

淺論

聯合國海洋法公約

之海盜行為

Piracy in United Nations Convention on Law of the Sea

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壹、普遍管轄下的海盜行為：

在公海自由原則及船旗國主義下，航行於公海之船隻，原則上僅受船旗國管轄。但為維護公海安全與秩序¹，對於違反國際法之海盜行為，容許各個國家在公海及任何國家管轄範圍以外的地方，由軍艦或授權執法的公務船舶，對非該國船旗船舶進行逮捕、扣押，並依國內法科處刑罰，此即是普遍管轄。

在公海上普遍管轄之對象包括：（一）海盜行為，（二）販奴行為，（三）非法販賣麻醉藥品與精神性調理物質行為及（四）非法廣播行為。前二項行為之普遍管轄，似已受到傳統國際法所接受，但後二項仍有爭議²，本文僅針對海盜行為進行探討。

應特別注意的是，國際法定義的「海盜行為」與國內法「海盜罪」不可混為一談，蓋犯罪者，應符合構成要件該當性、違法性及有責性。而聯合國海洋法公約第101條³僅規範出海盜行為的構成要件，任何國家對於海盜行為得以該公約第105條⁴取得管轄權，進行扣押船艦或逮捕人員後，再以國內法對之進行審判、處罰。

I. Piracy in General Jurisdiction

Under principles of "freedom of the high sea" and "flag state", ships on the high seas are regularly under jurisdiction of the flag state. However, to ensure security and order on the high seas¹, warships or authorized government ships of any state are allowed to arrest, detain and give penalties to ships which are against the international law and not registered in its country on the high seas and any place outside its jurisdiction. This is the so-called "general jurisdiction".

Subjects of general jurisdiction on the high seas include: 1.piracy; 2.slave trade; 3.illegal trade of narcotic drug; 4.illegal broadcasting. The first two subjects seem to be accepted by conventional international law. However, the last two subjects are still controversial.² In this article, we seek to discuss piracy only.

It is noted that the international law and state law have distinct definitions on "piracy". A delinquent should fulfill tatbestand, Rechtswidrikeit, Schuld. The United Nations Convention on Law of the Sea § 101 merely regulates elements of piracy and pursuant to the United Nations Convention on Law of the Sea § 105⁴ any state has the power to bring the piracy to trial or give penalties based on its own state laws after detaining of ships and arresting of people.

貳、聯合國海洋法公約之海盜行為

海盜行為最猖獗的時期在於資本主義前夕，如荷蘭、英國與法國等部分後起殖民國家，皆把海盜搶劫作為資本累積的手段⁵。有人將海盜稱為「海上的強盜」⁶，但海盜行為是公海船旗國管轄原則之例外，故其定義對於國際社會成員有重大牽連，因為只有國際法定義下之海盜行為才是「萬國公罪」⁷。依據聯合國海洋法公約第101條，國際法之海盜行為須符合下列要件：

一、須由私人船舶或飛機上的人員所為。

(一) 因為在1958年公海公約訂定之前，國際社會普遍認為政府船舶或公務船舶仍可能是海盜船舶。但後來考量到軍艦享有之豁免權，若將軍艦的非法行為視為海盜行為，由各國進行普遍管轄而予以逮捕、扣押，後果可能非常嚴重。對於公海和平與安全之促進，亦牽涉相當複雜的問題，故在公海公約草案即捨棄舊日國際習慣⁸。

(二) 軍艦或政府船舶經國家權限委任或命令而行動，即使實施該當於海盜行為的違法行為時，也應依照追究國家責任的程序來解決。而非藉由將其定義為海盜行為，委由普遍管轄的方式行使⁹。

(三) 前述原則之例外，若軍艦或政府船舶由於其上人員發生叛變，進而控制船舶從事該當於海盜之行為，則視同私人船舶所從事之行為¹⁰。在此種情況下，軍艦或政府船舶，亦有可能成為海盜行為規範之對象。

二、須基於私人目的。

(一) 在嚴格定義下的國際法海盜行為，行為應為私人目的。倘從事該行為並非基於私人目的，而係為達到某種特定政治目的，如1961年葡萄牙籍「Santa Maria」客輪遭到劫持，其目的在支持反對派政治領袖General Delgado。另1963年委內瑞拉籍「Anzoategui」商船遭到劫持，其目的則是反對委內瑞拉總統訪問美國。以上二個案例在國際法上，皆不被視為海盜行為¹¹。

