

# International Legal Regime Against Maritime Piracy Piracy off the coast of Somalia

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## Abstract:

Somalian Piracy constitutes one of the main threats not only to international trade but to international legal system. International peace and security, the first purpose of the United Nations as stated in article 1 of its charter, are facing a new challenge coming not from a state member of United Nations but from non-state actors such as pirates. Conventional international law regulates the problem of piracy in *mare liberum*, but piracy in sovereign territory of the state still in *non-liquet zone*. This research examines whether contemporary international law presents a sufficient solution to counter piracy off the coast of Somalia. It highlights how international community tries to fill the gap of conventional law via Security Council resolutions. This research stresses the importance that the measures undertaken by international military forces, within the framework of the United Nations to counter Somali piracy including UN resolutions, must comply with both the letter and the spirit of international law.

**Key Words:** Piracy, international legal system, International Law, sovereign territory, non-liquet, UN resolutions, Universal Jurisdiction, United Nations Charter, Non-State Actor

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(\*) Accepted ??/??/????.

## 1. Introduction

There were two events that occurred in the twentieth century and had an impact on peace and international security and made it necessary to revisit international law in a manner commensurate with the requirements of the century. The terrorist attack against World Trade Center and piracy off the coast of Somalia have attracted both regional and international attention as common problems to which international cooperation plays an increasingly important role to find a comprehensive solution.

Since a few years we observed an escalating level of piracy off the coast of Somalia<sup>(1)</sup>. International Maritime Trade is now under threaten. All the states which depend on maritime trade along with international organization such as Intergovernmental Maritime Consultative Organization (IMCO) are deeply concerned by the situation in the Gulf of Aden. This Gulf is known as "**Pirate Alley**"<sup>(2)</sup> due to the large activity of piracy in the area. Maritime transport in this region is now extremely risky.

There were many reasons for the emergence of the dilemma of Somali pirates. The most important reasons, says Bjorn Moller from the Danish Institute of International Studies, is surely the extreme economic and social hardships suffered by the general population and that the fishing industry had suffered severely from the Tsunami of the 26<sup>th</sup> of December 2004 leaving many fishermen redundant<sup>(3)</sup>. In addition to the foregoing reasons, I can say that the absence of a strong government in Somalia is a favorable climate for the flourishing activities of pirates.

International Chamber Of Commerce (ICC) has established a specialized division known as International Maritime Bureau (IMB). The major mission of the IMB is protecting the integrity of international trade by fighting all types of maritime crime and malpractice. In 1992, the IMB

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(1) The International Maritime Organization (IMO), and the International Maritime Bureau (IMB), gave data on all attacks at sea. According to E. Kontorovich and S. Art, between 1998 and 2007, there were 754 reported pirate attacks in international waters, all subject to the universal jurisdiction. *An Empirical Examination of Universal Jurisdiction for Piracy, the Limits of Judicial Altruism* (2010), at 32.

(2) J. Rose and M. Macleod, *The Book of Pirates, A Guide to Plundering, Pillaging and Other Pursuits*, published by Gibbs Smith (2010), at 218.

(3) B. Moller, *Piracy off the coast of Somalia*, Danish Institute of International Studies (2009), at 1 available at [http://www.diis.dk/graphics/Publications/Briefs2009/bmo\\_piracyofsomalia2.pdf](http://www.diis.dk/graphics/Publications/Briefs2009/bmo_piracyofsomalia2.pdf).

was alarmed by the increasing problem of piracy, so it had decided to create a special center known as the "Piracy Reporting Centre" (PRC)<sup>(4)</sup>.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS), known as the Montego Bay Convention, gave the requirements of piracy rather than its definition. These conditions are:

- 1 - Illegal acts of violence or detention, or any act of depredation,
- 2 - These illegal acts should be committed for private ends,
- 3 - The illegal acts should be committed by the crew or the passengers of private ship,
- 4 - The illegal acts should be directed against another ship or against persons or property on board such ship.

The same convention of 1982 mentioned another condition "ratione loci condition" as it is limited the act of piracy on the high seas which means waters outside of national jurisdiction.

In 1985, United Nation General Assembly, in its resolution 40/61<sup>(5)</sup>, invited the International Maritime Organization to study the problem of terrorism aboard or against ships. Three years later on 10 March 1988, IMO<sup>(6)</sup> has adopted the Convention for the Suppression of Unlawful Acts against the safety of maritime navigation. In this convention, called "SUA Convention", the IMO has expanded the definition of piracy by uniting the term piracy with armed robbery<sup>(7)</sup>.

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(4) For more information see <http://www.icc-ccs.org>.

(5) GA Res. 40/PV.108, 9 Dec. 1985 adopted without vote

(6) In French language: OMI: Organisation maritime internationale

(7) Article 3 of SUA Convention says: 'Any person commits an offence if that person unlawfully and intentionally: 1. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or 2. performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or 3. destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or 4. places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or 5. destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or 6. communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or 7. injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f)'.

Furthermore, IMO has adopted a code of practice for the investigation of crimes of piracy and armed robbery against ships. It defines armed robbery against ships as:

any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a state's internal waters, archipelagic waters and territorial sea; and any act of inciting or of intentionally facilitating an act described above<sup>(8)</sup>.

However, the definitions given previously do not cover all the situations of violence at sea since it is possible to use the ships as suicide weapons. The terrorist attack in Yemen against USS Cole and Sri Lanka's Tamil Tiger rebels suicide attacks on merchant ships off the island's northern coast, are patent examples. Writing to the *European Journal of International Law*, Tullio Treves, judge at the International Tribunal for the Law of the Sea, confirms that the definition of piracy is rather narrow, as it includes only action on the high seas and only action undertaken by one ship against another ship. So forms of violence conducted in the territorial sea as well as without the involvement of two ships, such as, the violent taking of control of a ship by members of its crew or passengers, are not included<sup>(9)</sup>. In addition, it is commonly held that piracy does not cover politically motivated acts<sup>(10)</sup>.

One of the most important principles governing mare liberum is the concept of freedom of navigation for all states. But freedom without regulation would generate anarchy. Piracy in mare liberum is an issue which concerns all the nations. The problem is bigger than that. Pirates are exercising their activities not only in mare liberum but in territorial waters, the sovereign territory of the state. In addition, pirates today are dangerous criminals; they are criminal organizations armed to the teeth. According to the UN Monitoring Group in Somalia, pirates have easy

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(8) IMO Resolution A.1025(26) Adopted on 2 December 2009, Assembly 26th session, Agenda item 10.

(9) Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia', 2 *EJIL* (2009) 20, at 402

(10) Douglas Guilfoyle, 'Piracy Off Somalia: UN SC Res. 1816 and IMO Regional Counter-Piracy Efforts', (2008) 57, *ICLQ*, at 690-699; J. Rehman, *International Human Rights Law, A Practical Approach*, (2003), at 459

access to weapons and are able to purchase them through the money obtained from kidnappings<sup>(11)</sup>.

