Leaving the Corsair's Name to Other Times: How to Enforce the Law of Sea Piracy in the 21st Century through Regional International Agreements

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NOTES

"LEAVING THE CORSAIR'S NAME TO OTHER TIMES:"

HOW TO ENFORCE THE LAW OF SEA PIRACY

IN THE 21ST CENTURY

THROUGH REGIONAL INTERNATIONAL AGREEMENTS

Timothy H. Goodman*

For him they raise not the recording stone -
His death yet dubious, deeds too widely known;
He left a Corsair's name to other times,
Link'd with one virtue, and a thousand crimes.

- Lord Byron¹

If you had civilian aircraft being threatened or bazookas being
fired at train drivers there would be a public outcry. Because [pi-
racy affects] shipping, it's out of sight, out of mind and nothing is
done.

- Captain Grahame Hicks²

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¹ LORD BYRON, The Corsair 293, in THE POETICAL WORKS OF LORD BYRON

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INTRODUCTION

Ghosts lurk upon the high seas. These ghosts have a name, in Lord Byron's verse,\(^3\) left from other times: piracy at sea. In the end, Byron's fictional corsair,\(^4\) Conrad, "sails away and is never heard [from] again."\(^5\) Unfortunately, sea piracy did not sail away with him. Piracy is alive and well in the modern world.\(^6\) From Orient to Occi-

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\(^2\) *Those In Peril On The Sea*, ECONOMIST, Aug. 9, 1997, at 40 (quoting Captain Grahame Hicks, Secretary of Numast, a major British union representing U.K. merchant marine officers).

\(^3\) At least one scholar recognizes the impact of Lord Byron's lyric tale of piracy. *See* DAVID CORDINGLY, *UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES* xx (1995). The image of pirates as "romantic outlaws..." was given a major boost with the publication of [this] epic poem by Lord Byron." *Id.*

\(^4\) A corsair is the historical designation assigned to "[a] pirate or privateer operating in the Mediterranean. The most famous corsairs were those based on the Barbary Coast of North Africa who were authorized by their governments to attack the merchant shipping of Christian countries." *Id.* at 276. Today, the term generically refers to a pirate or the type of ship utilized by pirates. *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 456 (2\(^{nd}\) ed. 1987).

\(^5\) *See* CORDINGLY, *supra* note 3, at xxi; *see also* LORD BYRON, *supra* note 1.

dent, those who choose to ply the high seas at the end of the 20th century are endangered by increasingly violent acts of piracy and by an international legal regime that lacks an effective enforcement mechanism to suppress piratical attacks from today's would-be Algerine. The sad reality is that no one appears to be paying attention to the contemporary piracy threat.

Contrary to those who may doubt the severity of the problem, "real, live pirates — high-seas buccaneers and murderers — are back with a vengeance." Acts of piracy are dramatically on the rise. Instead of sailing ships and cutlasses, the modern day pirate is equipped

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8 See generally Eric Ellen, Bringing Piracy To Account, JANE'S NAVY IN'T'L, Apr. 1, 1997, at 29 (explaining the violence that typically surrounds contemporary piracy).

9 See Menefee, supra note 7, at 147-50.

10 The term "Algerine" is used to refer to a pirate from Algiers, one of the four North African "Barbary States" — Morocco, Algiers, Tunis, and Tripoli — against which the United States first strongly attacked at-sea piracy threatening American interests in the Mediterranean Sea in the late 18th and early 19th centuries. See KENNETH J. HAGAN, THIS PEOPLE'S NAVY: THE MAKING OF AMERICAN SEA POWER 21-23 (1991).

11 See Those In Peril On The Sea, supra note 2.


with speedboats and machine guns. Although adequate international law exists to suppress piracy, "the fact is that it is simply not used."

The world community is faced with two challenges: preserving the integrity of the "great highway" of global shipping and protecting the safety of individuals on the high seas. Given these challenges and the pervasiveness of the threat, this Note explicates the prospects of enacting regional international agreements to suppress piracy within Southeast Asia, Africa, and the Americas. By doing so, the world community can regionally act to vanquish the "Corsair's name to other times."

Part I of this Note analyzes the legal-historical background of piracy. Part II examines the nature of the modern-day piracy threat. Part III sets forth a proposed solution, termed regional "Piracy Charters," examines the policy grounds supporting a regional approach, identifies the elements of a Piracy Charter, and analyzes the resultant policy implications that flow from establishing among groups of states regional enforcement machinery to attack piracy with true muscle. Part IV concludes with some final observations.