II. Piracy in the United Nations Convention on Law of the Sea

Piracy runs wild before capitalism has emerged. Such Colonial countries as Dutch, United Kingdom, and France consider pirates' despoliation to be an approach of capital accumulation⁵. Some call pirates "rubbers on the sea"⁶. Since piracy is the exception of principle of flag state's jurisdiction on the high seas, and only the international law define piracy as a "world-wide crime"⁷, its definition has a significant link with the international society. According to the United Nations Convention on Law of the Sea § 101, piracy should fulfill elements listed below:

(I) Illegal behaviors must be done by crews on private ships or aircrafts.

1. Before establishment of the United Nations Convention on Law of the Sea in 1958, the international society normally recognizes governmental ships or government ships may be pirates' ships. Such tradition has been abandoned when drafting the law in consideration of a complicated situation that if warships enjoying immunity are arrested, detained by any state for their piracy according to general jurisdiction.

2. When warships or governmental ships are authorized to act illegally as pirates, a process of investigation of state's liability, other than invoking of general jurisdiction, should be taken⁹.

3. An exception of the two fore-mentioned principles is a warship or governmental ship can be the subject of the United Nations Convention on Law of the Sea under the circumstance the ship is occupied to act piracy by mutineers¹⁰.

(II) Piracy must be for private purpose

1. Stricter definition for piracy is that it must be for private purpose. If the behaviors have political intention, instead of personal reason, it cannot be considered piracy. Take kidnapping of "Santa Maria", a Portugal-registered passenger ship, for example. When it was kidnapped in 1961, purpose of kidnappers is to support General Delgado, the leader of the opposition party. Another example is kidnapping incident of Anzoategui, a Venezuela-registered merchant ship, as of 1963. The kidnappers intended to oppose to Venezuela president's visit to United States¹¹.

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2. "Private purpose" is not limited to personal illegal freebooting. Some may be satisfied with revenge as attacking, destroying ships or treating crews on ship with illegal violence, therefore, piracy can be accompanied with the purpose of revenge, other than illegal freebooting. Such behaviors are also against piracy in the United Nations Convention on Law of the Sea.

(III) Piracy must aim at another ship, aircraft on the high sea, or people properties on the said ship or aircraft.

1. Piracy refers to the exterior attack on the high seas. If the attack is from the ship or aircraft itself, it does not meet principles of piracy in the United Nations Convention on Law of the Sea and should be controlled by the flag state or any state which has the jurisdiction instead.

2. Violate piracy for illegal violence, detaining, despoiling to ships, aircrafts, crews or properties on the said ship or aircraft, outside jurisdiction of any state. Since the United Nations Convention on Law of the Sea does not clarify the attack is to another ship or aircraft, any illegal violence, detaining or despoiling incurring from the ship and aircraft itself whose location is outside jurisdiction of any state can involve in piracy. However, currently only waters nearby the South Pole are outside jurisdiction of any state.¹²

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(二) 另此處的「私人目的」，不以取得私人不法所有為要件，海盜行為也可能以報復或仇怨為目的，而沒有取得私人不法所有的意圖。例如將船舶擊沉、破壞或對於人員施以非法暴力，因而得到復仇之情感上滿足，不以取得經濟利益為目的，此等行為亦可能構成海盜行為。

三、須在公海上對另一艘船舶或飛機，或對其上的人或財物為之；或在任何國家管轄範圍以外的地方對船舶或飛機，或對其上的人或財物為之。

(一) 公海上的海盜行為係遭受來自船舶或飛機外部的侵害，若行為人在公海上對同一船舶或飛機上的人或財物，從事非法的暴力或扣留、掠奪等行為，即非國際法定義下的海盜行為，應由各船旗國或有管轄權的國家，依其國內法處理。

(二) 在任何國家管轄範圍以外的地方，對船舶或飛機，人或財物從事非法的暴力或扣留、掠奪等行為，亦可能構成海盜行為。因公約在此僅規定對「船舶或飛機」，並未要求對「另一艘船舶或飛機」，故在任何國家管轄範圍以外的地方，發生來自船舶內部的非法暴力、扣留或掠奪行為，也可能構成海盜行為。但現今可能之處所，大概僅存於南極附近水域，始有不屬於任何國家管轄權以外的地方。¹²