In this research, our objective is to determine the international legal regime against piracy by studying the case of Somalia and, as we observed this challenge in the region has modified the international conventional norms in order to deal with such an international threat. Fortunately, 'international law is not rigid'<sup>(12)</sup> and one of the main characteristics of international law is its flexible nature. This flexibility is perceived by some states as a weakness, but in the case of Somalia, I can say that this flexibility is a strong feature<sup>(13)</sup> on the condition that it is not used inappropriately. If international law wishes to be a near-perfect law, it should be easily modified; otherwise it will become obsolete or no longer in use. In this regards, Grigory Tunkin emphasizes that 'It is evident that in our age of rapid change international law must constantly develop to keep pace with the development of international relations'<sup>(14)</sup>.

Maritime piracy has not been the subject of many reflections by the jurists; however the situation should be changed after the multiple attacks against international ships in the coast of Somalia<sup>(15)</sup>. Piracy in this part of the world has become one of the most important issues to which international community should find a real solution.

I will examine in the second part of this research the origin of the problem of Somali piracy and the efforts of the international community via United Nations Organizations. This background will be necessary to understand the problem. Secondly, I will focus on the international counter-piracy policies and the importance of a comprehensive approach of the international community. Discussions and explanations of the controversial positions adopted by states will lead to examining two main

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(11) UN Report of the Monitoring Group on Somalia pursuant to SC Res. 1811, (2008); SC Res. 769, 10 December 2008.

(12) In this regard see M. N. Shaw, *International law* (2003), at 72.

(13) For more information about the nature and characteristics of international law please see: M. Dixon, *Textbook on International Law* (2007), at 11-12; C. W. Kegley, *World Politics: Trend and Transformation* (2009), at 495-496; P. Malanczuk, *Modern Introduction to International Law* (1997), at 3-5.

(14) Grigory Tunkin, 'International Law in the International System', *RCADI* (1975/IV) 147, at 44.

(15) In this meaning see M.H. GOZI, *Le terrorisme* (2003), at 81.

ideas in this part: **A.** The absence of an international legal system for people accused of piracy since each state tries and jails suspected pirates according its own standards. As a result, **B.** I argue for the creation of an international court specific in the question of maritime piracy. Part three will be devoted to study the universal jurisdiction of crimes of piracy. In this part I criticize the absence of clear condemnation of piracy by international law. In spite of the fact that piracy is regarded as a violation of Jus Cogens, international law does not prohibit piracy, but instead encourages states to prosecute pirates. Regional and international organizations should actively take part in the fight against piracy. Part four provides an overview of the notion of sovereignty. If there is a conviction that states should respect the notion of sovereignty, however international community has adopted and supported a different approach. It would be impossible to solve the dilemma of Somali pirates if the international community adopts a rigid definition for sovereignty **A.** But international policies against piracy should be compatible with international law. However, during my examination, I noted a clear violation to conventional norms. If United Nations Security Council resolutions gave temporary authorization to international forces to enter into Somali waters, France has used this authorization to enter on Somali soil. In this paper, I will see if this intervention undermines the principles of non-interference in the internal affairs of states **B.** However, an important question should be examined: Does the French operation constitute "state practice", required by article 38 of the statute of the International Court of Justice (ICJ), to develop international customary law **C?**

Contemporary international law nowadays is facing a new fact that the threat to international peace and security may come not only from a state member of United Nations but from non-state actors such as pirates. The case of Somalia presents a perfect example of relations between state and non-state actors under international law. Accordingly, I estimated important to study in the last part the applicability of article 51 of the United Nations Charter to attacks by non-state actors.

## 2. Origin of the Problem: Facts and Background

The problem of piracy has started with the Somalian civil war in around 1991. The central government in Somalia has collapsed and lost considerable control of the state to rebel forces. The Somaliland, region of Somalia, which declared itself independent, was governed by a secessionist insurgents. The international community did not accept this new situation. In these conditions; deterioration, instability and insecurity spread throughout the country. In 1991, United Nations Organization (UN) tried to get involved in order to put an end for the civil war in Somalia by the creation of (UNOSOM I)<sup>(16)</sup>, United Nations Operation in Somalia I. In 1993 the subsequent UN mission in Somalia was known as (UNOSOM II)<sup>(17)</sup>. Between these two previous years, (UNITAF), Unified Task Force started its assignment in Somalia<sup>(18)</sup>. Due to the impossible mission to restore peace and security, the UN has decided to withdraw on March 3, 1995 from Somalia leaving this big country to rebels and criminals. The capacity of the Transitional Federal Government (TFG) to interdict or to prosecute pirates was limited. These previous situations are considered by pirates as excellent conditions to exercise their activities. Today, Somali pirates have been able to seize one of the world's biggest ships, a Saudi oil tanker.

## 3. International Response to Somali's Pirates: Comprehensive Approach is Needed

UN Secretary General has called on all states to support an integrated approach to address the root causes of piracy<sup>(19)</sup> After the incident of *Maersk Alabama*<sup>(20)</sup>, Secretary Hilary Clinton said that 'we may be dealing with a 17<sup>th</sup> century crime, but we need to bring 21<sup>th</sup> Century solution to bear'. International community has realized that

(16) UNOSOM I was established by SC Res. 733 and SC Res. 746.

(17) UNOSOM II was established by SC Res. 837, 26 March 1993.

(18) UNITAF's mandate was to use 'all necessary means' to guarantee the delivery of humanitarian aid in accordance to Chapter VII of the United Nations Charter.

(19) UN Report of the Secretary-General pursuant to SC Res. 1846 (2008); SC Res. 590, 13 November 2009.

(20) On 8 April 2009, Somali pirates attacked the cargo ship Maersk Alabama. It was located 240 nautical miles from the coast of Somalia.

fighting pirates off the coast of Somalia needs to gather international efforts. In this regard, on January 14, 2009, an international meeting was held in New York to launch a harmonized effort to halt pirate attacks that comes from Somalian territorial sea. This initiative was called the Contact Group on Piracy off the Coast of Somalia<sup>(21)</sup> (CGPCS) which was created pursuant to UN Security Council Resolution 1851. This group is composed from Forty-five states<sup>(22)</sup> and seven international organizations<sup>(23)</sup> along with two observers<sup>(24)</sup>. GPCS today is a complex sector because it forms a big working department with four groups. Each group is concerned with a specific vocation. The first group is directed by London and aims to manage military and operational coordination, information sharing and capacity building. The second group is chaired by Copenhagen and covers judicial issues. The third group is presided by Washington which supervises the strengthening shipping self-awareness and the last group which directed by Cairo is concerned with public information. CGPCS is an excellent forum for international cooperation and coordination to halt piracy<sup>(25)</sup>.

#### ***A. Absence of International Legal System for People Accused of Piracy***

Even if international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982, in particular its articles 100, 101 and 105, sets out the legal structure applicable to combating piracy and armed robbery at sea, this legal structure will not

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(21) Groupe de contact sur la piraterie au large de la Somalie.