15 Ellen, supra note 8, at 32.
16 Admiral Alfred Thayer Mahan, the preeminent American naval and sea power strategist, refers to the sea "from the political and social point of view [as] ... a great highway ... over which men may pass in all directions, but ... some well-worn paths show that controlling reasons have led them to choose certain lines of travel rather than others. These lines of travel are called trade routes." ALFRED THAYER MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY: 1660-1783, 25 (1892).
17 In 1996 alone, the economic loss due to pirate attacks on shipping was approximately $200 million dollars. See Sri Lanka to Introduce Laws to Combat Sea Piracy, XINHUA ENGLISH NEWSWIRE, Aug. 19, 1997, available in 1997 WL 11193876.
18 Other commentators have proposed regional solutions to piracy. Among those commentators, Menefee proposed in 1990 that regional approaches to combat piracy would be advantageous. See Menefee, supra note 7, at 149-50. However, this Note is distinguishable from Menefee's proposal, and other scholarship which has proposed a regional anti-piracy solution, in that it explains what a regional piracy solution might actually look like and provides a recent historical premise for embracing such a plan.
19 LORD BYRON, supra note 1.
20 See, e.g., Menefee, supra note 7, at 148-50. As noted by a current senior official at the U.S. Navy with over 20 years of seagoing experience, the author recognizes that this Note proposes regional cooperation among states which because of, among other reasons, historical, political and cultural differences may not have cooperated
I. PIRACY'S LEGAL-HISTORICAL BACKGROUND

Piracy at sea has haunted the world community for thousands of years. Although scholars and practitioners cannot agree upon a single contemporary definition of piracy, it is understood that piracy generally consists of "illegal acts of violence, detention or any act of depredation" aimed against a ship, its crew, or its manifest "for private ends."

Together extensively in the past. However, the author opines that given the severity of the modern piracy threat, a Piracy Charter might even pave the way for greater regional cooperation in other spheres in the future. Telephone Interview with James J. McTigue, Captain, U.S. Navy, Assistant Chief of Naval Personnel (PERS 6), and Commanding Officer of the warships USS Philippine Sea (CG 58), 1994-96; and USS Simpson (FFG 56), 1987-90 (Mar. 28, 1998) (summary notes on file with Case Western Reserve Journal of International Law).

21 See, e.g., E. KEBLE CHATTERTON, THE ROMANCE OF PIRACY, 17-150 (1915) (recounting, among other things, the history of piracy from the time of the Greeks and Romans through the time of the English pirate Captain Morgan in the mid-17th century). Even the young Julius Caesar was captured by pirates when traveling from Rome to Rhodes, Greece. See id. at 27. "During the Dark Ages (476-1000 A.D.), sea raiders were the scourge of... Greece... Throughout the Middle Ages, the Vikings were the most feared pirates of the Baltic and North Seas." Grissim, supra note 13, at C4. See also generally ALFRED P. RUBIN, THE LAW OF PIRACY (U.S. Naval War College Int'l Law Studies “Blue Book” Series No. 63, 1988) (providing an excellent account of the origins and development of the international law of piracy); THE GREAT SHIPS: THE PIRATE SHIPS (History Channel broadcast, Feb. 17, 1998) (chronicling, among other things, the so-called “Great Age” of piracy, which featured the likes of Captain Kidd and Edward Teach, also known as “Blackbeard”). This informative documentary also features historical perspectives by Dr. David Cordingly, whose scholarship is cited in this Note, supra note 3.

22 At least one legal commentator doubts "that an international agreement, be it in the form of convention, treaty, protocol, or exchange of notes, could be agreed upon regarding a [single] modern definition of piracy." Barry H. Dubner, Piracy in Contemporary National and International Law, 21 CAL. W. INT’L L. J. 139, 142 (1990-91).


For the landlubber, Davy Jones's Locker is, in the words of William A. Wheeler:

[a] familiar name among sailors for Death, formerly for the evil spirit who was supposed to preside over the demons of the sea. He was thought to be in all storms, and was sometimes seen of gigantic height, showing three rows of sharp teeth in his enormous mouth, opening great frightful eyes, and nostrils which emitted blue flames. The ocean is still termed by sailors Davy Jones's Locker.


See, e.g., The Trial of Joseph Dawson, Y.B. 8 Will. 3 (1696), 13 How. St. Tr. 455 (1697) (describing an old English municipal trial at the Old Bailey for piracy on the high seas) cited in, Barry H. Dubner, *The Law of International Sea Piracy* 1-2 (1980). See also The Bounty Act, 1825, 6 Geo. 4, ch. 49 (Eng.) ("An Act for encouraging the capture or destruction of piratical Ships and Vessels"); Offences at Sea Act, 1536, 28 Hen. 8, ch. 15 (Eng.) (old English piracy at sea law). These older anti-piracy statutes, as well as others in the Anglo-American legal experience, are highlighted by Rubin, supra note 21, at 359-85.

