

附件 C

防止和打击海盗和海上武装抢劫行为

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一. 引言

1. 海盗行为通常被理解为私人船舶的船员或乘客为私人目的，在公海上对另一船舶，包括对其上的人或财物从事的暴力、扣留或掠夺行为。¹ 海盗行为始于古代，自万国法问世以来，一直被视为一种国际罪行。的确，可以说海盗行为与海上航行本身一样古老。²

2. 不幸的是，海盗行为如今正以历史上前所未有的速度卷土重来，印度洋索马里沿海、几内亚湾、新加坡和马六甲海峡、阿拉伯半岛、加勒比海、西里伯斯海、爪哇海、黄海北部和南海以及孟加拉湾发生的海盗行为便是佐证。³ 海盗行为远非以往，而是以更加暴力的新形式重新出现，因为海盗现在有更好的组织，更加精良的装备和更完备的武装。⁴ 联合国秘书长在其 1997 年 10 月关于海洋和海洋法的报告⁵ 中警告国际社会注意海盗和海上武装抢劫问题的严重性。这种抢劫和暴力犯罪行为伴随着大量其他相关非法行为，如海上恐怖主义⁶、腐败、洗钱、违反国际人权法、非法捕鱼、向海洋非法排放废物和有毒物质、贩运人口和贩毒等⁷。

¹ 见《联合国海洋法公约》，1982 年 12 月 10 日，《联合国条约汇编》，第 1833 卷，第 3 号 [《联合国海洋法公约》]，第一〇〇至一〇七条。

² Jane G Dalton, J Ashely Roach & John Daley, “Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea – Resolutions 1816, 1846 & 1851” (2009) 48 ILM 129 at 129; Alfred P Rubin, “The Law of Piracy” (1987) 15:2-3 Denver Journal of International Law and Policy 173.

³ C Paul Hallwood & Thomas J Miceli. *Maritime Piracy and Its Control: An Economic Analysis* (New York: Palgrave Macmillan, 2015) at 3-4; ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Report for the Period 1 January – 31 December 2018*, London, January 2019.

⁴ Jennifer C Bulkeley, “Regional Cooperation on Maritime Piracy: A Prelude to Greater Multilateralism in Asia?”, (2003) 14 Journal of Public and International Affairs, Article 2 at 3; Masataka Okano, “Is International Law Effective in the Fight against Piracy: Lessons from Somalia” (2010) 53 Japanese Yearbook of International Law 178 at 179-81; Yvonne M Dutton, “Maritime piracy and the impunity gap: insufficient national laws or a lack of political will” (2012) 85:5 Tulane Law Review 1111 at 1127-30.

⁵ 秘书长的报告，《海洋和海洋法：海洋法》，联合国大会正式纪录，第五十二届会议，联合国文件，A/52/487(1997 年)，第 374 段。

⁶ Monica Pathak, “Maritime Violence, Piracy at Sea & Marine Terrorism Today” (2005) 20 Windsor Review of Legal and Social Issues 65.

⁷ Hugh R Williamson, “New Thinking in the Fight against Marine Piracy: Financing and Plunder Pre-empting Piracy before Prevention Becomes Necessary” (2013) 46 Case Western Reserve Journal of International Law 335; S Whitman & C Saurez, “Dalhousie Marine Piracy Project: The Root Causes and True Costs of Marine Piracy” (2012) Marine Affairs Program Technical Report #1.

3. 因此，海盗行为目前是国际社会关注的一个主要问题，因为海盗行为发生在所有海域，在不同程度上影响到所有国家的利益，无论是沿海还是内陆国家。⁸ 从国家财富和发展的角度来看，值得指出的是，85%的商品通过海路运输，⁹ 而其中许多海路受到海盗威胁。因此，船旗国、沿海国、港口国和其他国家正试图在所有海域打击一切形式的海盗行为，以保护人的生命，保护经济利益，维护航行自由，并保护海洋环境免受非法海洋污染和其他海上非法行为的危害。

4. 海盗行为通常以私人船只为目标，因此对私人行为者产生严重影响。¹⁰ 遇袭船只的船员面临长期扣留、¹¹ 人身伤害或死亡等风险。船主为使海盗释放其船员、货物和船只，被索要巨额赎金。¹² 海上保险公司必须考虑海盗行为的可能性，从而提高了海运的总体成本，并在海事合同中增加了海盗条款。¹³ 海盗行为也是沿海社区和国际组织关切的问题之一。¹⁴ 在这种情况下，适当的解决办法是让私营公司参与打击海盗行为，但这种办法及其在国际法中的法律依据存在争议。