參、海盜行為修正討論

鑒於海盜事件對於國際貿易影響甚鉅，部分學者建議放寬國際法有關海盜罪之定義，擬將行為地點由「公海」改為「領海或公海」；並將對「另一艘船舶或飛機」改為對「船舶或飛機」，以期能擴大各國發動普遍管轄的條件，進而有效打擊海盜行為，減少海洋犯罪以維護海上之安全與秩序。

一、將行為地點由「公海」改為「領海或公海」：

- (一) 此部分主張海盜行為不僅侷限在公海，而應包括領海在內¹³，因為部分非法暴力、掠奪行為發生在沿海國之內水、領海或群島水域時，若沿海國不具有海上執法能力或疏於執法時，此時第三國將無法對海盜船舶進行管轄，致不能有效打擊此等非法行為。
- (二) 若將海盜行為的地點放寬至「在領海或公海上」¹⁴，將使得發生在領海內對另一艘船舶或飛機，或對其上的人或財物所為非私人目的之非法暴力、扣留或掠奪等行為，符合海盜行為構成要件，所有國家得行使普遍管轄，有可能衝擊沿海國在領海內的專屬管轄權。

III.Modification to Piracy

As a result of the significant impact on international trade, some scholars recommend extension of definition of piracy, which seeks to modify the location "high sea" to "territorial sea or high seas", and also replace "to ship or aircraft" with "another ship or aircraft". By loosening restriction on general jurisdiction, it is expected to beat piracy efficiently, and ensure maritime security and order.

(I)To modify "high seas" to "territorial sea or high seas"

- 1.Piracy is not limited to the high seas because illegal violence, despoiling sometimes take place in internal waters, territorial sea around coastal state or waters surrounding island. If the coastal state lacks enforcement capability on sea or disregards the importance, the third state is unable to involve, thus resulting in a loophole.
- 2.If location of piracy expands to "territorial sea or high seas", any state is able to exercise general jurisdiction to illegal violence, detaining, despoliation to another ship or aircraft or crews or properties on the said ship or aircraft for private purpose in its territorial sea. Such change will probably affect the executive jurisdiction of the coastal state in its own territorial sea.



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3. In accordance with first half part of the United Nations Convention on Law of the Sea § 105, a state should exercise general jurisdiction in high

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肆、海盜行為構成要件放寬之影響

在公海上海盜行為須對「另一艘船舶或飛機」，此為海盜行為相當重要之條件，若輕言捨棄，則會造成船旗國管轄與普遍管轄的衝突。依據公約現行規定，僅有在任何國家管轄範圍以外的地方，才將對「同一艘船舶或飛機」的私人非法暴力、扣留或掠奪行為，置於該當海盜行為的普遍管轄。

依據前述說明，本文認為將海盜行為放寬至領海，應當有其可行性，如此才得以保障船舶在通過沿海國領海，遭到該當於海盜行為之非法侵害，而沿海國卻不具有海上執法能力或疏於執法時，第三國軍艦或公務船舶即能行使普遍管轄權，對該當海盜行為之船舶進行扣押、逮捕。但第三國之軍艦或公務船舶仍應注意聯合國海洋法公約第105條，亦即進行扣押船舶或逮捕人員時，須在公海或在任何國家管轄範圍以外的任何其他地方進行。

若將海盜行為放寬至在領海及公海上，但第三國卻僅能在公海或任何國家管轄範圍以外的地方進行管轄。對於發生在沿海國領海內該當海盜行為之非法侵害，第三國軍艦或政府船舶不能逕行進入沿海國領海行使扣押或逮捕，若此則難以即時阻止此等非法行為，以保障船舶航行安全。

但若將公約第105條前段，放寬至各國得在領海、公海或任何國家管轄範圍以外的地方，對於海盜船舶進行普遍管轄權後，第三國之軍艦或政府船舶，即得進入沿海國領海扣押海盜船舶或逮捕其上人員。若此，將會對於沿海國主權，帶來相當大的影響，造成領海制度在無害通過權後，另一巨大衝擊。

IV. Impact of Extension of Piracy Definition

Principle of "to another ship or aircraft" is such an element to piracy that abandon of it will cause conflict between executive jurisdiction of flag state and general jurisdiction. Based upon current regulation of the United Nations Convention on Law of the Sea, general jurisdiction is allowed to exercise only when illegal violence, detaining or despoliation to same ship or aircraft for private purpose occurs in location outside jurisdiction of any state.