"Jamaica Discipline" refers to the Articles for the Government of Pirate Ships during the 18th century. The Articles served as a type of "social contract" amongst pirates. See Michael Walzer, *The Hard Questions: Piracy Isn’t What It Used to Be*, New Republic, Apr. 28, 1997, at 29. The Articles generally stipulated that:

the captain took two shares of all stolen booty, the officers one and one-half and one and one-quarter depending upon rank, while all the crew shared alike. In order to prevent quarrels and brawls aboard ship, gambling and the bringing of women aboard ship were prohibited. Indulgence in strong drink could only take place on deck after 8:00 p.m.

Mack & Connell, supra note 24, at 260.

See generally Hagan, supra note 10, at 21-37, 54-62 (providing an excellent account of the Barbary pirate crisis by a preeminent U.S. naval historian on the faculty of the United States Naval Academy, Annapolis, Maryland).
and roamed it in swift corsairs, encouraged by their rulers to prey on the vessels of any nation which refused to pay the price of 'protection.'

International law has long been considered a part of American law. The Founding Fathers understood American law to include piracy and "felonies committed on the high seas." Given the substantial threat against American interests on the high seas, piracy was a key concern at the 1787 Constitutional Convention at Philadelphia. Concerns over the threat of piracy prompted the Founding Fathers to include in Article I, Section 8 of the Constitution the power of Congress to define and punish piracy.


29 See, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that "[i]nternational law is part of our [domestic U.S.] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction"); see also, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 451 (1964) ("part of the law American courts are bound to administer is international law"). The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111(1)-(2) (1987) agrees: "[i]nternational law and international agreements of the United States are law of the United States such that "[c]ases arising under international law... are within the Judicial Power of the United States and... within the jurisdiction of the federal courts."

30 THE FEDERALIST NO. 42, at 212 (James Madison) (Buccaneer Books 1997) (stating that "[t]he definition of piracies might perhaps without inconvenience, be left to the law of nations; though a legislative definition of them, is found in most municipal codes. A definition of felonies on the high seas is evidently requisite").

31 See HAGAN, supra note 10, at 21-37, 54-62.

32 Id. The American historian Thomas A. Bailey even went so far as to opine that "in an indirect sense, the brutal Dey of Algiers was a Founding Father of the Constitution." See MARKS, supra note 28, at 50 & n.72 (citing THOMAS ANDREW BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 65 (1955)). See also THE FEDERALIST NO. 42, supra note 30, (stating that "[t]he power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, belongs... to the general government, and is a still greater improvement on the articles of confederation").

33 U.S. CONST. art. I, § 8, cl. 10. ("The Congress shall have Power... to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations").
Pursuant to this grant of legislative authority, Congress adopted statutes to combat piracy in 1790.\textsuperscript{34} Since that time, under its authority to define and punish piracy, and regulate commerce,\textsuperscript{35} and in concert with the federal judiciary's power to adjudicate "all Cases of admiralty and maritime Jurisdiction,"\textsuperscript{36} Congress has passed a host of statutes that impose sanctions for piracy.\textsuperscript{37}

Applying this law of piracy, a federal court in 1813 declared that "[m]urder and robbery, committed on the high seas, . . . amount to piracy," and "is clearly bottomed upon the principles of the maritime law of nations, with which the common law . . . agrees."\textsuperscript{38} Another federal court termed piracy a universal crime such that "all nations [have] surrendered their subjects [if found to be pirates] to the punishment which any government might inflict upon them."\textsuperscript{39} By the

\textsuperscript{34} The First Congress passed "An Act for the Punishment of Certain Crimes Against the United States," which, among other things, provided for the punishment of piracy. Act of Apr. 30, 1790, 3 Stat. 112. Congress subsequently adopted additional laws against piracy in 1819, proscribing that "if any person . . . shall, on the high seas, commit the crime of piracy as defined by the law of nations . . . upon conviction thereof . . . [he] shall be . . . punished with death." Act of Mar. 3, 1819, 3 Stat. 513, 513-14.

\textsuperscript{35} See U.S. CONST. art I, § 8, cl. 3 (the Commerce Clause).

\textsuperscript{36} U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority; . . . [and] to all Cases of Admiralty and maritime Jurisdiction"). The meaning of this clause is considered at length in De Lovio v. Boit, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776). This case is considered "the Marbury v. Madison of American admiralty law." Henry Billingsley, Esq., Adjunct Professor of Law, Case Western Reserve University School of Law, Admiralty Law Class Lecture (Jan. 20, 1998) (summary notes on file with Case Western Reserve Journal of International Law).


\textsuperscript{38} United States v. Jones, 26 F. Cas. 653, 655-656 (C.C. D. Pa. 1813) (No. 15,494) (finding the defendant privateer guilty of piracy against the Portuguese brig \textit{Triumph of Mars}).