(22) List of Participating states: Australia, Austria, Bahamas Belgium, Canada, China, Cyprus, Czech Republic, Denmark, Djibouti, Egypt, Ethiopia, France, Germany, Greece, India, Indonesia, Italy, Japan, Kenya, Republic of Korea. Liberia, Malaysia, The Marshall Islands, Mexico, Morocco, The Netherlands, Nigeria, Norway, Oman, Panama, Portugal Russia, Saudi Arabia, Seychelles, Somalia, Spain, Sweden, Turkey, United Arab Emirates, United Kingdom, Ukraine, United States of America and Yemen.

(23) African Union, European Union, International Maritime Organization (IMO), International Criminal Police Organization (INTERPOL), League of Arab States, North Atlantic Treaty Organization (NATO) and United Nations.

(24) Baltic and International Maritime Council (BIMCO) and International Association of Independent Tanker Owners (INTERTANKO).

(25) [http://www.un.org/News/briefings/docs/2010/100610\\_Piracy.doc.htm](http://www.un.org/News/briefings/docs/2010/100610_Piracy.doc.htm).

(26) Security Council, 6226<sup>th</sup> Meeting, Department of Public Information, News and Media Division, New York, 30 November 2009. Available at <http://www.un.org/News/Press/docs/2009/sc9799.doc.htm>.

give answers to some legal questions concerning piracy. What should be done with the pirates once they have been caught? This question has been discussed by many legal and political experts. The solutions proposed by countries are different. For example, it is reported that the commander of a Danish frigate, who had seized a pirate vessel, released the crew shortly afterwards, regardless of whether there was sufficient evidence to support prosecution, as he did not know what to do with them<sup>(26)</sup>. The same thing was done by the French navy who decided to leave the kidnappers on the Somali beach. But we have to admit that this way of dealing with persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community<sup>(27)</sup>. On the contrast, suspected Somali pirates have been tried in various countries across the world. Dutch courts have started proceedings against a group of Somalis accused of trying to hijack a ship from the Dutch Antilles in January 2009. A court in Yemen sentenced other Somali pirates to death for hijacking a Yemeni oil tanker in April 2009, but most of those arrested in international waters will be tried by Kenya's courts<sup>(28)</sup>. Seychelles, another important country fighting piracy, has created an UN supported center to prosecute suspected pirates. The center will accept and try pirates captured by the European Union Navy. The observations developed above shows the absence of international legal system for people accused of piracy. It is not clear whether national courts can exercise universal jurisdiction over crimes under international law such as piracy. In addition, there are a number of other obstacles to prosecuting the pirates such as improper defenses, dual criminality or bars on retrospective application of international criminal law in national law<sup>(29)</sup>.

### ***B. An International Court for Piracy is Needed***

United Nations Security Council has adopted many resolutions<sup>(30)</sup> asking the Secretary General to present to the Security Council a report

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(27) See SC Res. 1918 (2010) adopted at its 6301<sup>st</sup> meeting on 17 April 2010.

(28) According to agreements signed between Kenya's government, United States and European Union, Nairobi has accepted to trail pirates captured by American and European navies.

(29) Amnesty International, Venezuela, End Impunity Through Universal Jurisdiction, May (2009), at 8 Available at: [www.amnesty.org/en/library/asset/AMR53/.../amr530062009en.pdf](http://www.amnesty.org/en/library/asset/AMR53/.../amr530062009en.pdf).

(30) SC Res. 1918, 17 April 2010.

on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia. In response, the Secretary General has identified seven options for the Security Council to consider:

**Option 1:** The enhancement of United Nations assistance to build the capacity of regional states to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia;

**Option 2:** The establishment of a Somali court sitting in the territory of a third state in the region, either with or without United Nations participation;

**Option 3:** The establishment of a special chamber within the national jurisdiction of a state or States in the region, without United Nations participation;

**Option 4:** The establishment of a special chamber within the national jurisdiction of a state or States in the region, with United Nations participation;

**Option 5:** The establishment of a regional tribunal on the basis of a multilateral agreement among regional states, with United Nations participation;

**Option 6:** The establishment of an international tribunal on the basis of an agreement between a state in the region and the United Nations;

**Option 7:** The establishment of an international tribunal by Security Council resolution under Chapter VII of the Charter of the United Nations<sup>(31)</sup>.

All these options seem feasible but I am in favour of the last option. In my opinion, like the International Criminal Tribunal for the former Yugoslavia (ICTY), or the International Criminal Tribunal for Rwanda (ICTR), the establishment of an international tribunal by Security Council resolution under Chapter VII of the Charter of the United is needed. This tribunal should deal with the problem of piracy in general and not only for the question of Somalia. This court should be judicial body of the United Nations to prosecute Pirates. This Tribunal should have concurrent jurisdiction with national courts in the pursuit of pirates

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(31) SC Res. 394, 26 July 2010.

who have seriously violated international laws. In other words, the primacy of the International Tribunal for piracy over national courts should be stipulated in its statute. It should have jurisdiction over Crimes of Piracy and Armed Robbery against Ships committed not only in the high seas but also in other territories where countries are unable to prosecute pirates. As other ad hoc tribunals, the maximum sentence can imposed is life imprisonment and its organizational components are Chambers, Registry and the Office of the Prosecutor (OTP).<sup>(32)</sup> What are the benefits that can be achieved by the establishment of such a court?

Setting up this International Tribunal will send a strong message to pirates around the world that the international community is determining to move from impunity to accountability, from diversity in dealing with the pirates to unification of measures in their fights, from fragmentation in the decisions of the local courts to the association of decisions via one international court, from the past centuries where gangs dominate the sea to the present time where the rule of law on the sea and its clients. This international tribunal will confirm the idea accepted by states that's pirates are *hostis humani generis* which means enemies of humanity<sup>(33)</sup> In the same context, this tribunal will strengthen the rule of law, because the Tribunal will use international standards against piracy.

Someone may criticize the creation of this court by saying that the tribunal has no powers to arrest the pirates. But I think that this is not a big issue since it can benefit from others agencies, notably national governments to apprehend and extradite pirates with the collaboration of OTP of the tribunal. Others may says that this tribunal's cost will be so expensive like other ad hoc courts, but I think that this problem is easily resolved in that the cost is borne by all UN members since piracy is threatening all the nations not only some states. Maybe simultaneous translation slows trials, but trails here will be fast when compared to other ad hoc tribunal which extend for several years.

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(32) Chambers encompasses the judges and their aides, The Registry is responsible for handling the administration of the Tribunal and such general duties. The Office of the Prosecutor (OTP) is responsible for investigating piracy crimes, gathering evidence and prosecuting indictees.

(33) I. Brownlie, *Principles of Public international law* (2003), at 229.