5. 海盗行为对人和经济的影响确实不容忽视。2010年，26%的海盗行为受害者被劫持为人质，在总共4,185名受害者中有1,181名人质，其中59%的人质受到更严重的暴力。¹⁵ 仅因索马里海盗行为导致的经济损失估计就有10亿至160亿美元；其中包括改道导致的燃料费、每次航行增加的20,000美元保险费、油轮供应减少以及提高的租船费率等。¹⁶ 此外，船主向海盗支付的赎金在50万美元至550万美元之间，导致仅为亚丁湾海盗行为支付的赎金总额估计就达1.6亿美元。¹⁷ 大约10起劫持船只事件使亚欧之间的出口减少了11%，造成280亿美

⁸ 联合国安全理事会正式纪录，第67年，第6727次会议，联合国文件，S/RES/2039(2012年)，序言部分。

⁹ D Ortolland & J-P Pirot, eds, *Atlas géopolitique des espaces maritimes : frontières, énergie, pêche et environnement* (Paris : Technip, 2008).

¹⁰ Storny-Annika Mildner & Franziska Grob, "Piracy and World Trade: The Economic Costs" in Stefan Mair, ed, *Piracy and Maritime Security: Regional characteristics and political, military, legal and economic implications*, SWP Research Paper, (German Institute for International and Security Affairs: Berlin, 2011) at 26-28.

¹¹ 同上，第12页。

¹² Hallwood and Miceli, *Maritime Piracy and Its Control*, *supra* note 3 at 5-6.

¹³ See R Wright, "Piracy set to escalate shipping costs", *Financial Times*, 20 November 2008; Christopher N Douse, "Combating Risk on the High Sea: An Analysis of the Effects of Modern Piratical Acts on the Marine Insurance Industry" (2010) 35 *Tulane Maritime Law Journal* 267 at 278-81.

¹⁴ See José Louis Jesus, "International Tribunal for the Law of the Sea" in Jon M Van Dyke et al, eds, *Governing Ocean Resources: New Challenges and Emerging Regime* (Leiden: Martinus Nijhoff, 2013) 25 at 26.

¹⁵ Torben C Skaanild, "Piracy: Armed Robbery, Kidnapping, Torture and Murder at Sea" in Maximo Q Mejia, Chie Kojima & Mark Sawyer, eds, *Piracy at Sea* (New York: Springer, 2013) 23 at 24; Hallwood & Miceli, *Maritime Piracy and Its Control*, *supra* note 3 at 4; Whitman & Saurez, "Dalhousie Marine Piracy Project" *supra* note 7 at 70.

¹⁶ Hallwood & Miceli, *Maritime Piracy and Its Control*, *ibid* at 5.

¹⁷ Hallwood & Miceli, *Maritime Piracy and Its Control*, *ibid* at 5-6; Whitman & Saurez, "Dalhousie Marine Piracy Project" *supra* note 7 at 57.

元的损失。¹⁸ 虽然很难找到关于渔民的准确统计数据，但他们遭受海盗袭击的次数尤多(通常是为了窃取宝贵的渔获物和设备)，导致每个渔民损失数千美元，每个受影响地区损失数百万美元。¹⁹ 最后，欧盟和北约反海盗海军实施的安全措施每年估计费用为 11.5 亿美元，私人反海盗措施每年估计费用为 47 亿美元。²⁰

6. 现代海盗从陆上基地发起行动，在海上的时间比过去的海盗少得多。²¹ “他们常用的战略是使用抢夺来的船只作为母船，放出小船进行快速突袭，然后返回岸上庇护所，在那里得到当地部族和民兵的保护。”²² 因为这种陆上保护，所以海盗很难被发现，海盗的成功往往要依靠这种保护的有效性。窝藏和保护海盗通常会带来利润丰厚的收入，但这也是风险性收入。据推测，当没有其他形式的收入或其他形式收入很少时，沿海社区就会做出这种选择。²³ 现代海盗没有复杂的组织结构，通常由一位要求下属绝对忠诚的领导人领导，他们通过将自己的活动融入当地经济为自己筹集资金。²⁴