As the foregoing description, this article intends to agree to feasibility to expand the location to "territorial sea". This is to enable warships or government ships of the third state to exercise general jurisdiction by detaining, arresting pirate's ship to protect ships suffering piracy in the territorial of the coastal state which lacks or disregards importance of maritime enforcement. However, warships or government ships should still be careful of the United Nations Convention on Law of the Sea § 105, which regulates detaining ships or arresting people should be taken in the high seas or any place outside jurisdiction of any state.

Furthermore, warships or government ships will have difficulties entering to the territorial sea of coastal state to detain or arrest if location is expanded to "territorial sea or high seas". The third state can hardly take rapid action to stop illegal piracy and protect navigation safety immediately.

Nevertheless, modification to last half of the United Nations Convention on Law of the Sea § 105, which seeks to enable any state to exercise general jurisdiction in territorial seam high seas or any place outside jurisdiction of any state, also legalize warships or government ships of the third state to detain pirates' ships and arrest people in territorial sea of coastal state. If so, it will bring another huge impact on coastal state's sovereignty ever since adoption of "innocent passage".



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Concerning the piracy report issued by International Maritime Bureau, ICC, in 2006, there were 239 attacks on ships, compared to 276 in 2005 and 329 in 2004 says the annual report. Although gradual decrease has been seen in three consecutive years, there were 198 attacks in the first three quarters of 2007 and number of attacks increased by 14% in comparison with the first three quarters of 2006 (174 attacks).¹⁷ It reveals piracy has been the obstacle for maritime security. Due to involvement of state's sovereignty and jurisdiction, whether definition to piracy, problems on jurisdiction of coastal state, flag state and general jurisdiction should be expanded is still an uncertain issue.¹⁸

(The author is currently with the Assignment Command Center of Coast Guard Administration)

References

1. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA § 100: All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State
2. Jiang Huang Chr, The International Law of the Sea, Sharing Culture Enterprise Co. Ltd., September 2004, p616.
3. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA § 101: Piracy consists of any of the following acts:
 - (1) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (I) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (II) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
 - (2) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
 - (3) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).
4. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA § 105: 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 or aircraft 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

依據國際海事局 (International Maritime Bureau, ICC) 海盜報告, 全球海盜事件在2004年為329件, 2005年為276件, 2006年為239件, 雖然已連續三年呈現減少趨勢。但2007年前三季, 全球船隻遭受海盜攻擊共有198件, 較去年同期 (174件) 增加了14%, 可見海盜問題仍是海上安全的隱憂。前述聯合國海洋法公約對於海盜行為定義的放寬, 包含沿海國管轄、船旗國管轄與普遍管轄的問題, 涉及各國主權與管轄事務, 未來能否放寬, 仍待觀察。¹⁸

(本文作者任職於海巡署勤務指揮中心)

參考資料:

1. 聯合國海洋法公約第100條: 所有國家應盡最大可能進行合作, 以制止在公海上或在任何國家管轄範圍以外的任何其他地方的海盜行為。
2. 姜皇池: 國際海洋法 p616, September 2004, 學林文化事業有限公司。
3. 聯合國海洋法公約第101條, 下列行為中的任何行為構成海盜行為:
 - (a) 私人船舶或私人飛機的船員、機組成員或乘客為私人目的, 對下列對象所從事的所有非法的暴力或扣留行為, 或任何掠奪行為:
 - (1) 在公海上對另一船舶或飛機, 或對另一船舶或飛機上的人或財物。
 - (2) 在任何國家管轄範圍以外的地方對船舶、飛機, 人或財物。
 - (b) 明知船舶或飛機成為海盜船舶或飛機的事實, 而願參加其活動的任何行為;
 - (c) 教唆或故意便利 (a) 或 (b) 項所述行為的任何行為。
4. 聯合國海洋法公約第105條: 在公海上, 或在任何國家管轄範圍以外的任何其他地方, 每個國家均可扣押海盜船舶或飛機或為海盜所奪取並在海盜控制下的船舶或飛機, 和逮捕船上或機上人員並扣押船上和機上財物。扣押國的法院可判定應處的刑罰, 並可決定對船舶、飛機或財產所應採取的行動, 但受善意第三者的權利的限制。

