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国际法视角下的海盗法律规制研究

**A study on Pirate Laws and Regulations from the
Perspective of International Laws**

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摘要

21世纪是海洋的世纪。世界经济的高速发展导致对资源需求的不断增长，加之陆地资源的逐渐枯竭，各国对海洋资源的需求急剧增加。科技发展为人类开发与利用海洋提供了条件。在此背景下，海洋在世界各国，无论是沿海国还是内陆国的发展战略中都具有非常重要的意义。然而，21世纪的海洋并不平静。海盗、海上武装抢劫、海上恐怖活动和跨国有组织犯罪等传统和非传统安全因素交织在一起，严重威胁着海洋秩序与海洋安全。

海盗一直伴随着人类征服海洋的过程。尽管在某些历史阶段，海盗一度沉寂，但一直没有消亡，有时还呈现加剧的态势。20世纪80年代冷战结束，世界经济复苏，全球商业运输明显上升，国际航运业蓬勃发展，再加之一些沿海国家或者地区陷于内战和分裂，政局混乱，政府的海上安全力量薄弱，国民生活困苦，这些因素都为海盗活动的再度兴起提供了土壤。

海盗作为一种社会现象，在人类社会早期，并不为法律所禁止。国家和国际社会对海盗行为的规制与人类利用海洋水平的提高、人类对海洋认识的加深以及海洋研究理论的发展密切相关。16世纪以后，随着新兴资本主义国家的兴起，为打破中世纪以来传统海洋大国的海上垄断地位，“公海自由”理论诞生。海盗活动直接对“公海自由”理论中的航行自由构成威胁，因此新兴资本主义国家对海盗的态度也从原来的容忍、默认、小规模打击，转为通过立法予以禁止并坚决予以打击，逐渐形成了“海盗为人类公敌，各国对海盗行为均有普遍管辖权”的国际习惯。

20世纪以后，国际社会开始致力于制定、编纂规制海盗行为的成文法，其中哈佛大学法学院主持开展的海盗问题研究成果——《哈佛海盗行为研究草案》最为全面。草案中关于海盗行为要素的许多规定，成为日后相关国际条约内容的蓝本。目前，国际社会在制止与惩治海盗过程中普遍适用的国际条约是1958年的《公海公约》（HSC, Convention on the High Seas）和1982年的《联合国海洋法公约》

（UNCLOS, United Nations Convention on the Law of the Sea）。HSC和UNCLOS在惩治海盗方面最突出的贡献是以国际成文法形式，定义了国际法意义上的海盗行为及对海盗行为的普遍管辖权。一些国家的国内刑事法律也有关于海盗罪的规定，这些规定有的与HSC和UNCLOS规定相同，有的关于海盗行为的规定，其外

延要比HSC和UNCLOS更广泛。

尽管UNCLOS得到了国际社会的普遍接受，但21世纪初以来，索马里和亚丁湾周边水域、南中国海水域海盗的猖獗活动，使国际社会对UNCLOS规定的海盗行为认定标准产生质疑，焦点是UNCLOS将海盗行为限定在出于“私人目的”和“发生在公海或者任何国家管辖范围之外的地点”，从而将出于政治目的而实施或者在国家主权管辖水域实施的海上非法暴力行为排除在国际法意义上的海盗行为之外。UNCLOS将海盗行为限定在出于“私人目的”的原因在于使UNCLOS能得到国际社会普遍接受。因为国家基于政治立场和意识形态的差异，对“政治目的”有着不同理解，强调海盗行为的政治目的必然引起对“行为动机”是否正义的探讨，而国际社会在这一问题上几乎不可能取得较为一致的看法。UNCLOS第101条关于海盗行为的规定，明确要求海盗行为的实施地点是公海或者国家主权管辖范围之外，这样规定能较好地解决海上非法暴力行为的普遍管辖权与主权国家的属人管辖权、属地管辖权、船旗国管辖权的冲突。另一方面，将海盗行为的动机限定于出于私人目的，且将海盗行为的实施地点限定于公海或者国家主权管辖范围之外，并不等同于否认除UNCLOS规定的海盗行为之外的其他水域非法暴力行为的违法性。事实上，大多数国家的刑事法律都对发生在不同水域的非法暴力行为设定有相应的法律责任。当然，从打击海上非法暴力行为，维护海洋秩序与安全角度出发，UNCLOS关于海盗行为的规定存在一定瑕疵。因此，一些国际组织通过修改相关国际条约，如国际海事组织（IMO，International Maritime Organization）通过《制止危及海上航行安全非法行为公约》2005年议定书，一些国家通过制定区域性国际条约，如东南亚十几个国家签署的《打击海盗及武装抢劫船只的地区合作协定》（ReCAAP，Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia），扩大了海上非法暴力行为的范围。