7. 与海盗行为有关的国际法数量可观，起初是国家实践，随着时间的推移，这些实践在这一领域发展为广泛的习惯国际法。基于这种习惯，尤其是基于《哈佛海盗行为研究草案》²⁵，国际法委员会制定了一系列关于海盗行为的条款，作为其海洋法工作的一部分，²⁶ 这些条款最终成为《日内瓦公海公约》第 14 至 21 条，²⁷ 后者又成为《联合国海洋法公约》第一〇〇至一〇七条²⁸ 的基础。主要在国际海事组织的主持下，全球层面制定了其他协议法，例如 1988 年《制止危及海上航行安全非法行为公约》²⁹ 及其《制止危及大陆架固定平台安全非法行为议定书》³⁰ (以及后来 2005 年的两项议定书)。另一些不专门针对海盗行为的全球条约也可能与此相关，如 1979 年《反对劫持人质国际公约》³¹ 和《国际海

¹⁸ Hallwood & Miceli, *Maritime Piracy and Its Control*, *ibid* at 6; Whitman & Saurez, “Dalhousie Marine Piracy Project” *ibid* at 58.

¹⁹ Whitman & Saurez, “Dalhousie Marine Piracy Project” *ibid* at 59-61.

²⁰ Hallwood & Miceli, *Maritime Piracy and Its Control*, *supra* note 3 at 6.

²¹ Hallwood & Miceli, *Maritime Piracy and Its Control*, *ibid* at 15.

²² 同上。

²³ 同上，第 16 页。

²⁴ 同上，第 16-18 页。

²⁵ 国际法逐渐编纂专家委员会，“国际法的编纂：第四部分：海盗行为”(1932) 26, *American Journal of International Law Supplement* 739.

²⁶ 国际法委员会，《国际法委员会第八届会议工作报告》，联合国大会正式纪录，第十一届会议，补编第 9 号，联合国文件，A/3159(1956 年)，第 282 页。

²⁷ 《公海公约》，1958 年 4 月 29 日，《联合国条约汇编》，第 450 卷，第 11 号。

²⁸ 《联合国海洋法公约》，上文脚注 1。

²⁹ 《制止危及海上航行安全非法行为公约》，1988 年 3 月 10 日，《联合国条约汇编》，第 1678 卷，第 221 号。

³⁰ 《制止危及大陆架固定平台安全非法行为议定书》，1988 年 3 月 10 日，《联合国条约汇编》，第 1678 卷，第 304 号。

³¹ 《反对劫持人质国际公约》，1979 年 12 月 17 日，《联合国条约汇编》，第 1326 卷，第 205 号。

上人命安全公约》(1974 年《海上人命安全公约》)、《打击跨国有组织犯罪公约》、《国际船舶和港口设施保安规则》等。

8. 区域和次区域层面也制定了许多条约和文书,例如 2004 年《亚洲打击海盗和武装抢劫船舶行为区域合作协定》³², 16 个亚洲国家加入了该协定³³。许多国家制定了处理海盗问题的国家法律³⁴, 各国法院因此产生了重要判例³⁵, 某些区域在防止和打击海盗行为方面取得了很大成功³⁶。后来为打击海盗行为进行了其他次区域合作,特别是 2009 年在国际海事组织(海事组织)主持下通过了题为“关于打击西印度洋和亚丁湾海域海盗和武装抢劫船只的行为守则”³⁷的《吉布提行为守则》,以下 9 个国家加入了该守则:吉布提、埃塞俄比亚、肯尼亚、马达加斯加、马尔代夫、塞舌尔;索马里、坦桑尼亚联合共和国和也门。另一项行为守则于 2013 年在喀麦隆通过,处理西部和中部非洲几内亚湾的海盗问题,称为《关于在西部和中部非洲打击海盗行为、武装抢劫船只和海上非法活动的行为守则》(涵盖西非国家经济共同体³⁸(西非经共体)和中部非洲国家经济共同体(中非经共体)的《几内亚湾行为守则》)。一项研究表明,“2018 年上半年,世界上报告的海盗袭击有 40%以上发生在几内亚湾”。³⁹

9. 此外,面对海盗问题的严重性,安全理事会根据《联合国宪章》第七章采取行动,通过了一系列决议⁴⁰,处理在索马里沿海和几内亚湾及亚丁湾、马六甲海峡和新加坡海峡等海域,以及加勒比海发生的海盗行为。

³² 《亚洲打击海盗和武装抢劫船舶行为区域合作协定》,2006 年 11 月 29 日,《联合国条约汇编》,第 2398 卷,第 199 号。

³³ See Brice Martin-Castex & Guillaume Loonis-Quélen, “L’Organisation maritime internationale et la piraterie ou le vol à main armée en mer : le cas de la Somalie” (2008) 54 *Annuaire français de droit international* 77 at 86. 此协定在日本的倡议下通过,缔结协定的国家包括:孟加拉国、文莱达鲁萨兰国、柬埔寨、日本、中国、印度、韩国、印度尼西亚、老挝、马来西亚、缅甸、菲律宾、新加坡、斯里兰卡、泰国和越南。