As we know, in the proceedings before the Tribunal for the former Yugoslavia and Rwanda, victims were neither allowed to participate in their personal capacity nor were they entitled to receive compensation or reparation for damages suffered. The original priority of the drafters of the Statute and Rules of Procedure and Evidence (RPE) of the ICTR, ICTY tribunals was two things. First: To punish those guilty of serious violations of international humanitarian law<sup>(34)</sup>. Second: To safeguard the right of the accused to be tried fairly and expeditiously<sup>(35)</sup>. I can understand why victims before ICTR and ICTY were not allowed to participate in their personal capacity, the nature and the scope of the crimes involve a great number of victims, and the presence of the victims could excessively interrupt the proceedings and undermine the rights of the accused. But I think the situation would be completely different if we decided to establish an International tribunal against piracy. Victims of piracy should participate in their personal capacity. Their number compared to other international crimes is modest.

However, I think that there are some difficulties facing the success of an international Tribunal for combating piracy. What should be done if the person whose extradition is requested belongs to a government that has a constitution denying extradite its citizens accused of piracy to international court. We should keep in mind two things: 1) Many constitutions forbid extradition of its citizens, for example, the Venezuelan constitution<sup>(36)</sup> accepts to extradite foreign criminals but denies it for national citizens. In addition, the United Nations Model Treaty on Extradition, article 4 (a), enables a requested state to refuse extradition of its nationals<sup>(37)</sup>. 2: Observing the constitution of countries shows a big difference in dealing with extradition. Article 13 of the Spain

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(34) SC Res. 827, 25 may 1993.

(35) Article 19(1) of the ICTR Statute and article 20 of the ICTY statute says 'The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.

(36) See article 271 from the Venezuelan constitution 'Extradition of foreign nationals responsible for capital delegitimization, drug, and international organized crime offenses, as well as crimes against the public patrimony of other states and against human rights, shall in no case be denied', but article 69 states that 'Extradition of Venezuelans is prohibited'.

(37) The question of extradition of national citizens has been treated by M. Plachta, 'Non-Extradition of Nationals: A never-ending Story', *EILR* (1999).

Constitution says that "Extradition shall be granted only in compliance with a treaty or with the law and no extradition can be granted for political crimes; but acts of terrorism shall not be regarded as such"<sup>(38)</sup>.

Second problem is the lack of legislation regulating the cooperation with international tribunal. If any state failed to extradite or prosecute individuals suspected of crimes under international law, they could not be arrested and surrendered to the International Criminal Court or any other international tribunal. There is almost no jurisprudence in countries involving universal jurisdiction.

In this regard we can propose that the crime of piracy be added to the jurisdiction of the International Criminal Court. It was suggested that it would be easier to proceed through protocol than amendment since any amendment to the Rome Statute must be adopted by two-thirds and thereafter ratified by seven-eighths of the States Parties in order to come into effect

The establishment of international tribunal to judge the pirates seems, for the moment, not a priority of states right now. But until that day is realized, and after the observations developed previously in this paragraph, I recommend turning our eyes upon International Tribunal for the Law of the Sea (ITLOS). This tribunal can temporarily take over the role of the permanent tribunal for piracy. If ITLOS has the power to settle disputes between member states, why do we not enlarge its responsibility? ITLOS statute does not prevent dealing with the question of piracy, on the contrary, article 15 states that the tribunal may form special chambers, composed of three or more of its elected members, as it considers necessary for dealing with particular categories of dispute. Of

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(38) Article 26 of the Italian Constitution states that 'The extradition of a citizen may be permitted only in such cases as are expressly provided for in international conventions'. This is the same position of the Netherlands constitution in its second article in which 'Extradition may take place only pursuant to a treaty'. The Portuguese constitution in article 33 accept the extradition of Portuguese citizens if reciprocal arrangements have been established by international treaty, in cases of terrorism and organised international crime, but say nothing about extradition to international tribunal as many others European countries. On the contrary, article 14 of the Cyprus constitution affirms that 'No citizen shall be banished or excluded from the Republic under any circumstances'. Only, the Basic Law of the Federal Republic of Germany accepts the extradition of national citizen to a member state of the European Union or to an international court of justice as long as the rule of law is upheld. The Poland constitution after announcing the principle by refusing to extradite nationals, it keeps the door open in case of admission by national courts.

course, we need to modify the tribunal's statute for it to be applicable to piracy. To date the tribunal has dealt with 17 cases and, if the international community decides to add piracy questions to that tribunal, it will not cause considerable strain on the tribunal's resources.

#### **4. Piracy: Universal Crime and Universal Jurisdiction: *hostis humani generis***

It is indubitable that there is no commonly accepted definition of *universal jurisdiction* in conventional or customary international law, but according to Judge Christine Van Den Wyngaert<sup>(39)</sup>, one thing is very clear: the *ratio legis*<sup>(40)</sup> of universal jurisdiction is based on the international reprobation for certain very serious crimes<sup>(41)</sup>. Judge Guillaume<sup>(42)</sup> distinguishes between universal jurisdiction, which signifies jurisdiction over extraterritorial crimes by foreigners based on the presence of the accused in the forum state, and universal jurisdiction *in absentia*, which is jurisdiction asserted by a state without any link with the accused. In his opinion, international law only authorizes a narrow view of universal jurisdiction as accepted in cases of piracy where treaties alone oblige parties to exercise universal jurisdiction actions<sup>(43)</sup>. In the same ICJ case, Judge Oda, in his dissenting opinion, and judge Ranjeva, in his declaration, shares the view of Judge Guillaume and recognizes that piracy is subject to universal jurisdiction. The concept of universal jurisdiction is very close to the idea that certain universal norms are *erga omnes*, obligations or rights toward every state<sup>(44)</sup>.

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(39) Former ad hoc member of the ICJ.

(40) The reason of the law or 'raison d'être de la loi'.

(41) Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium). ICJ Reports, (2002), at 46. Dissenting Opinion of Judge van den Wyngaert.

(42) Former member of the ICJ from 1987-2005 and President from 2000-2003.

(43) *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. ICJ Reports (2002), at 9-12-15-16. Separate Opinion of President Guillaume. He says '*states primarily exercise their criminal jurisdiction on their own territory....additionally they may exercise jurisdiction in the cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not accept universal jurisdiction, still less does it accept universal jurisdiction in absentia*'. For an in-depth analysis of the question see S. Macedo: *Universal Jurisdiction: National courts and the prosecution of serious crimes under international law* (2006); M. Inawumi: *Universal Jurisdiction in modern international law: Expansion of national jurisdiction for prosecuting serious crime under international law* (2005).

(44) *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ Reports, (1970), at 33.