加强海上执法，强化监管措施，完善危机应对机制是目前国际社会惩治海盗所采取的主要措施。除UNCLOS规定的各国军舰、军用飞机或者为政府服务并经授权的其他船舶或者飞机在公海上对涉嫌海盗行为的船舶或者飞机可行使紧追权和登临权外，为解决索马里和亚丁湾周边水域海盗猖獗问题，2008年以来，联合国安理会根据《联合国宪章》第七章授权，通过了一系列治理索马里水域海盗问题的决议，其中授权各成员国和区域组织可以应索马里过渡联邦政

府（索马里联邦政府）邀请或经其同意，进入索马里领土，按照国际法规则，采取一切必要手段打击海盗是一个新举措。但联合国安理会同时强调这些决议的内容并不形成国际习惯法。此外，IMO 和国际海事局（IMB, International Maritime Bureau）等专业性国际组织、国际航运界及美国等国家，结合海上反恐工作，推行管理对象风险分级评估和分类管理制度。同时，通过完善港口和船舶管理制度，加强监管的透明度，强化资料搜集、分析与发布，促进技术标准的制定与应用，改善船舶技术装备，加强船员培训及完善危机应对等措施，推行全方位的海盗防范措施。一些船舶公司甚至开始为商船配备武器和武装安保人员，^①以便在受到海盗袭击时行使自卫权。虽然 IMO 和美国海岸警卫队（USCG, United States Coast Guard）制定了关于“船舶安保”的计划或者指南，但目前为止还没有相应国际条约或者国内法对船舶公司自行配备武装安保人员及武器的使用条件、程序、强度等进行规范，因此商船武装安保人员使用武器进行自卫可能带来诸多法律问题，商船配备武装安保人员还未成为目前国际航运界的普遍做法。

海盗审判是目前制约海盗惩治、影响打击海盗效果的最主要因素。尽管国际习惯法与国际成文法均明确各国对国际法意义上的海盗行为享有普遍管辖权，国际社会对此也没有异议。但由于海盗活动猖獗地区的沿岸国多基于政局动荡、司法能力较弱等原因，没有能力或者不愿意行使管辖权；而拿获海盗的其他国家，考虑到审判成本巨大、判决执行存在实际困难等原因，不愿意或者无法有效行使管辖权，导致大部分被拿获的海盗在被解除武装后被放行，没有进入司法程序，严重影响了海盗打击效果。虽然有国际法院（ICJ, International Court of Justice）、国际刑事法院（ICC, International Criminal Court）、国际海洋法法庭（ITLOS, International Tribunal for the Law Of the Sea）等国际司法机构以及特设国际刑事法庭、国际和国内混合型法庭等国际司法实践存在，但绝大部分国际司法机构的管辖范围、当事方或者运作模式并不适合审理海盗案件。如果通过修改章程的方式，将海盗罪纳入 ICC 的管辖范围，不但程序复杂，还将耗费较长时间，不能解决目前海盗案件审理中存在的管辖权消极冲突的问题。因此，国际社会应当重点在审判及判决执行方面加强合作，帮助海盗活动猖獗

^①本文中的“商船”是指除军舰和其他由一国所有或者经营的用于政府非商业性服务的船舶之外的其他船舶。

地区的沿岸国切实提高司法能力，在沿岸国国内司法体系中审判海盗是解决海盗案件中存在的“抓而不审”的最理想也是最便宜的模式。

我国是海洋大国，海洋对我国具有巨大的政治、经济与军事利益。亚丁湾和索马里周边水域及南中国海水域的海盗活动，对我国海上航运构成巨大威胁，进而威胁到我国能源安全及对外贸易。因此，我国一方面应当加强同东南亚国家及国际社会合作，积极参与国际社会打击海盗活动。另一方面，要完善我国刑事法律，增设海盗罪；根据我国海洋执法活动需求，改革我国海上执法机构，加强海上执法力量建设，多策并举打击海盗，维护我国海上安全与海洋利益。

关键词：法律规制；预防与惩治；管辖与审判

ABSTRACT

The 21st century is the century of sea. The global economy has higher and higher demand for resources due to its rapid development, plus the gradual depletion of land resources, so the sea resource demand of each country sharply increases. Technological development creates conditions for human to develop and utilize marine resources. Under this background, sea is of great significance to the development strategies of both coastal states and land locked states in the world. Nevertheless, sea in the 21st century is not at peace. Traditional and non-traditional safety factors such as piracy, armed robbery at sea, terrorist activity at sea and transnational organized crime are intertwined, thus seriously threatening maritime order and safety.