\textsuperscript{39} United States v. Chapels, 25 F. Cas. 399, 403 (C.C. D. Va. 1819) (No. 14,482). The proposition that piracy is a universal crime continues today. See, e.g., \textit{Restatement (Third) of the Foreign Relations Law of the United States} § 404.
mid-1800s, the Supreme Court of the United States recognized piracy as a universal crime and like other tribunals, termed the pirate *hostis humani generis* (a foe of all mankind):

[A pirate is a foe of all mankind] because he commits hostilities upon the subjects and property of any and all nations, without any regard to right or duty, or any pretence of public authority. If he willfully sinks or destroys an innocent merchant ship, without any other object other than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, [both] in the sense of the law of nations, and of the act of Congress.  

Punishment for piracy on the high seas, however, did not fade with the mid-19th Century, nor was it confined to the American experience. In the early 1900s, Commonwealth courts refined the meaning of piracy on the high seas. A seminal case in which this meaning was examined was the English case *Bolivia v. Indemnity Mutual.*  

In affirming the judgment of the trial court that the Bolivian rebel incident was not a loss instigated by “pirates, rovers, and thieves,”  

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40 United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844) (Story, J.). The significance of this decision is also noted by Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy, and the IMO Convention on Maritime Safety,* 82 AM. J. INT’L L. 269, 273-74 (1988). In yet another case, the U.S. Supreme Court rejected the proposition that Africans, who rose up against the master of the Spanish schooner *L’Amistad* on the high seas while being illegally transported to the Americas for enslavement, could be considered pirates under the law of nations. See *The Amistad,* 40 U.S. 518, 593-94 (1841); see also *AMISTAD* (Dreamworks SKG 1997) (recent Steven Spielberg film chronicling the *Amistad* dispute).  

41 Republic of Bol. v. Indemnity Mutual Marine Assurance Co., Ltd. [1909] 1 K.B. 785 (Eng. C.A.). In this case, the government of Bolivia brought action against the defendant insurance company under policies procured for goods it owned onboard a steamship, the *Labrea,* operating in South American rivers between Brazil and Bolivia. See id. at 786. Of the named perils on the Bolivian insurance policy, Indemnity Mutual agreed “to be made liable [for losses incurred by] pirates, rovers, [and] thieves.” Id. Rebel troops in a break-away region of Bolivia came upon the *Labrea* on an inland waterway and, upon finding that she was carrying goods for the Bolivian government, sacked her cargo. See id. at 787-789. The Bolivian government claimed this action was piracy, and sought indemnification from Indemnity Mutual. See id. at 789.  

42 This phrase is an oft-repeated clause within maritime insurance policies, and was first used by Lloyd’s of London in 1799. Robert Mottley, *Is Your Cargo Insured From Pirates?*, AM. SHIPPER, Jan. 1, 1996, at 67.
the English appeals court held that one of the prerequisites for piracy is the pursuit of *private* rather than *public* ends.\(^{43}\) Thus, held the court, because the Bolivian rebel action against the *Labrea* was directed at the Bolivian state, it could not be considered piracy.\(^{44}\) Moreover, the court stated that since piracy is a maritime offense, an incident occurring on an inland waterway such as a river could not be considered piracy on the high seas.\(^{45}\) As such, the Bolivian rebels were not "pirates in such a sense as would give any nation a right to deal with them as being ‘*hostes humani generis*’[sic]."\(^{46}\)

The *Indemnity Mutual* court refined the definition of piracy for 20\(^{th}\) century international jurisprudence. The court determined that piracy must be for private gain, conducted on the "high seas," and within international — not state — jurisdiction. Based upon this definition, in 1927, the Permanent Court of International Justice (P.C.I.J.) at the Hague described piracy:

> [B]y [the] law of nations ... [as a matter of] universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come .... [The pirate] is treated as an outlaw, as the enemy of all mankind — *hostis humani generis* — whom any nation may in the interest of all capture and punish.\(^{47}\)

The P.C.I.J., unlike the English court in *Indemnity Mutual*, carefully noted that piracy does not "embrace all acts of plunder and violence .... simply because [such acts occur] on the high seas," since this could conceivably reduce any maritime activity to "piracy.\(^{48}\) Rather, "the distinctive mark of piracy is independence or rejection of

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\(^{43}\) *See Indemnity Mutual*, [1909] 1 K.B. at 796 (Williams, J.) (emphasis added); *see also id.* at 803 (Kennedy, J.) (noting that pirates are "those who plunder indiscriminately for their own gain, not persons who operate solely against the property of a particular Government").

\(^{44}\) Lord Judge Williams also noted that "[t]he man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds." *Id.* Thus, the rebels' actions of alleged "piracy" were not a covered peril under the insurance policy. *See also id.* at 803-04 (Kennedy, J.).

\(^{45}\) *See id.* at 799.

\(^{46}\) *Id.* at 804 (Kennedy, J.) (emphasis added).

\(^{47}\) *S.S. Lotus*, (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 9, at 70 (Sept. 7) (Moore, J., diss.).