³⁴ 见联合国海洋事务和海洋法司,“国际法之下的海盗行为”,可在以下网址查阅:<https://www.un.org/depts/los/piracy/piracy.htm>。

³⁵ 见本专题参考文献选编;第 4 项涉及各国法院的裁决。

³⁶ G Noakes, “Statement on International Piracy” before the US House of Representative Committee on Transportation and Infrastructure’s Subcommittee on Coast Guard and Maritime Transportation”, February 2009, online: www.marad.dot.gov/documents/HOA_Testimony-Giles%20Noakes-BIMCO.pdf。

³⁷ 《关于打击西印度洋和亚丁湾海域海盗和武装抢劫船只的行为守则》,海事组织理事会第 102 届会议,文件编号 C 102/14 (2009 年),附件 1。

³⁸ 《关于在西部和中部非洲打击海盗行为、武装抢劫船只和海上非法活动的行为守则》,2013 年 6 月 25 日,喀麦隆雅温得,可在以下网址查阅:http://www.imo.org/en/OurWork/Security/WestAfrica/Documents/code_of_conduct%20signed%20from%20ECOECO%20site.pdf。

³⁹ 丹麦外交部、工业部、司法部和国防部, *Priority Paper for the Danish efforts to Combat Piracy and Other Types of Maritime Crime 2019-2022*, at 6。

⁴⁰ 联合国安全理事会关于海盗问题的决议: S/RES/1816(2008 年),2008 年 11 月 6 日; S/RES/1838 (2008 年),2008 年 10 月 7 日; S/RES/1846(2008 年),2008 年 12 月 2 日; S/RES/1851(2008 年),2008 年 12 月 16 日; S/RES/1897(2009 年),2009 年 11 月 30 日; S/RES/1918(2010 年),2010 年 4 月 23 日; S/RES/1950(2010 年),2010 年 11 月 23 日; S/RES/1976(2011 年),2011 年 4 月 11 日; S/RES/2015(2011 年),2011 年 10 月 24 日; S/RES/2020(2011 年),2011 年 11 月 22 日; S/RES/2018(2011 年),2011 年 10 月 31 日; S/RES/2020(2011 年),2011 年 11 月 22 日; S/RES/2039(2012 年),2012 年 2 月 29 日;

10. 然而，尽管有大量国际法、区域法和国内法，但仍然存在尚未确定或得到发展的重要国际法问题，这些问题值得国际法委员会研究、编纂和逐渐发展。

11. 委员会首先应注意到，海盗行为这一专题的核心方面已经编纂成文，主要有1982年《海洋法公约》、《制止危及海上航行安全非法行为公约》，还有其他条约。委员会的目标不是寻求改变现有条约中规定的任何规则，而是考虑各国是否以及如何能够最好地履行其条约义务。

二. 当前与海盗和海上武装抢劫行为有关的国际法问题

A. 防止海盗行为：合作的要求

12. 理想的情况是，各国在履行这些义务时消除海盗行为赖以滋生的温床，以最大限度地降低海盗在海上活动的的能力。委员会可以分析在国际法其他领域成功运作的防止方法，以便就如何履行这些防止义务向各国提供指导。

B. 打击海盗行为：对现有法律法规的要求和对海盗行为的普遍刑事管辖权的澄清

13. 当然，防止不可能始终做到，海盗行为会继续发生，这就提出了对实施这类行为者进行惩罚的问题。海盗行为长期以来被视为一种可由任何国家予以惩处的罪行，即使该国与海盗、海盗行为受害者或犯罪地点没有直接联系。事实上，海盗长期以来都被视为所有国家和全人类的敌人(人类公敌)。因此，长期以来，任何国家对海盗行使国家管辖权被视为普遍刑事管辖权的第一种形式，不允许海盗在任何国家避难，无论他们与该国有何联系。⁴¹

14. 即便如此，这种针对海盗行为的普遍刑事管辖权的确切界限并没有得到很好的理解。委员会可以分析1982年《海洋法公约》中对海盗行为的定义，以帮助各国在确立和行使国家刑事管辖权时理解“海盗行为”的含义。此外，还可以评估协议法或习惯国际法是否规定各国义务确立这种管辖权，还是各国仅可以依照国际法选择确立这种管辖权。