Piracy has a long history. It has been with the process of human's conquest of the sea since human started to carry out maritime activities. Although piracy used to subside in certain historical stages, it has not died out and was even more rampant sometimes. Since 1980s, due to the end of cold war and the development of global economy, economic trade contact between countries becomes closer, commercial transportation demand grows increasingly and international shipping industry develops vigorously. In addition, some coastal states or regions are engulfed in civil war, secession and political turmoil and have weak maritime safety force and their people live in hardship. All these factors revive piracy.

As a social phenomenon, piracy was not legally prohibited in the early period of human society. Piracy regulation of national and international community is closely related to the improvement of human's utilization of marine resource, the development of human's knowledge of sea and the development of study theory of sea. After the 16th century, with the rise of emerging capitalist countries, the theory of "freedom of the high seas" developed in order to break the monopoly by traditional large marine countries. Piracy directly threatens the navigation freedom described in the theory of "freedom of the high seas", so emerging capitalist countries have changed their attitudes towards piracy from toleration, tacit consent and small-scale fighting into legal prohibition and harsh fighting and also established the international custom that "pirates are the common enemies of human and each country has

universal jurisdiction over piracy”.

After the 20th century, international community began to formulate and compile statute laws regulating piracy, among which, *Harvard Research in International Law, Draft Convention on Piracy with Comments*, the result of research on piracy issue conducted by Harvard Law School, is most complete. The draft has many provisions about piracy and becomes the blueprint for relevant international conventions formulated subsequently. The international conventions universally applicable to prohibiting and punishing piracy crime currently used by international community are *Convention on the High Seas (HSC)* adopted at the First UN Conference on the Law of the Sea in 1958 and *United Nations Convention on the Law of the Sea (UNCLOS)* adopted at the Third UN Conference on the Law of the Sea in 1982. The greatest contribution to piracy punishment made by HSC and UNCLOS is defining piracy and universal jurisdiction over piracy defined by international law in the form of international statute law. The domestic criminal laws of some countries contain provisions concerning piracy crime, among which, some provisions are the same as HSC and UNCLOS while the range of piracy crime stipulated by some provisions is wider than HSC and UNCLOS.

Although UNCLOS is commonly accepted, upsurge of piracy in water areas around Somali and Gulf of Aden and South China Sea since 21st century makes international community doubt the piracy determination standard specified by UNCLOS. The key point lies in that UNCLOS limits the definition of piracy within “for private purpose” and the piracy should happen on the high seas or in any place outside the range of jurisdiction of any country, thereby excluding illegal actions and violence at sea conducted for political purpose or conducted in water areas within the range of jurisdiction of any country from piracy crime specified in international law. The reason why UNCLOS limits the definition of piracy within “for private purpose” is to make UNCLOS universally accepted by international community. Due to differences in political stand and ideology, different countries have different understandings of “political purpose”. If UNCLOS highlights the political purpose of piracy, it is bound to result in the discussion on whether “behavioral motive” is just, but international community hardly reaches an agreement with respect to this issue. UNCLOS limits the definition of piracy within “happening on the high seas or in any place outside the range of jurisdiction of any country”, which can well solve the conflict between universal jurisdiction and personal jurisdiction, territorial jurisdiction

as well as flag state jurisdiction over illegal actions and violence at sea. Additionally, although UNCLOS limits the definition of piracy within “for private purpose” and the piracy should happen on the high seas or in any place outside the range of jurisdiction of any country, it cannot be deemed that UNCLOS denies illegality of other illegal actions and violence at sea apart from piracy specified UNCLOS and legal responsibilities corresponding to such other illegal actions and violence will not be affected. In fact, the criminal law of most countries generally define the criminal responsibilities for illegal actions and violence at sea. Certainly, from the perspective of fighting against illegal actions and violence at sea and maintaining maritime order and safety, the definition of piracy set forth in UNCLOS is imperfect. In this case, some international organizations revise relevant international conventions and some countries sign regional international conventions in order to enlarge the range of illegal actions and violence at sea. For instance, *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)* has been signed by countries of Southeast Asia.