According to international law, any state may prosecute pirates. The 1982 Law of the Sea Convention and customary international principles gives all nations the possibility to prosecute an act of piracy regardless of whether the incident involved an attack on their national interests. Article 105 of the Convention states that 'On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship, or a ship taken by piracy and under the control of pirates, and arrest the persons'<sup>(45)</sup>. Even if the crime of piracy is regarded as violation of **Jus Cogens**<sup>(46)</sup> international law does not prohibit piracy, but instead encourages states to prosecute pirates. Piracy is considered as a crime against all nations, and for that reasons it's classified as *hostis humani generis* or the enemy of mankind. Article 105 precedent needs to be examined closely. According to Randall, this provision indicates that parties have the right, but not the obligation, to assume jurisdiction over piratical acts with which they have no direct connection and non-parties to the Convention may assert universal jurisdiction over piracy under customary international law<sup>(47)</sup>. Prof. Bahar, comments on this situation by saying that '[T]he state that flagged the pirate vessel will retain jurisdiction, if the vessel is indeed flagged-unlike the skiffs used by the Somali pirates-but under universal jurisdiction it will simply lose its exclusive jurisdiction normally permitted to its own vessels and nationals under the law of the sea'<sup>(48)</sup>.

(45) This is the same position of the Convention on the High Seas of 1958 'On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith' article 19 of the Convention.

(46) Vienna Convention of the law of the treaties provides in article 53 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

(47) Kenneth Randall, 'Universal Jurisdiction under International Law', 4 *TLR* (1988) 66, at 785, 791-792.

(48) Michael Bahar, 'Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations', *VJIL* (2006) 40, at 13-14.

The accessibility of universal jurisdiction to take legal action against pirates off the coast of Somalia has been confirmed by many resolutions adopted by United Nations Security Council. These resolutions call upon states, regional and international organizations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, by deploying naval vessels and military aircraft and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia<sup>(49)</sup>. Kenya is considered as a provisional place where the universal jurisdiction is applied. Until 2010, Kenyan courts are considered the main destination de trail Somali Pirates. According to agreements signed between Kenya's government, United States and European Union, Nairobi has accepted to trail pirates captured by American and European navies. But the situation has changed. Kenyan Foreign Minister, Moses Wetangula, informed the international community that Kenya will no longer accept Somalian Pirate cases to be tried in its courts. Wetangula stated that the large number of Somalian pirate cases referred to Kenya has overburdened the country's judicial system and noted that the international community has not followed on its promises to support the country in adjudicating these cases<sup>(50)</sup>. Additionally, Attorney General Amos Wako noted the lack of commitment by other countries in taking on piracy cases, leaving Kenya largely responsible<sup>(51)</sup>. Two months later, the international community had taken the Kenyan threats seriously and funded the creation of a new Court. This new court is funded by a coalition of nations through the United Nations Office on Drugs and Crime. In fact, Kenya is holding the highest number of piracy suspects in the region, with 105 on trial and 18 already convicted, with sentences ranging from seven to 20 years<sup>(52)</sup>.

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(49) SC Res. 1851(2008); SC Res. 1846 (2008).

(50) Available at <http://jurist.org/paperchase/2010/04/kenya-courts-no-longer-accepting.php>.

(51) Available at <http://jurist.org/paperchase/2010/04/kenya-courts-no-longer-accepting.php>.

(52) M. Pflanz, *At last, a court to try Somali pirates*, The Christian Science Monitor, (2010), Available at <http://www.csmonitor.com/World/Africa/2010/0708/At-last-a-court-to-try-Somali-pirates>.

## 5. Piracy and the Notion of Sovereignty

One of the fundamental principles accepted by international law is that a state cannot exercise its jurisdiction outside its territory. The notion of state sovereignty is not new; it was laid down in the Treaty of Westphalia which dates back to 1648. In this treaty many principles had been codified such as territorial integrity and border inviolability.

### *A. A Rigid Approach of Sovereignty Undermines the International Efforts Against Piracy*

In accordance with Article 2 (1) of the UN Charter, the world organization is based on the principle of the sovereign equality of all member states. Further, article 2 (4), calls all members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

Actually, the notion of sovereignty is found in the heart of both customary international law and the conventional law<sup>(53)</sup>. This principle has been repeatedly confirmed by international tribunals. In 1927, the Permanent Court of International Justice (PCIJ) in the '*Lotus*' case confirms this perception by saying that public international law

'Governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims. Restrictions upon independence of states cannot therefore be presumed'<sup>(54)</sup>.

In 1949 the ICJ, the principal judicial organ of the United Nations, observed that 'between independent states, respect for territorial sovereignty is an essential foundation of international relations'<sup>(55)</sup>. The same Court, in the case *Military and Paramilitary Activities in and*

(53) In this regard see John Jackson, 'Sovereignty-Modern: A New Approach to outdated Concept', *AJIL* (2003) 97, at 782-802.

(54) The case of the *SS Lotus* (France v. Turkey), 7 September 1927 PCIJ Series A, No. 10, at 18-19.

(55) *Corfu Channel* (*United Kingdom v. Albania*), ICJ Reports (1949), at 35.

against Nicaragua assured this concept and said: 'it is the duty of every state to respect the territorial sovereignty of others'<sup>(56)</sup>. In 1990, Prof Brownlie in his book, *Principles of public international law*, clarifies territorial sovereignty by saying:

[T]he principal corollaries of the sovereignty and equality of states are 1. A jurisdiction, prima facie exclusive, over a territory and the permanent population living there, 2. A duty of non-intervention in the area of exclusive jurisdiction of other states, and 3. The dependence of obligations arising from customary law and treaties on the consent of the obligor.<sup>(57)</sup> Recently, ICJ declares: '*Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of state sovereignty over territory and of the stability and certainty of that sovereignty*'<sup>(58)</sup>

It's become obvious to everyone that sovereignty gives all governments comprehensive control over their territories, but in the case of Somalia, the situation is completely different. In spite of the widely spread conviction that states should respect the notion of sovereignty, there were general tendencies and multilateral approaches to recognize that the notion of sovereignty is not rigid but flexible. According to former UN Secretary General Boutros Boutros-Ghali, 'The time of absolute and exclusive sovereignty has passed'<sup>(59)</sup>. This flexibility is observed in the case of Somalia. The insecurity of this country influences the stability of international trade. However, the question of reconciliation between sovereignty and intervention in sovereign states has been a divisive one. If I agree to revisit the notion of 'right to intervene', states, Security Council and tribunals, should approach this principle cautiously and not as a slogan which could paralyze all progress in international law. In my opinion, only

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(56) *Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. United States of America*), ICJ Reports (1986), at 111.

(57) I. Brownlie. *Principles of public international law* (1990), at 285.

(58) *Sovereignty over Pedra Branca Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore), ICJ Reports (2008), at 122.

(59) Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, Document A/47/277-S/241111, 17 June 1992 (New York: Department of Public Information, United Nations) (1992). <http://www.un.org/Docs/SG/agpeace.html>.

if one state is unable or unwilling to exercise its sovereignty, the international community should intervene.