C. 通过和统一各国关于海盗行为的刑法

15. 鉴于上文B节得出的结论，委员会可考虑各国应当或可能在国家刑法范围内采取哪些具体措施，对被指控实施海盗行为的人确立和行使管辖权。这类措施可能有助于促进各国通过和统一这方面的国家法律，从而建立更有效的全球执法制度，以及加强这方面的国家间合作。

S/RES/2077(2012年)，2012年11月21日；S/RES/2125(2013年)，2013年11月18日；S/RES/2383(2017年)，2017年11月7日。

⁴¹ Sandra L Hodgkinson, “The Governing International Law on Maritime Piracy” in Michael P Scharf, Michael A Newton & Milena Sterio, eds, *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge: Cambridge University Press, 2015) 13 at 15-17; Malcolm D Evans & Sofia Galani, “Piracy and the Development of International Law” in Panos Koutrakos & Achilles Skordas, eds, *The Law and Practice of Piracy at Sea: European and International Perspectives* (London: Hart Publishing, 2014) 343 at 344-45.

16. 一些国家也许能够仅根据对 1958 年或 1982 年《公约》的批准，甚至仅根据习惯国际法，行使国家刑事管辖权。⁴² 然而，在大多数司法管辖区，此类依据可能是不够的，需要颁布将海盗行为定为犯罪的国家法规。需要颁布国家法规，可能是因为“法无明文规定不为罪”的原则，即没有制定法律，罪行和惩罚就不成立。⁴³ 2008 年，印度洋索马里沿海和大西洋沿岸几内亚湾海盗暴力犯罪行为死灰复燃，表明各大洲许多国家都没有任何处理海盗问题的国家立法。⁴⁴ 法国在 Ponant 号案中的情况就是一个实例。⁴⁵ 在抓获索马里海盗后，法国不得将他们释放，因为法国当时没有将海盗罪确立为刑事犯罪的国内法，而一般刑事法律不足以使海盗行为在法国刑事法院受审。但法国并非这方面的唯一实例。目前，大多数非洲国家也没有关于海盗行为的立法，或者与当代国际法相比，它们关于这一问题的法律已经过时。⁴⁶

17. 因此，一些国家现有的一般刑事法律可能不足以起诉和打击海盗罪行。反之，可能需要关于海盗罪的具体立法，或者至少需要在一般刑事条款中笼统提及海盗行为，以确保具备起诉海盗的刑事程序。此外，国家检察官和法官往往不具备有效处理这一罪行所需的技术和法律知识，因为这是一种独特的罪行，要理解有待证明的罪行要素以及满足这些要素所需的证据类型，可能需要特别的指导。⁴⁷ 尽管批准《海洋法公约》是各国同意受国际法约束的最明确表示，也是一项必要的法律行为，但这还不足以使各国有效履行义务。这一情况同样适用于与海盗行为有关的习惯国际法和仍然对六个国家有效的《公海公约》。换句话说，一国不能仅凭它是相关两项公约之一的缔约国，或仅依靠习惯国际法来合法打击海盗行为。即使国际法已经界定了打击海盗行为的法律框架，但还是需要各国的国内法将海盗行为定为犯罪。⁴⁸

18. 除了缺乏国内法和某些关于海盗行为的国内法已过时之外，还存在海盗法的统一问题。一些国家的国内法只将海盗行为与在公海上实施的行为联系起来，而另一些国家的法律只将海盗行为与其领海或专属经济区内的行为联系起来。⁴⁹ 理想的情况是，各国对领海以外所有地区的海盗行为拥有相同或相似的法律。

⁴² Dutton, “Maritime piracy and the impunity gap” *supra* note 4 at 1143-44.

⁴³ 同上，第 1152 页。

⁴⁴ 同上，第 1116 页。

⁴⁵ Mahinga, Jean-Grégoire, “L’affaire du Ponant” (2008) 7 *Revue de droit des transports* 10; Philippe Chapleau & Jean-Paul Pancraccio, *La piraterie maritime : Droit, pratiques et enjeux* (Paris: Vuibert, 2014) at 106-107.

⁴⁶ 联合国海洋事务和海洋法司。“关于海盗问题的国家立法”。可在以下网址查阅：https://www.un.org/depts/los/piracy/piracy_national_legislation.htm。

⁴⁷ See for e.g. Brian Wilson, “Reshaping maritime security cooperation: the importance of interagency coordination at the national level” in Guilfoyle, Douglas, ed, *Modern Piracy: Legal Challenges and Responses* (Cheltenham, UK: Edward Elgar, 2013) 202.

