea through increasing of prosecution and prison sentences given, then Article 18 emphasized the importance of increasing the capacity of existing prisons. therefore, Somali authorities, the United Nations Office On Drugs and Crimes (UNDOC), the United Nations Development Program (UNDP), and other international communities have been asked to assist in the construction and operation of the prison.

In addition to the legal steps taken above, this resolution also stated that it is important to build the potential of Somalia to encourage stable and sustainable economic growth, which can be used as a tool to tackle the causes of piracy, including poverty, thus contributing in reducing the level of piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters. This resolution also reiterates that the measures to combat piracy *jure gentium* and armed robbery at sea under this resolution are only applied in Somalia.

i. UNSC Resolution 2020 (2011)³⁷

In this resolution again emphasizes: the lack of TFG capacity in conducting investigations and prosecuting perpetrators of piracy, and in securing international navigation outside territorial sea and Somali waters; the threat posed by piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters against international peace and security in the region; and the agreement given by the TFG for the involvement of the international community in combating piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters. This agreement was given based on a letter dated November 10, 2011 submitted by a permanent representative of Somalia at the UN to the UN Security Council. In the same letter, the TFG also gave approval for the renewal of another 12 periods for states as well as in international and regional organizations carried

³⁷ United Nations, 2011, "Security Council, Resolution 2020 (2011) Adopted by the Security Council at its 6663rd meeting, on 22 November 2011", [online] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/604/21/PDF/N1160421.pdf?OpenElement>, (accessed on 29th of March 2012)

out their duties in accordance with the authority given by this resolution.

The authority given in this resolution was the same as the authority covered by Article 7 of UNSC Resolution 1816 (2008), Article 10 of UNSC Resolution 1846 (2008), Article 6 of UNSC Resolution 1851 (2008), Article 7 of UNSC Resolution 1897 (2009), and Article 7 of the UNSC Resolution 1950 (2010), which allowed states as well as regional and international organizations in collaboration with TFG, in carrying out operations to combat piracy *jure gentium* and armed robbery at sea, can enter Somali territorial waters, and take actions against these crimes, such as actions taken against piracy carried out on the high seas.

In this resolution it can also be seen that several international entities have been involved in combating piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters, namely: the European Union, the North Atlantic Treaty Organization (NATO), Combine Task Force 151, and other states that collaborate with the TFG to combat piracy that occurs there. In addition there are also states that act individually in carrying out their operations, namely: China, India, Iran, Japan, Malaysia, South Korea, Russia, Saudi Arabia, and Yemen. Article 10 stated that this resolution was only applied in relation to the situation in Somalia alone and was not intended to underlie the formation of customary international law.

In all these resolutions, it was recognized that the crisis situation in Somalia and the lack of capacity of the Somali government have played a role in the increasing of piracy *jure gentium* and armed robbery at sea that occur outside the territorial sea and Somali waters. For example in UNSC Resolution 1846 (2008) it was stated that: "Taking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict pirates or patrols and secure either the international sea lanes off the coast of Somalia or Somalia's territorial waters", or in UNSC Resolution 1851 (2008) stated that: "Against taking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG), the interdiction to prosecute the pirates or patrol and secure waters off the coast of Somalia, including the international sea lanes and Somalia's territorial waters".

In these resolutions issued, it was also emphasized that the piracy *jure gentium* and armed robbery at sea had threatened international peace and security in the region. Therefore the official Somali government, TFG, requested through the UN Security Council to get assistance from the international community, namely from states that have naval ships and military aircraft on the high seas and in air space outside the territorial sea of Somalia to combat piracy *jure gentium* and armed robbery at sea that occurs outside the territorial sea and Somali waters. These foreign military forces can apply the use of force off the coast of Somalia and even within the territorial waters of Somalia because it was conducting under the Chapter VII of United Nation Charter which permit the use of force in a country territory as long as there is an authorization from Security Council.³⁸ It also should be noted that authorization from Security Council regarding the piracy *jure gentium* was issued because of the request from Somali government of the international assistance to combat piracy *jure gentium* and armed robbery at sea in Somalia. In the resolution issued, it was stated that:

Decides that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

- a. Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
- b. Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas, with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery³⁹

From this decision, it can be seen that the authority given to states that take part in combating piracy *jure gentium* and armed robbery at sea is not only limited to taking necessary measures in the territories outside the territorial sea of Somalia, but also in territorial waters which fall under the jurisdiction of Somalia. It can be

³⁸ Anonymous, United States Participation in International Efforts to Combat Piracy The American Journal of International Law, Vol. 103, Iss.4, October 2009 P.750

³⁹ Point 7 of United Nations Security Council Resolution 1816 (2008).

seen that the large scope of operations that states can enter in combating piracy *jure gentium* and armed robbery at sea, that is, to the area that is the jurisdiction and is under the sovereignty of Somalia. As recognized in UNCLOS 1982, in territorial waters, the sovereignty of a country fully applies to everything that exists and occurs in it, but what happens in Somalia shows the opposite with the involvement of other states in combating armed robbery at sea which is actually fully subject to Somali jurisdiction, because it occurs in its territorial waters.