In his report to the Millennium Assembly, Mr. Annan, former UN Secretary General, acknowledged the complexity of the issue but argued that circumstances sometimes demand external intervention<sup>(60)</sup>. In December 2001, the International Commission on Intervention and State Sovereignty took on the challenge to renovate the relations between matters of intervention and state sovereignty. The commission provides a set of guidelines to intervene with military means where diplomatic initiatives, sanctions, and arms embargoes will not suffice<sup>(61)</sup>. The previous peaceful alternatives mentioned before seem inappropriate to the Somali case. For this reason the United Nations Security Council (UNSC) has decided to intervene in the question of Somalia through many resolutions. Between 2008-2010, UNSC has adopted 16 resolutions dealing with the question of Somalia. This Council is seriously concerned by the threat that piracy at sea against vessels pose to the situation in Somalia and other states in the region, as well as to international navigation and the safety of commercial maritime routes<sup>(62)</sup>. These resolutions were adopted according to Chapter VII of the United Nations. It allows the Council to determine the existence of any threat to the peace or act of aggression and to take military and nonmilitary action to restore international peace and security.

### ***B. The Right of Hot Pursuit on Somali Land: An Obvious Violation of International Law***

It is interesting to start the discussion of this subject by mentioning an important case that happened not in Somali territorial waters but on Somali land. It is known as "*Le Ponant case*" 'French luxury yacht seized

(60) <http://www.un.org/ecosocdev/geninfo/afrec/vol14no3/01secur.htm>

(61) The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty. The Report is accessible at <http://www.iciss.ca/report-en.asp>.

(62) See previous resolutions concerning the situation in Somalia, especially resolutions SC Res. 1814 (2008); SC Res. 1816 (2008); SC Res. 1838 (2008); SC Res. 1844 (2008); SC Res. 1846 (2008); SC Res. 1851 (2008); SC Res. 1897 (2009); SC Res. 1916 (2010); SC Res. 1918 (2010). Article 53 of the UN Charter mandates that '*no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council*'.

by Somali pirates<sup>(63)</sup>. In summer 2008, the French military tracked, from the Djibouti military base to the village of Jariban, and captured six pirates on Somali soil. This is the first time an international force launches a raid and enters onto Somali land to apprehend pirates. Consequently, what are the legal dimensions that can arise from this case?

We should remember that conventional and customary principals permit combating piracy only outside of national jurisdiction and especially on the high seas. But Somali pirates are different, they are able to begin an assault against ships on the high seas and then quickly return to Somali territorial waters. To fill the gap in international law, UNSC has decided to intervene in this subject by adopting a resolution giving international forces a provisional green card to enter into Somali territorial waters.

In spite of there being no detailed list of acts and offences justifying hot pursuit, piracy is considered as one of the main crimes to which a state can exercise its right of hot pursuit<sup>(64)</sup>. Actually, observing United Nations Security Council resolutions relating to Somalia, especially resolution **1816**, adopted by the Security Council at its 5902<sup>nd</sup> meeting on 2 June 2008, shows important progress of international law regarding the question of intervention in sovereign states. This resolution, adopted with the consent of the Transitional Federal Government of Somalia, gives mandate to regional and international forces to counter piracy off the coast of Somalia by deploying naval vessels and military aircraft, and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery off the coast of Somalia, or for which there is reasonable ground for suspecting such use. According to the previous resolution, any state or regional organization can enter into 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

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(63) For more details about this case see the following site. [http://en.wikipedia.org/wiki/MY\\_Le\\_Ponant](http://en.wikipedia.org/wiki/MY_Le_Ponant).

(64) Travers, *Le Droit Penal International* (1921), at 246 mentioned by N. M. Poulantzas, *The Right of Hot Pursuit in International Law* (2002), at 129.

respect to piracy under relevant international law; and use, within the territorial waters of Somalia all necessary means to repress acts of piracy and armed robbery at sea. The basic effect of United Nations Security Council resolutions, dealing with the question of Somali pirates, is to make the rules of international law concerning piracy on the high seas applicable also to territorial waters, *inter alia* permitting pursuit from the high seas into these waters, and clarifying that states acting under these rules within the territorial waters of Somalia may use all necessary means<sup>(65)</sup>

In my opinion and contrary to US understanding<sup>(66)</sup>, and opposing to some academic positions<sup>(67)</sup>, the logical interpretation of the UN Security Council resolution, based on the principle of good faith (fundamental principle of international law)<sup>(68)</sup> makes the application of the UN resolution limited to Somali territorial waters. The scope of application of the previous resolution should be interpreted narrowly not broadly. Nothing in this resolution or others approves the possibility to enter into Somali land. Nothing in this resolution should be construed as infringing the right of Somali people in their sovereignty and territorial integrity.

What has been done by the French military forces undermines the principles of non-interference in the internal affairs of states, violating thereby international law. It should be mentioned that the previous authorizations provided in resolution 1816 Adopted by the Security Council at its 5902<sup>nd</sup> meeting, on 2 June 2008 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.

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(65) T. Treves, 'Ibid.' at 404.

(66) C. Lynch, *U.N. Authorizes Land, Air Attacks on Somali Pirates*, Washington Post A, 14 Dec. 2008. see: <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/16/AR2008121602848.html>.

(67) D. Guilfoyle, observes that UN SC Res. 1851(2008) authorises 'cooperating states' to go further and engage in counter piracy action on Somali soil.

(68) See article 2 (2) of the United Nations Charter; article 26 and 31 (1) of the Vienna Convention on the Law of Treaties; *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports (1997), at 142; R. Kolb, *La Bonne Foi en Droit International Public: Contribution à l'étude des Principes Généraux du Droit* (2000), at 295.

Actually, piracy off the coast of Somalia provokes some judicial examinations. If United Nations Security Council gave regional and international forces the jurisdiction to enter into territorial waters of Somalia to prosecute pirates, under what other legal circumstances could these forces enter on Somali soil? Some American politicians believe that it is necessary to apply hot pursuit into Somali soil only to prosecute pirates. Senator John Kerry said a hot pursuit policy on Somalia's coastline is 'long overdue'. But he warns against any 'haphazard, sloppy' military missions<sup>(69)</sup>. This declaration shows the misunderstanding of hot pursuit under international law. In 2008, a senior diplomat on the Security Council said the United States has distributed a text to the other permanent members of the Security Council in which US propose to allow military forces to enter Somali territory in 'hot pursuit' of pirates<sup>(70)</sup>.

This question of hot pursuit on Somali land needs to be examined closely.<sup>(71)</sup> The question is: Is it possible to exercise the principle of hot pursuit to enter into Somali soil? Firstly, it is important to mention that the principle of "hot pursuit" has been treated in article 111 of the 1982 United Nations Convention on law of the sea and in article 23 of the 1958 Convention on the High seas. Article 111 gives the necessary conditions to use this right of hot pursuit by states

*'The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within...the territorial sea...of the pursuing state, and may only be continued outside the territorial sea... if the pursuit has not been interrupted... The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a*

(69) Available at [http://www.usatoday.com/news/world/2008-12-29-somali-pirates\\_N.htm](http://www.usatoday.com/news/world/2008-12-29-somali-pirates_N.htm). Mr Kerry holds in his memory what happened in 1990s when 18 American soldiers were killed brutally by Somalis.

(70) Available at <http://edition.cnn.com/2008/US/12/10/united.nations.us.pirates/index.html>.