5. 姜皇池; 國際海洋法 p617.
6. 魏靜芬, 徐克銘; 國際海洋法與海域執法 p101, March 2002, 神州圖書出版有限公司。
7. 姜皇池; 國際海洋法 p619.
8. 姜皇池; 國際海洋法 p620.
9. 魏靜芬, 徐克銘; 國際海洋法與海域執法 p105.
10. 聯合國海洋法公約第102條：軍艦、政府船舶或政府飛機由於其船員或機組成員發生叛變並控制該船舶或飛機而從事第101條所規定的海盜行為，視同私人船舶或飛機所從事的行為。
11. 姜皇池; 國際海洋法 p623.
12. 姜皇池; 國際海洋法 p622.
13. Barry H. Dubner; 1980, The Law of International Sea Piracy, p160-p165. <魏靜芬; 國際海洋法與海域執法 p109.>
14. 對於「公海」範圍定義，有認為採用嚴格解釋，係指領海、專屬經濟海域、大陸礁層以外之自由水域；或僅指領海向外，非國家主權所及之水域。蓋公海範圍非本文討論之目的，本文採用1958年公海公約第1條所稱：稱公海者，謂不屬於領海或一國內國水域之海洋所有部分。
15. International Chamber of Commerce website. Accessed on 17 October 2007. <<http://www.icc-ccs.org/main/news.php?newsid=80>>
16. 國際海事局(International Maritime Bureau)是隸屬於國際商會(International Chamber of Commerce)的組織，而其統計之海盜行為是以船舶遭受攻擊(attacks)計算，未必皆符合聯合國海洋法公約定義之海盜行為。
17. International Chamber of Commerce website. Accessed on 17 October 2007. <<http://www.icc-ccs.org/main/news.php?newsid=95>>
18. 姜皇池; 國際海洋法 p624.
- 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.
5. Jiang Huang Chr, The International Law of the Sea, Sharing Culture Enterprise Co. Ltd., September 2004, p617.
6. Wei Jing Fen and Shiu Ke Ming, The International Law of the Sea and Enforcement of the Law, Shen Ehou Book Publishing Co., Ltd March 2002, p101.
7. Jiang Huang Chr, The International Law of the Sea, Sharing Culture Enterprise Co. Ltd., September 2004, p6169.
8. Jiang Huang Chr, The International Law of the Sea, Sharing Culture Enterprise Co. Ltd., September 2004, p620.
9. Wei Jing Fen and Shiu Ke Ming, The International Law of the Sea and Enforcement of the Law, Shen Ehou Book Publishing Co., Ltd March 2002, p105.
10. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA § 102: The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.
11. Jiang Huang Chr, The International Law of the Sea, Sharing Culture Enterprise Co. Ltd., September 2004, p623..
12. Jiang Huang Chr, The International Law of the Sea, Sharing Culture Enterprise Co. Ltd., September 2004, p622.
13. Barry H. Dubner; 1980, The Law of International Sea Piracy, p160-p165. < Wei Jing Fen and Shiu Ke Ming, The International Law of the Sea and Enforcement of the Law, Shen Ehou Book Publishing Co., Ltd March 2002, p109.>
14. Some suggest to adopt stricter definition to high seas, which includes territorial sea, exclusive economic zone, free waters. Others tend to adopt the definition of the area beyond territorial sea. In this article, definition of high seas is same as United Nations Convention of the Law of the Sea § 1, "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.
15. International Chamber of Commerce website. Accessed on 17 October 2007. <<http://www.icc-ccs.org/main/news.php?newsid=80>>
16. International Maritime Bureau is under International Chamber of Commerce. Its piracy report reveals only number of attacks, not necessarily meet the definition of piracy.
17. International Chamber of Commerce website. Accessed on 17 October 2007. <<http://www.icc-ccs.org/main/news.php?newsid=95>>
18. Jiang Huang Chr, The International Law of the Sea, Sharing Culture Enterprise Co. Ltd., September 2004, p624.