Based on this international cooperation to combat piracy *jure gentium* and armed robbery at sea, the foreign naval are allowed to capture the suspects of crimes of piracy *jure gentium* and armed robbery at sea not only for the acts committed on high seas but also on the territorial water of Somalia. They are also allowed to bring the suspects to be tried under the domestic law of those who capture the suspects.⁴⁰ This practice based on 1982 UNCLOS should only be applied to piracy *jure gentium* but under the UN Security Council Resolutions regarding the piracy *jure gentium* and armed robbery at sea in Somalia, it also can be applied to armed robbery at sea.

The need to counter piracy *jure gentium* and armed robbery at sea to justice, as stipulated in UN Security Council Resolution 2020 (2011), not only to bring the suspects of these crimes to justice but also to investigate and prosecute those who support the suspects to do so. It is included those who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such crime.⁴¹

In summary, naval counter piracy forces operating off the coast of Somalia enjoy clear authority under the Law of the Sea Convention and international law to board, search, detain, and arrest suspected pirates on the high seas and in EEZ waters of the Gulf of Aden and the Indian Ocean, and clear authority under the Security Council resolutions to do so as well in the territorial sea and internal

⁴⁰ Roach, J Ashley, Countering Piracy Off Somalia: International Law and International Institutions, The American Journal Of International Law, Vol. 104, Issue 3, P. 401

⁴¹ Ruwantissa Abeyratne, The use of Armed Guard on Board Merchant Vessels, Journal of Transportation Security, Vol.5, Issue 2, June 2012, P.161

waters of Somalia.⁴²

One important thing to remember from all the UN Security Council Resolutions issued is the existence of Indonesia's role which urged the inclusion of statements in these resolutions that the measures taken to combat piracy *jure gentium* and armed robbery at sea outside the territorial sea and Somali waters can only be applied in Somalia alone and not to be applied or set a precedent to be applied in other regions or not become a customary international law.⁴³ Indonesia as a party to UNCLOS 1982 believe that the piracy *jure gentium* and armed robbery at sea are different problems thus the handling of them should be different either.

In addition to being limited by the *rationale loci*, which is only to be applied in Somalia, the resolutions issued regarding the handling of piracy *jure gentium* and armed robbery at sea in Somalia are also limited by the *ratio temporis*, which is only valid for a certain period.⁴⁴ UN Security Council Resolution 1816 was only valid for a period of 6 months; UNSC Resolution 1838 was also only valid for 6 months; UNSC Resolution 1846 was valid for 12 months; UNSC Resolution 1851 was valid for 12 months; UNSC Resolution 1897 was valid for 12 months; The 1918 UNSC Resolution was valid for 12 months; The 1950 UNSC resolution was valid for 12 months; and the UNSC 2020 Resolution was valid for 12 months.

In the involvement of foreign states to combat armed robbery at sea, which should be the authority of Somalia to handle it, their involvement is based on the agreement of the official Somali government, TFG, to the UN Security Council. As stated in the UN Security Council Resolution 1816 in which it states that: "... Taking further notes from the Permanent Representative of the Somali Republic to the United Nations to the President of the Security Council dated 27 February 2008, conveying the consent of the TFG to the Security Council for urgent assistance in the territorial and international waters off the coast of Somalia for the

⁴² Id

⁴³ James Karaska, *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy*. Praeger, Santa Barbara, California, 2011, p.156.

⁴⁴ *Supra* Number 10, p. 405.

safe conduct of shipping and navigation...". It can be seen that there is agreement from the TFG regarding the involvement of foreign parties in handling the armed robbery at sea in its territorial waters, which are subject to its jurisdiction. Therefore, it cannot be understood that the involvement of foreign parties in handling the armed robbery at sea immediately took place only because of the lack of capacity of Somalia to deal with armed robbery. Thus it can be seen also that consideration of Somalia's sovereignty as a sovereign state still exists even though Somalia has a crisis situation that causes instability in the country and lack of capacity to deal with armed robbery at sea that occurs in the territory that becomes its own jurisdiction.

Conclusion

The model of handling piracy *jure gentium* carried out simultaneously with the handling of armed robbery at sea off the coast and in Somali waters is a special handling model. There are three reasons that underlie this particular handling model, firstly, the crime of piracy *jure gentium* and armed robbery at sea off the coast and Somali waters has caused international concern because the region is one of the busiest shipping lanes in the world; secondly, the inability of Somalia to handle these problems due to the condition of the country which continues to be in a situation of prolonged internal conflict; and thirdly as a result of this inability, Somalia asked for international assistance to handle the problem of piracy *jure gentium* off the coast, and even gave authorization for foreign countries to deal with armed robbery at sea on its waters. The model for handling piracy *jure gentium* and armed robbery carried out in Somalia is also not intended to be an international custom so that it cannot be applied in other regions.

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