(71) Reports of International Arbitral Awards, Recueil des Sentences Arbitrales, s.s "I'm Alone", (Canada v United States, 30 June 1933 and 5 January 1935, Volume III, pp. 1609-1618, United Nations, 2006. Max Planck Encyclopedia of Public International Law (MPEPIL)2, 133-134 (1981);

أنظر أيضاً الدكتور غسان الجندي، الروائع المدثرة في قانون البحار، ١٠٨ - ١٠٩ (١٩٩٢).

*third state...The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect’.*

For its part, the International Tribunal of the Law of the Sea notes that the conditions, mentioned before, for the exercise of the right of hot pursuit under article 111 of the Convention are cumulative. Each of them has to be satisfied for the pursuit to be legitimate under the Convention<sup>(72)</sup>. Consequently, by applying the previous conditions to ‘Le Ponant case’ the dissimilarity, between the French military operation on Somali land and the legal applicability of article 111, might be considerably immense.

After the French operation to liberate Le Ponant, the Somali Prime Minister Nur Hassan Hussein declared to international media that:

‘The French forces arrested six Somali pirates and took them to France to face justice. We encourage such steps by the French. The Somali government asks the international community to take action against piracy’.<sup>(73)</sup>

In my opinion, this declaration seems not only ambiguous but also confusing. I don’t know if the Prime minister precedent gave any authorization to French forces before this operation. In reality, the scope of this declaration should be without any legal effects. Even if the Security Council resolutions related to Somali piracy have been adopted on the basis of the authorization of the Somali Transitional Federal Government TFG, I think that the requirement of the consent of the TFG is not needed and without any value since the Security Council has intervened into Somalia according to Chapter VII of UN Charter. In addition, TFG has no legitimacy since it cannot exercise any effective power in Somalia.

Regardless of the previous declaration, it is important to clarify at this point that states are very vigilant if another state violates their sovereignty for whatever the reason. It is important that the international community should fight legally the piracy off the coast of Somalia. I do

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(72) International Tribunal for the Law of the Sea, the M/V “Saiga” No. 2 case, 1 July 1999, judgment, at 146. Available at <http://www.un.org/Depts/los/>.

(73) Declaration available at <http://yachtpals.com/boating/le-ponant-3>.

not believe in the theory of Just War '*Bellum Iustum*' which is based on the ends justifies the means but I believe in respecting the rules of international law. It's possible that the drafters of the UNCLOS did not contemplate the existence of Somali methods of piracy, but that does not mean to jump over international law. If the United Nations resolution 1373, adopted by Security Council shortly after the September 11 attacks of 2001, gives states authorization to combat threats to international peace and security caused by terrorist activities by all means, however, the same resolution, remember, states to respect United Nations Charter.

Contrary to my view, writing for the Foreign Policy Research Institute, US Secretary of State George Shultz calls for danger solutions. He says, 'We reserve, within the framework of our right to self-defense, the right to preempt terrorist threats within a state's borders - not just hot pursuit, but hot preemption'. This opinion not only violates international law and the Charter of the United Nations and all international principles but also constitutes the greatest violation of the United Nations Security Council resolutions. Accordingly, it is important for the interested parties to enter into negotiations in order to reach an agreement in which clear text is mentioned giving the parties authorization to enter into the territories of each other.

### ***C. Le Ponant Case is Not Enough to Crystallize the Rule as Part of Customary International Law***

If entering into Somali territorial waters for combating pirates is considered as exception to the general rule of international law, entering on Somali land should be considered illegal and should not be seen as international custom. Article 38 of the Statute of the International Court of Justice defines international custom as evidence of general practice accepted as law. All the international jurists agree that custom is an important component of the international legal systems but international law requires two elements of international custom: general practice and acceptance of this practice as law by states. It is known today that customary international law results when states follow certain practice. The wide-spread repetition by states of similar international acts over time<sup>(74)</sup>,

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(74) S. Rosenne, *Practice and Methods of International Law* (1984), at 55.

required by article 38, is not available. The logical consequence of "Le Ponant case" is not evidence of international custom. The Security Council, for its part, affirms that the authorization given to international forces to enter Somali territorial waters applies only regarding the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law. This includes any rights or obligations under UNCLOS, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law. In this regard, Prof. Poulantzas, notes a significant observation when he says that:

'Pursuit on land has not succeeded in acquiring the character of a right in customary international law, as is the case with hot pursuit in the international law of the sea. This the reason way a network of treaties between various states was necessary permitting and expressly providing for hot pursuit on land on a basis of reciprocity and only under special conditions'<sup>(75)</sup>.

## **6. Article 51 of the United Nations Charter and Non-State Actor Threat**

It is evident that piracy off the coast of Somalia is a complex question since there is neither a state of law nor local government authority able to solve the dilemma of piracy. The crisis of Somali piracy persists due to the non-existence of the rule of law. Actually, we are not faced with a state unwilling to take action against pirates, but a state deprived from any authority and controlled by gangs and tribes. In addition, Somalia's pirates are not viewed as criminals by their own communities but called '*coast guards*' since they protect Somali waters<sup>(76)</sup>.

By entering Somalia soil, France provided a successful illustration on how to bring pirates to justice, but failed to comply with the rules of international law? Apparently, it is agreed today that the non-state actor threat is a new form of threat. Mr. Cherif Bassiouni gives a

(75) N. M. Poulantzas, *The Right of Hot Pursuit in International Law* (2002), at 11-12.

(76) T. Karon, *Why New York is No Place to Try Somali Pirates?* 21 April 2009. Available at <http://www.time.com/time/world/article/0,8599,1892895,00.html>.

comprehensive but not exclusive list of groups that can be classified as non-state actors:

- 1 - 'Regularly constituted groups of combatants with a military command structure and a political structure;
- 2 - Non-regularly constituted groups of combatants with or without a command structure and with or without a political hierarchical structure,
- 3 - Spontaneously gathered groups who engage in combat or who engage in sporadic acts of collective violence with or without a command structure and with or without political leadership'<sup>(77)</sup>.

Piracy may be considered as a clear illustration of the last group.

Consequently, it is essential to examine the following question closely: 'Whether the 'attack' by Somali Pirates may be characterized as an 'armed attack' pursuant to Article 51 giving therefore the right of self-defence to France?'

Some doctrinal opinions have been supported by the fact that attacks from non-state actors could be constituted as armed attacks in accordance with article 51 of the UN Charter<sup>(78)</sup>, however I think it is important to re-examine this question in the light of the United Nations Charter, United Nations resolutions and International Court of Justice.

In reality, texts contained in United Nations Charter should be read in conjunction with each other. United Nations Charter in its article 2(3) calls all members states to settle their international disputes by peaceful means. The Charter enumerates six varieties of pacific solutions. Article 33 clearly states that 'The parties to any dispute, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'. Having in mind that the ultimate goal and the fundamental purposes for which the United Nations Organization was created<sup>(79)</sup>, UN Charter stresses in article 2(4) that 'all

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(77) C. Bassiouni, *Criminal Law, 'The New War and the Crises of Compliance with the Law of Armed Conflict by Non State Actors'*, 3 *JCLC* (2008) 98, at 715-716.