\(^{48}\) *Id.* at 71 (internal quotations omitted).
State or other equivalent authority,"\textsuperscript{49} excluding acts done for so-called "political" or public ends, versus "private ends."\textsuperscript{50}

The next notable development in international piracy law came after the Second World War. In 1958, the world community attempted to codify piracy law in the Geneva Convention on the High Seas, a multilateral treaty that formally defined piracy and every state's obligation to combat it.\textsuperscript{51} The Geneva Convention contains several articles on piracy\textsuperscript{52} that are largely restated in the most recent international agreement that governs piracy, the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

UNCLOS essentially confirms the holding of \textit{Indemnity Mutual} that piracy must be for "private ends,"\textsuperscript{53} conducted "on the high seas,  

\textsuperscript{49} \textit{Id.} (internal quotations omitted).

\textsuperscript{50} See \textit{id.} The so-called ""private ends' controversy" still pervades contemporary piracy legal scholarship. \textit{See}, e.g., Menefee, \textit{supra} note 7, at 142-143. A definition of piracy restricted to private ends appears to run counter to the case of the Barbary States crisis, in which pirates acted under the \textit{de facto}, if not \textit{de jure}, control of foreign powers. \textit{See} HAGAN, \textit{supra} note 10, at 21-37, 54-62. Indeed, as observed by Halberstam, \textit{supra} note 40, at 274, at least one federal court took the position rejected by the majority in \textit{Indemnity Mutual} and included insurgents within the definition of piracy. \textit{See} The Ambrose Light, 25 F. 408, 422-25 (S.D.N.Y. 1885) (applying the international laws of piracy against the crew of the Colombian insurgent vessel Ambrose Light, seized by the U.S. Navy in the Caribbean Sea in June 1885, even when the act in question involved "private ends"). The private ends requirement would also appear to run counter to more recent examples of arguable piracy, such as the 1985 \textit{Achille Lauro} hijacking. \textit{See generally} Halberstam, \textit{supra} note 40, at 269-70, 276-91 (discussing, among other things, the \textit{Achille Lauro} incident, and the history of the private ends versus public ends controversy in international piracy law). For a possible explanation for this contemporary "private ends" requirement, see \textit{infra} note 53.

\textsuperscript{51} \textit{See} Geneva Convention, \textit{supra} note 23, arts. 14-22.

\textsuperscript{52} \textit{See id.} The Geneva Convention was based upon a draft agreement proffered by the International Law Commission during the 1950s. \textit{See} Menefee, \textit{supra} note 7, at 140. This draft drew heavily upon the so-called 1932 Harvard Research Draft Convention on Piracy, a product of the Harvard Research Project in International Law conducted at the Harvard Law School. \textit{See id.} at 139-40; \textit{see also} Kahn, \textit{supra} note 23, at 297 & n.19. \textit{See also generally} Harvard Research in International Law, \textit{Draft Convention on Piracy with Comments}, 26 Am. J. Int'l L. 739 (Supp. 1932); \textit{A Collection of Piracy Laws of Various Countries}, 26 Am. J. Int'l L. 887 (Supp. 1932).

\textsuperscript{53} \textit{See} UNCLOS, \textit{supra} note 23, art. 101(a). The codified international law requirement that acts of piracy be for private ends, rather than for public or political ends, is consistent with the 1932 Harvard Research Draft Convention. \textit{See} Halberstam, \textit{supra} note 40, at 277. It appears that the drafters of the Harvard Research Draft, which is the basis of the Geneva Convention and UNCLOS, used "for private
against another ship . . . or against persons or property on board such ship."

UNCLOS also states that piracy must be "outside the jurisdiction of any State," and those committing alleged acts of piracy must have the intent to commit piracy. Further, "[o]n the high seas, . . . every State may seize a pirate ship . . . [and] [t]he courts of the [seizing] State . . . may decide upon the penalties imposed." However, such seizure may be effected "only by warships . . . or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect," and only if the warship has a reasonable belief that the suspect vessel is engaged in piracy. UNCLOS also contains additional provisions relating to piracy suppression. As such, UNCLOS essentially mirrors the content of the Geneva Convention.

II. THE CURRENT THREAT OF PIRACY

Notwithstanding domestic and international legal regimes designed to combat piracy, it is alive and well as we approach the 21st Century. Indeed, it is flourishing. Reported incidents of piracy have

ends" in order to "exclude acts by unrecognized insurgents who limited their attacks to the state from which they were seeking independence." Id.; see also Republic of Bol. v. Indem. Mut. Maine Assurance Co., Ltd. [1909] 1 K.B. 785 (Eng. C.A.). However, "neither the Harvard draft nor the Geneva Convention [upon which the UNCLOS piracy provisions are based] was intended to exclude all attacks that were animated by a political motive." Halberstam, supra note 40, at 277. Thus, historical cases like the Barbary States Crisis, and the Achille Lauro attack, can reasonably be considered acts of piracy.

See UNCLOS, supra note 23, art. 101(a)(i).

Id. at art. 101(a)(ii).