⁴⁸ Anna Petrig & Robin Geiß, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford: Oxford University Press, 2011) at 140-44.

⁴⁹ 联合国海洋事务和海洋法司，上文脚注 46。

D. 澄清海盗与海上武装抢劫的关系⁵⁰

19. 另一个问题与上文 C 节有关，涉及分析和帮助澄清海盗作为一种犯罪行为与另一种罪行海上武装抢劫之间的区别。一般来说，海盗行为是在公海(包括现在被视为专属经济区的海域)发生的一种罪行。⁵¹ 反之，海上武装抢劫罪发生在一国的领海内。⁵²

20. 许多国家似乎都有这两种罪行，但其国内法对这两种犯罪行为的区别，特别是犯罪地点的区别不明确，⁵³ 因此可能会出现“双重定罪”的问题，造成适用法律的混乱。委员会可以根据国际法和国家实践，分析这些罪行应在何时适用，它们之间有何不同，以及它们是否存在联系，作为澄清这方面法律的一种手段，这可能有助于各国制定国内法和行使国家管辖权。

三. 本专题的范围

21. 国家的海上行动，无论是单边还是多边行动，全面有效应对海盗行为的能力有限，私人船只因而易受攻击。这种脆弱性导致船主往往与安保公司签订合同来保障自己的海上安全。这种私人海上安保可以包括在私人船只上配备武装保安人员，当其他船只靠近时，他们可能采取致命行动。就预防措施而言，这一现象提出了国际法是否要求或应该要求船旗国、安保公司注册国或其他国家对这类行动进行监管的问题。⁵⁴ 根据 1982 年《公约》，私人船只无权进行紧追。因此，作为海盗行为受害者的私人船只无法根据海洋法采取执行行动。委员会不妨考虑这一领域的法律和实践，以了解国际法是否禁止私人船只采取这种行动，如果是，那么这类行动与遭到海盗袭击时的防御行动之间的界线在哪里。

22. 1982 年《海洋法公约》仅允许公用船只追逐海盗，如军用船只和行使公务的其他国有船只。⁵⁵ 委员会可以根据当代国家实践，分析这些规则在海盗和海上武装抢劫背景下的运用情况，并考虑 1982 年《公约》就此制定的规则是否具备对所有国家有约束力的习惯国际法地位。

23. 事实上，在公海犯罪的海盗知道，如果停留在公海或专属经济区，任何国家都可以依据普遍刑事管辖权追捕他们。为了避免这种情况，他们在实施海盗行为后，通常会迅速转移到最近的某国领海，以逃避外国船只的追捕。此外，许多国

⁵⁰ Melda Kamil Ariadno, “Maritime Security in South East Asia: Indonesian Perspective” (2009) 7:1 Indonesian Journal of International Law 88 at 95.

⁵¹ 《联合国海洋法公约》，上文脚注 1，第五十八和一〇一条；Anna Petrig, “Piracy” in Donald Rothwell et al, eds, *The Oxford handbook of the law of the sea* (Oxford: Oxford University Press, 2016) 844 at 848-49.

⁵² Petrig, “Piracy” *ibid* at 851-52.

⁵³ 联合国海洋事务和海洋法司，上文脚注 46。

⁵⁴ Ilja Van Hespren, “Protecting merchant ships from maritime piracy by privately contracted armed security personnel: a comparative analysis of flag state legislation and port and coastal state requirements” (2014) 45:3 Journal of Maritime Law and Commerce 361.

⁵⁵ 《联合国海洋法公约》，上文脚注 1，第一一一条。

家没有能力控制其领海，这促使海盗转移到这些水域行动，袭击和攻击等待入港的船只。⁵⁶

24. 正是为了解决这一问题，安全理事会破例授权外国海军从邻近的公海和专属经济区进入索马里领海追捕海盗船。此外，安理会还授权外国海军船只经索马里政府同意，进入索马里领海追捕海盗船。与此同时，安全理事会明确表示，“本决议的规定仅适用于索马里局势，不影响国际法为会员国规定的权力和义务或责任”，⁵⁷ 这意味着这些规定应在 1982 年《海洋法公约》确立的打击海盗的法律框架⁵⁸ 和习惯国际法规则下执行。

25. 关于被指控罪犯的权利，被控实施海盗行为的人有权获得公平待遇，包括公平审判，其权利根据国内法和国际法得到充分保护，这体现在与起诉海盗相关的国内法院判决和国际法院裁决的判例中。⁵⁹