(78) Y. Dinstein, *War Aggression and Self-Defence* (2005), at 196.

(79) 'Maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace'.

members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations'. This previous article has been explained 29 years later when United Nations General Assembly adopted in 1974 its famous resolution 3314 approving therefore the definition of aggression<sup>(80)</sup>.

Article 2(4) is facing article 51 of UN Charter. Therefore, if it is forbidden to use force in international relations, then article 51 is considered as the unique exception. Article 51 is clearly recognizes 'the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations'.

The words used by the drafters of precedent articles identify the kind of attackers against whom this right of self-defence can be exercised. The precedent articles refer exclusively to relations between states and not between states and non-state actors<sup>(81)</sup>. However, after the attack on the United States by Al-Qaeda on 11 September 2001, the Security Council recognized the United States' right of legitimate self-defense<sup>(82)</sup>. Three years later, and contrary to the previous Security Council position, the

(80) Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition. (a) The invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another state or part thereof; (b) Bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state; (c) The blockade of the ports or coasts of a state by the armed forces of another state; (d) An attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state; (e) The use of armed forces of one state which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state; (g) The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein. Available at <http://www.un.org/documents/resga.htm>.

(81) Against my opinion see Sean Murphy, 'Terrorism and the Concept of Armed Attack in Article 51 of the United Nations Charter', *HILJ* (2002).

(82) Giuliana Ziccardi Capaldo, 'Providing a Right of Self-Defense Against Large-Scale Attacks by Irregular Forces: The Israeli Hezbollah Conflict', *HJIL* (2007) 48, at 104; Steven Ratner, 'Jus ad Bellum and Jus in Bello After September 11', *AJIL* (2002) 96, at 905.

International Court of Justice, had an opportunity to say to the international Community and especially to Security Council that the right of self-defence, laid down in article 51, is limited to relations between states. The Court, in its Advisory opinion of the '*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*'<sup>(83)</sup>, writes: '*article 51 of the Charter... recognizes the existence of an inherent right of self-defence in the case of armed attack by one state against another state*'. *Someone may criticize this advisory opinion*<sup>(84)</sup>, *but we should not forget that one of the main functions of the International Court of Justice, which was established by the Charter of the United Nations as the principal judicial organ of the United Nations, is to provide advisory opinions*<sup>(85)</sup>. *The Court is not a legislative organ but an independent one so it does not create law but summarize the current state of international law*<sup>(86)</sup>.

However, that does not mean that international law is completely silent regarding non-state actors since article 3 common to the four Geneva Conventions of 1949, deals with this situation<sup>(87)</sup>. In addition, International Jurisprudence confirms that non-state actors should be

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(83) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004), at 139.

(84) E. Hertz, *The Right of Self-Defence, United Nations and the International Court of Justice, Reply to The Advisory Opinion of 9 July 2004 in the Matter of Legal Consequences of the Construction off a wall in the Occupied Palestinian Territories as Submitted by the International Court of justice*, (2005).

(85) Article 65 of the Statute of ICJ says: 'The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request'.

(86) *The Legality of the Threat or Use of Nuclear weapons, Advisory Opinion* ICJ Reports (1996).

(87) Article III 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;(b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for...'

treated according to international standards. ICTY confirms in the *Tadic* Appeal Decision that the Hague Conventions of 1899 and 1907 have since evolved through customary law to apply equally to non-international conflicts<sup>(88)</sup>.

In my opinion, even if some conventional treaties invoked non-state actors, there is '*non liquet*'<sup>(89)</sup> regarding the question of the right of self defence against armed attack from non-state actors or as Professor Capaldo says:

'[T]he lack of a right of self-defense against armed attacks from irregular forces and/or terrorist groups not attributable to a state, even in the case of large-scale armed attack, is a grave lacuna in international law'<sup>(90)</sup>. Consequently, any use of force does not necessarily mean that the requirements of article 51 of the UN Charter had been available. In relation to the issue of "le Ponant", Professor Antonin Cassese, examined an important question, and asks whether attacks against nationals situated in foreign countries constitute an attack against the state itself? He mentioned some requirements using force could be illegitimate. These requirements are:

- 1 - 'The threat or danger to the life of nationals is serious,
- 2 - No peaceful means of saving their lives are open,
- 3 - Armed force is used for the exclusive purpose of saving or rescuing nationals,
- 4 - The force employed is proportionate to the danger or threat,
- 5 - As soon as nationals have been saved, force is discontinued,
- 6 - The state that has used armed force abroad needs to report to the Security Council'.<sup>(91)</sup>

Applying these provisions to the Military French operation in the case of 'Le Ponant' shows that Paris has exceeded what is permitted. Accordingly, Somali attack against French luxury yacht 'Le Ponant' cannot be qualified as an armed attack according article 51 of the United

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(88) Prosecutor v. Tadic, Case IT-94-1-AR 72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction. 2 Oct. 1995. at 86-93.

(89) situation where there is no applicable law.

(90) Giuliana Ziccardi Capaldo, '*Ibid.*' at 106.

(91) Antonin Cassese, '*Ibid.*' at 366.

Nations Charter; therefore French Operation on the Somali soil cannot be qualified as self-defence.

## **Conclusion**

In this research, I outlined the legal regime of piracy off the coast off Somalia. Piracy off the coast of Somalia poses a universal threat to the United Nations Charter. Countering pirates continued to be regarded as a responsibility of vital importance to the international community. states, especially the permanent members of Security Council, have the responsibility of tracking down and capturing pirates and then to try them. These trials should take place in an international tribunal established by Security Council resolution under Chapter VII of the Charter of the United Nations.

Since 2008, the Security Council has paid special attention to the protection of international maritime trade. Resolution 1816, adopted by the Security Council on 2 June 2008, constitutes a smart answer to Somali pirates. Here, the Security Council has played a positive role to fill the gap of international law. Many states support an effective military response to stop pirates' attacks off the coast of Somalia and in the Gulf of Aden. This solution seems essential but the key question is whether these positive developments have actually improved international law? What I am arguing for is that fighting piracy should not proceed through violation of international law. We need to fully understand that we cannot change existing international law through the Security Council but we should take into consideration the concerns of all the international community. Of course, the Council's engagement in Somalia is vital in order to keep peace and security, but UN Security Council's resolutions should be fully independent from the small interests of some states and should be fully aware of the role International Court of Justice. Neither *De jure* nor *de facto* Somalia's sovereignty has been respected. Article 51 should not be interpreted in a broad way. I have argued that entering to Somalian waters or Somali soil does not constitute customary law. I have considered that French military operation on Somali soil as illegal and against the essence of international law.

Piracy off the coast off Somalia flourishes in environments of extreme poverty and weak government capacity to maintain law and order. As a result, comprehensive strategy is needed and restoration of the state should be the priority of the international community.

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