See id. at art. 103.

Id. at art. 105.

Id. at art. 107.

See UNCLOS, supra note 23, art. 110(1).

See id. at art. 110(1)(a) (describing the right to visit a ship when there is "reasonable ground for suspecting that . . . the ship is engaged in piracy); see also id. at art. 111 (describing the so-called right of "hot pursuit" of a vessel suspected of offenses such as piracy).

The only noticeable change is the addition of the proviso that a warship or other craft in government service must be "clearly marked and identifiable" to seize a pirate vessel. See id. at art. 107.

Piracy is truly global in scope. From around the world, Australian courts have considered the definition of piracy in the context of the wrongful taking of a pleasure craft. See, e.g., Societe Maritime Caledonienne v. The "Cythera" and Her Cargo,
risen over 250% since 1994, putting national governments and the shipping industry on heightened guard. Piracy threatens not only economic interests, but people's lives.

While adapting to overcome "modern technical, political, economic, and social developments," today's pirates, like yesterday's pirates, continue to be motivated principally by greed. The wealth


See supra note 13 (justifying the 250% statistic).

For example, several major trading nations have filed formal notice with the International Maritime Organization (IMO). The IMO, originally known as the Intergovernmental Marine Consultative Organization (IMCO), exists to provide "for cooperation among Governments in [areas] . . . affecting shipping engaged in international trade." See Convention on the Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, 9 U.S.T. 621, 623, 289 U.N.T.S. 48. The governments of the Netherlands, Denmark, Sweden, and Norway informed the IMO that recent pirate attacks "show a significant ruthlessness and seem very well organized [sic]." It's a Perilous Life on the Ocean Wave: Tale of a Raid in the South China Sea, GUARDIAN, Sept. 20, 1997, Jobs, at 2. Meanwhile, the U.S. shipping industry calls piracy "a serious and growing problem." Mottley, supra note 42. In fact, the threat has reached a level that supports a market for at least one counter-piracy consulting firm operated by former U.S. Navy Sea Air Land (SEAL) team commanders, Vantage Systems, Inc. of Montana. See Facing the Black Cloud of Piracy: A Captain's Point of View (visited Oct. 14, 1998) <http://www.vantagesecurity.com/pirwood.htm>.

For an example, see the detailed account of Captain Peter Newton, whose ship, Australia Star, was subjected to a relatively violent piratical attack in the South China Sea in April 1992. See It's a Perilous Life on the Ocean Wave, supra note 64, at 3; for a captain's personal assessment, see e.g., Facing the Black Cloud of Piracy, supra note 64.


See Batchelor, supra note 14.
available on merchant vessels and pleasure craft invite plunder. Additionally, the nature of modern shipping exacerbates the problem. The increased automation of modern merchant ships, like smaller private yachts, means a vessel can be manned by smaller crews. Thus, would-be pirates need only subdue a small crew to raid a large merchant ship. With such plunder, pirate attacks have become increasingly "violent, bloody, and ruthless." In 1997 alone, pirates carried guns in sixty-eight cases reported world-wide, and knives in an additional 26 occasions. Incidents of piracy also imperil the safe navigation of shipping, as vessels, fully-loaded and left drifting underway on the high seas, "dramatically [increase the danger of additional loss of life and property by] increasing the risk of collision or running aground." Some cases of piracy have even uncovered a pattern of systematic piratical attacks being sponsored by organized criminal organizations.

In 1994, the International Maritime Bureau (IMB), whose Regional Piracy Centre (RPC) tracks worldwide incidents of piracy, logged ninety reported piratical attacks. One year later, with trans-oceanic international trade continuing at impressive levels, these al-

68 See id.
69 See id.
70 Piracy on the Increase and More Violent - Report, supra note 13 (quoting Eric Ellen, Executive Director, International Maritime Bureau); see also Increase in Piracy: Ships Most Often Hit in Indonesia, Brazil, DEUTSCHE PRESSE-AGENTUR, Feb. 3, 1997, available in LEXIS, World Library, DPA File.
72 Id.
73 See Ellen, supra note 8.
75 The IMB's Regional Piracy Centre is based in Kuala Lumpur, Malaysia. See International Chamber of Commerce: International Maritime Bureau, supra note 75.
76 See Those In Peril On The Sea, supra note 2.
77 See It's a Perilous Life on the Ocean Wave, supra note 64.
ready high statistics more than doubled, with 187 reported cases of piracy worldwide in 1995,79 and rising again in 1996, to 224 reported cases.80 The 1996 data includes twenty-six individual murders committed during the course of piratical attacks.81 1997 statistics confirm that piracy continues to increase in occurrence and violence. The IMB stated that there were 229 reported piracy cases as of December 31, 1997, slightly higher than that reported for 1996.82 Over fifty mariners died in piratical attacks during 1997,83 a near 100% increase over 1996 levels. Additionally, over 400 individuals were taken hostage in 1997, dramatically higher than the 194 hostages reported taken during all of 1996.84