26. 在公海上被抓获的人不属于任何国家的主权管辖范围，委员会可以对这类人员上述权利的行使情况进行分析，以澄清这些权利在这种情况下如何行使。

27. 本专题的范围仅限于防止和打击海盗和海上武装抢劫行为。专题将讨论以下问题：对海盗行为的定义，以《联合国海洋法公约》条款为背景，并考虑海盗行为当前和不断演变的各个方面，以及国际海事组织等相关国际组织提供的定义。需要处理的其他要素包括：对海盗行为的处罚；在打击海盗方面开展合作；对海盗罪行使管辖权，包括刑事定罪、追捕、逮捕、拘留、引渡、海盗嫌疑人移交协议、司法协助、起诉、调查、证据、判决、海盗嫌疑人的权利、海盗和海上武装抢劫受害者的权利等问题。

四. 本专题符合列入国际法委员会长期工作方案的要求

28. 要将一个专题列入国际法委员会的长期工作方案，必须证明它符合以下标准：(a) 专题应反映各国在逐渐发展和编纂国际法方面的需要；(b) 专题应在国家实践方面处于足够成熟阶段，从而允许逐渐发展和编纂；(c) 专题应具体可行，宜于逐渐发展和编纂；(d) 委员会不应局限于传统专题，也可考虑反映国际法新动态和整个国际社会紧迫关切事项的专题。⁶⁰

29. 海盗和海上武装抢劫行为这一专题符合列入委员会长期工作方案所需的标准。

⁵⁶ Joseph M Isanga, “Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes” (2010) 59 American University Law Review 1267 at 1273.

⁵⁷ 联合国安全理事会正式纪录，第 66 年，第 6635 次会议，联合国文件，S/RES/2015 (2011 年)，序言部分。

⁵⁸ 联合国安全理事会正式纪录，第 63 年，第 5902 次会议，联合国文件，S/RES/1816 (2008 年)，序言部分。

⁵⁹ Douglas Guilfoyle, “Counter-Piracy Law Enforcement and Human Rights” (2010) 59:1 International and Comparative Law Quarterly 141；另见参考文献选编，第 4 项。

⁶⁰ 见国际法委员会，《国际法委员会第五十届会议工作报告》，联合国大会正式纪录，第五十三届会议，补编第 10 号，联合国文件，A/53/10 (1998 年)，第 553 段；国际法委员会，《国际法委员会第六十九届会议工作报告》，联合国大会正式纪录，第七十二届会议，补编第 10 号，联合国文件，A/72/10 (2017 年)，第 32 段。

30. **第一：**本专题符合各国逐渐发展该领域国际法的需要。事实上，本专题得到了全球性的关注，因为正如本大纲导言部分所示，这个专题关系到整个国际社会。正因为这一关切的全球性，所以联合国大会和安全理事会通过了若干关于打击海盗和海上武装抢劫行为的决议。沿海国、船旗国、港口国、海盗或海上武装抢劫行为受害者所属国、内陆国、私营海运业行为者(船主、托运人、海上保险公司等)，无论是货物的装载者、接收者、进口商或出口商、还是国际组织，都希望海上没有任何安全问题和犯罪，从而确保国家的发展及所有人的安全和社会经济福祉。

31. **第二：**本专题值得委员会审议，因为已有的国家实践适于就本专题编纂和逐渐发展国际法。如上所述，有些全球和区域条约及其他文书可以从本专题的角度进行分析。此外，根据联合国海洋事务和海洋法司秘书处提供的数据，有 70 多个国家通过了防止和打击海盗和海上武装抢劫行为的立法。这一实践在现阶段已经足够成熟，并将随着更多关于海盗问题的拟议法案逐渐成为适用法律而进一步发展。在这方面，几个非洲沿海国家已向各自的议会提出了法案，这些法案应在不久的将来获得通过。总体而言，关于这一专题的现有立法代表了世界的主要区域和主要法律体系，因为它们来自非洲、欧洲、亚洲、美洲和加勒比地区。

32. **第三：**本专题值得根据适用的法律进行分析，同时铭记其具体性、实际性和可行性。专题不会造成任何特别困难，因为大多数工作将涉及现有国际法：1982 年《海洋法公约》编纂的现行法，该法界定了海盗和海上武装抢劫行为的法律制度和框架。除了现有的和仍在发展的国家实践之外，我们可以依靠其他普遍性法律文书，如《制止危及海上航行安全非法行为公约》和国际海事组织在 2005 年至 2012 年期间通过的关于海盗和海上武装抢劫行为的相关决议。有大量关于本专题的学术著作(见下文参考文献选编)和国家判例(美国、英国、法国、西班牙、坦桑尼亚、肯尼亚、塞舌尔、欧洲人权法院的欧洲判例、日本、韩国等)。将根据适用的国内法及其执行的相关国际法对这些国内司法裁决进行分析。将考虑联合国环境规划署(环境署)区域海洋方案界定的每个海洋区域和区域海的特定地理背景，对各区域针对世界不同海域发生的海盗和海上武装抢劫行为采取的办法进行分析。