At present, main measures taken by international community to punish pirates include enhancing maritime law enforcement, strengthening regulation measures and perfecting crisis response mechanism. UNCLOS provides that warships, warplanes or other authorized ships or planes working for the government of each country can exercise their right of hot pursuit and right of visit over ships or planes suspected of being involved in piracy activities on the high seas. In addition, in order to solve the upsurge of piracy in water areas around Somali and Gulf of Aden, since 2008, the UN Security Council has adopted a series of resolutions concerning piracy in Somali according to “Chapter 7: Authorization” of the *Charter of the United Nations*, among which, it authorized each member country and regional organization to enter the territory of Somali and take all necessary measures to fight against pirates according to the rules of international law upon the invitation or consent of transitional federal government of Somali (or federal government of Somali). This is a new measure. However, the UN Security Council also emphasizes that the above resolutions do not constitute a customary international law. Moreover, professional international organizations such as IMO,IMB (International Maritime Bureau),international shipping industry and American , with the support of anti-terrorism work at sea, implement management object risk level assessment and classified management system. Meanwhile, comprehensive piracy preventative measures are taken through

perfecting port and ship management system, increasing regulation transparency, strengthening information collection, analysis and distribution, promoting the formulation and application of technical standards, improving ship technology and equipment, enhancing crew training, perfecting crisis response proposal, etc. Some shipping companies even started to equip merchant ships with weapons and armed security guards so as to defend themselves when attacked by pirates. Although IMO and USCG (United States Coast Guard) have developed plans or guidelines concerning “ship security”, so far there is no corresponding international convention or domestic law specifying the use condition, procedure, strength and the like of armed security guards and weapons for merchant ships of shipping companies. Therefore, the use of weapons by armed security guards for merchant ships possibly causes a lot of legal issues. At present, equipping merchant ships with armed security guards has not become the common practice of international shipping industry.

Piracy trial is currently the most important factor restricting piracy punishment and affecting anti-piracy effect. Customary international law and international statute law provide that each country has universal jurisdiction over piracy defined by international law and the international community has no objection about this provision. However, coastal states where piracy proliferates are unable or unwilling to exercise such jurisdiction due to political disorder, poor judicial ability and the like; in view of high trial cost, difficulty in execution of judgement and the like, other countries arresting pirates are unwilling or unable to effectively exercise such jurisdiction, so most pirates arrested were set free after being disarmed and did not undergo judicial procedure, seriously affecting anti-piracy effect. Although there are international judicial authorities such as International Court of Justice (ICJ), International Criminal Court (ICC) and International Tribunal for the Law of the Sea (ITLOS) and international judicial practices such as international ad hoc tribunal and domestic and international mixed tribunal, most international judicial authorities are not suitable for piracy trial due to scope of jurisdiction, parties or operation mode. If piracy crime is included in the scope of jurisdiction of ICC through revising *Statute of the International Criminal Court*, it requires complicated procedure and also takes a lot of time but cannot solve the existing problem of piracy trial. Therefore, the international community should strengthen cooperation with respect to trial and execution of judgement and help coastal states where piracy proliferates to really improve their juridical ability. Carrying out piracy trial within the domestic juridical

systems of these coastal states is the most ideal and cost-effective mode to solve the problem of “arresting without judging” of piracy cases.

China is a large marine country and seas bring considerable political, economic and military benefits to China. Piracy in water areas around Somali and Gulf of Aden and South China Sea greatly threatens the shipping industry of China and further threatens the energy source safety and foreign trade of China. Consequently, on one hand, China should strengthen cooperation with Southeast countries and international community and participate in anti-piracy activities conducted by the international community. On the other hand, China should perfect domestic criminal law through including piracy crime and based on the need of maritime law enforcement, reform maritime law enforcement organ, strengthen the building of maritime law enforcement force, fight against pirates with multiple policies and measures and maintain the maritime safety and sea interests of China.

Keywords: legal regulation; prevention and punishment; jurisdiction and trial

缩略语表(Abbreviations)

HSC	Convention on the High Seas (《公海公约》)
IMO	International Maritime Organization (国际海事组织)
IMB	International Maritime Bureau(国际海事局)
ITLOS	International Tribunal for the Law of the Sea (国际海洋法法庭)
ICJ	International Court of Justice (国际法院)
ICC	International Criminal Court (国际刑事法院)
ISPS	International Code for the Security of Ships and Port Facilities (《国际船舶和港口设施保安规则》)
ISSC	The International Ship Security Certificate(《国际船舶保安证书》)
IMT	The International Military Tribunal at Nuremberg(纽伦堡国际军事法庭)
IMTFE	The International Military Tribunal for the Far East Tokyo(远东国际军事法庭)
PSI	Proliferation Security Initiative (《防扩散安全倡议》)
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia(《打击海盗及武装抢劫船只的地区合作协定》)
SOLAS	International Convention for the Safety of Life at Sea (《国际海上人命安全公约》)
SUA	The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (《制止危及海上航行安全非法行为公约》)
UNCLOS	United Nations Convention on the Law of the Sea(《联合国海洋法公约》)
USC	United States Code (《美国法典》)
USCG	United States Coast Guard (美国海岸警卫队)

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