Although daunting, these statistics are actually considered “grossly underreported” by the RPC.85 In fact, the IMB estimates that the actual number of piratical attacks each year could be “at least twice as high” as those actually reported.86 This may be attributed to several factors. The shipping industry likely fears that “official investigations will delay shipments, increase insurance premiums, prompt demands for higher pay by nervous crews, and raise questions about their credibility among clients who can switch carriers at a moment’s notice.”87 Another possibility illustrates “fears of retribution” and pressure on shipmasters to adhere to tight delivery schedules.88 A final explanation focuses on the nature of shipping on the high seas itself

79 See Piracy Declines, But on Soft Data, supra note 13.
80 See Grissim, supra note 13.
81 See id. at C4.
83 See id.
84 See id.
85 Piracy Declines, But on Soft Data, supra note 13; see also Gibson, supra note 6 (quoting IMB Commercial Crime Service Executive Director Eric Ellen).
86 Those In Peril On The Sea, supra note 2 (emphasis added). Assuming that this estimate is underreported, the author questions what the globe’s response would be if there were 500+ aircraft hijackings per year.
87 Pirates? What Pirates?, supra note 6, at 34. To help alleviate these concerns, the IMB recently launched a piracy “rapid-response service” in an effort to provide “national law enforcement agencies with information quickly.” See A Service to Pursue Pirates, NAT’L L.J., Sept. 14, 1998, at A14. “The response team will fly to meet, at its next port of call, a ship that has been attacked by pirates.” Id.
88 Grissim, supra note 13, at C4.
since piracy takes place on the high seas removed from the public's notice. Since piracy takes place on the high seas removed from the public's notice.89

III. THE PROPOSED SOLUTION: REGIONAL "PIRACY CHARTERS"

A. Policy Grounds Supporting the Piracy Charter Concept

Given the renewed vigor of piracy, policy grounds support a regional approach to combat modern piracy. International law enforcement and piracy commentators have identified regionally-based piracy "clusters."90 Marking each regional piracy "cluster" is its "own particular methods, geographical areas, and originating causes."91 In the late 1990s, the three most problematic regions appear to be west and east Africa, Southeast Asia and the Far East, and the Americas, predominantly Brazil.92

In Africa, for example, the piracy cluster is marked by "an emphasis . . . on theft of cargo from vessels at rest."93 In Southeast Asia

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89 See generally Those In Peril On The Sea, supra note 2. See also author's comment supra note 86.
90 The author's proposal for regional anti-piracy regimes is not new. Several commentators in the past have proposed a regional approach to augment the suppression of piracy. See, e.g., Menefee, supra note 7, at 149-150; Blanche & Blanche, supra note 66. While piracy has increased in severity since Menefee's proposal, in the author's analysis, a practical plan of action has yet to be provided by the academic community on how to precisely establish and constitute a regional piracy approach.
91 Menefee, supra note 7, at 131 & n.18 (citing Menefee, Scourges of the Sea: Piracy and Violent Maritime Crime, 1 MARINE POL'Y REP. 13, 16 (1989)).
92 See Ellen, supra note 8, at 30, 31; Mottley, supra note 42.
93 Menefee, supra note 7, at 131. After 1970, merchant ships became particularly susceptible to piracy attacks off the coast of West Africa, as European roll-on roll-off and container ships sometimes were forced to wait for weeks for berths in African ports. See I. R. Hyslop, Contemporary Piracy, in PIRACY AT SEA 3, 8 (Eric Ellen ed., 1989).

These ships became increasingly susceptible to piratical attack as they waited at anchor over 20 miles from the coasts of Nigeria, Sierra Leone, and other West African coastal states. See id. Vessels at anchor were usually attacked at night by groups of pirates operating from small outboard engine boats, occasionally disguised as fishing boats. See id. Occasionally ships were attacked in harbor with gangs of over 100 men, stealing the cargo either to the pier or to awaiting small boats. See id. Pirates typically stayed on board for several hours breaking into cargo containers. See id.

Representative examples of piratical attacks in the African cluster pattern include the August 1982 attack upon the American-flagged American Camellia, which was
and the Far East, the piracy cluster pattern is denoted by the attack of vessels transiting the Malacca Straits and the South China Sea, which generally includes the "theft of valuables and personal possessions" from such ships. Interestingly, "[w]hile Southeast Asia has by far the boarded off the coast of Lagos, Nigeria and robbed by four armed pirates. See Samuel P. Menefee, The United States and Post-War Piracy, in PIRACY AT SEA 61, 73 & n.73 (Eric Ellen ed., 1989) (citing ROGER VILLAR, PIRACY TODAY 112 (1985)). The Export Challenger was robbed in Monrovia, Liberia, and later at Lagos, Nigeria in January and August 1983. See id. at 73 & nn. 73-74 (citing ROGER VILLAR, PIRACY TODAY 112, 115-16 (1985)).