33. **第四：**与海盗和海上武装抢劫行为有关的国际法完全属于委员会传统上处理的专题范围，因为委员会长期以来一直处理与海洋法有关的规则。正因如此，将本专题列入长期工作方案原则上不应造成任何问题，因为本专题是整个国际社会迫切关注的问题。

五. 方法

34. 《联合国海洋法公约》与海盗行为有关的规定将是这项研究的出发点。因此，如上所述，讨论这一专题的目的不是要改变这些规定。此外，对于本专题中不受此类条约直接管制的方面，将通过这方面的其他文书和国家实践进行分析，以便以可能有助于各国的方式，进一步编纂或逐渐发展国际法。所分析的国家实践，无论是立法还是国内法院裁决，将包括所有可能或真正关注保护海洋免受海盗和海上武装抢劫危害的国家的实践。这些国家包括沿海国、船旗国、港口国、内陆国、可能对海盗行为受害国民行使主动或被动管辖权的国家，还包括其他有关行为体和国际组织。

六. 成果形式

35. 本专题的目标可以是制订关于防止和打击海盗和海上武装抢劫行为的条款草案。随着专题的展开，是否适合就本专题制订新公约的问题可能会更加明朗，在这种情况下，条款草案仍将是委员会工作的适当形式。然而，如果发展本专题的最好方式显然是只为各国履行现有国际义务提供指导意见，则成果可改为“结论”或“准则”。

七. 参考文献选编

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Africa

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Kenya: *Act 4 of 2009 – Merchant Shipping, Part XVI – Maritime Security, articles 369-372*

Liberia: *Title 26 of the Liberian Code of Laws Revised and Approved July 22, 2008, Vol.IV, page 816, Article 15.31. Piracy*

Morocco: *Code disciplinaire et penal de la marine marchande, Annexe2 du Code maritime de 1919, Article 23(3) crime de piraterie*

South Africa: *Act No.42, 2002, Defence Act 2002, Chapter 4: Law Enforcement Powers of Defence Force at Sea*

Tanzania: *Penal Code, Chapter 16 of the Laws (Revised)*

Togo: *Ordonnance No.129 du 12 Aout 1971, Code de la Marine Marchande, révisée en 2018 ?*

Union des Comores: *Projet de code maritime, Article 81 (sur la piraterie maritime)*

Americas

North America

Canada: *Criminal Code (2009); C-46, Part II, Sections 74-75*

United States of America: *18 U.S.C. §2280; 18 U.S.C.§ Piracy under law of nations; 18 U.S.C.§ 1652 Citizens as pirates*

Latin America and the Caribbean

Argentina: *Penal Code, Chapter III (piracy), Articles 198 and 199*

Argentina: *Penal Code, Section VII, « Crimes against Public Safety », Chapter III- Piracy, Articles 198 and 199*

Bahamas: *Penal Code, Chapter 84, Article 404 (piracy)*

Brazil: *Criminal Code, as Decree Law No 2828 from 7 December 1940, Chapter II, Article 157: Robbery and Extorsion*

Chile: *Codigo Penal : Titulo I del Decreto No.5839 de 30 de septiembre de 1948, Art.6 (7): la pirateria*

Cuba: *la Ley No. 93 de 20 de Diciembre de 2001, « Ley contra actos de terrorismo », Capitulo IV: Actos contra la Seguridad de la Navegacion Maritima, Articulo 16.1 ; Capitulo VI : Otros Actos que Atentan contra la Seguridad Aerea y Maritima, Articulo 21*

Guatemala: *Decreto Numero 56-96*

Mexico: *Federal Penal Code, Chapter I: Piracy, Article 146 (I, II, III)*

Asia

Indonesia: *Penal Code, Chapter XXIX, Article 438-448*

Iran: *Islamic Punishment Act, Article 683, Article 185*

Japan: *Law on Punishment of and Measures against Acts of Piracy*

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Czech Republic: *Law No.40/2009 Coll., Criminal Code, January 1, 2010, Section 290 (Gaining Control over the Aircraft, Civil Vessel and Fixed Platform)*

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10 International Cooperation

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