Piracy did not, however, subside in Africa in the 1980s. As recently as October 1996, for example, pirates boarded a Russian fishing vessel off the coast of Sierra Leone wielding AK-47s, causing injury to her crew and making off with various items. See Rashid Yusof, Piracy Cases Shift from Strait to South China Sea, NEW STRAITS TIMES (Singapore), May 4, 1997, at 9, available in 1997 WL 2960071. 94 Menefee, supra note 7, at 131. Incidents of piracy in this region alone were 15 in 1993, rising dramatically to 77 in 1994, and 123 in 1995. See Blanche & Blanche, supra note 66.

The Malacca Straits area is one of the heaviest concentrations of merchant traffic in the world, with more than 200 vessels transiting the Straits every day. Felix Chan, Call to Keep Malacca Straits Open and Safe from Pirates, BUS. TIMES (Singapore), May 7, 1997, available in 1997 WL 7767289. Indeed, maritime traffic in the South China Sea area is expected to triple by the year 2010. Daniel Yergin, Dennis Eklof & Jefferson Edwards, Fueling Asia's Recovery, FOREIGN AFF., Mar./Apr. 1998, at 47.

The Straits area historically has been plagued by pirate activity. Id. It "has enjoyed a lingering cultural and historical acceptability in the area since at least the sixteenth century when impoverished local inhabitants first reacted to the control of their economies by foreigners." Id. "If the straits were not available for transit passage . . . shippers would incur substantial costs to sail between the Indian Ocean and the South China Sea." Id.

Pirates in Southeast Asia are state-of-the-art, and operate with modern equipment. They utilize "mother ships" from which to operate "smaller, faster boats," and often conduct their attacks 50 to 120 nautical miles from shore. See Blanche & Blanche, supra note 66. Pirates approach their targets more often at night, when vessels passing through the area are forced to slow down as they enter the narrow straits, than while a ship is in port. See Hyslop, supra note 93, at 12. The pirates have been known to seize "cash and disposable items, and [have] often make straight for the ship's safe or the crew's cabins." Id. at 13.

Piracy attacks frequently take place near the Horsburgh Lighthouse, 25 miles east of Singapore, as well as in the Phillip Channel, which lies 10 miles east of Singapore. See Hyslop, supra note 93, at 12. A recent representative example of this piratical cluster pattern activity occurred in November 1996. Pirates boarded a Malaysian-flagged gas-oil tanker vessel near the Horsburgh Lighthouse, blind-folded most
highest incident rate of piracy, the Americas surprisingly have the second worst record,95 where the piracy cluster pattern tends to manifest itself, as it does near Brazil, as attacks on vessels at rest.96

Since piratical attacks generally occur within regional boundaries, a logical counter to the piracy threat is to establish regional international agreements. However, the ability of states to suppress piracy is limited by international law, which promotes only individual state action against pirates and makes no provision to encourage, much less coordinate, effective anti-piracy enforcement.97 Although international law articulates that "[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas,"98 no authority has been named or established to ascertain whether or not a nation-state is meeting this obligation.99

Given a multiplicity of interests and responsibilities, a nation-state — as an exercise of its sovereignty within the international system — can let its piracy suppression obligation drift to the wayside.100

dr of the crew, and left them alone at sea in one of the tanker's lifeboats until the fishermen later rescued them. During the attack, the pirates blind-folded most of the crew and left them alone at sea in one of the tanker's lifeboats until fishermen later rescued them. See id.

95 Grissim, supra note 13, at C4.

96 In 1996 alone, there were 30 separate piratical attacks, of which 16 occurred off the coast of Brazil. See id. Most of these incidents occurred while the hapless vessels were at anchor or pierside. Id. Incidents against shipping in the Americas have abounded throughout the late 20th century. Representative cases include the attack upon the U.S.-flagged merchant ship Joseph Lykes, when boarded at rest off the coast of Ecuador on April 12, 1982; her cargo was seized in a classic episode of piracy. See Maneefee, supra note 93, at 73 & n.71 (citing ROGER VILLAR, PIRACY TODAY 142-43 (1985)) The next day, her sister ship, James Lykes, was boarded and robbed by pirates in Cartagena, Columbia. See id. at 73 & n.71 (citing ROGER VILLAR, PIRACY TODAY 112, 143 (1985)). These piracy incidents have continued into the 1990s. In March 1997, armed pirates boarded an Antiguan ship at anchorage off the coast of Rio De Janeiro and stole $30,000 in cash and valuables from the crew. See Grissim, supra note 13, at C4.

97 See Blanche & Blanche, supra note 66, at 26.

98 UNCLOS, supra note 23, at art. 100.

99 See Maneefee, supra note 7, at 147.

100 International law supports that "a state has . . . sovereignty over its territory and general authority over its nationals." See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206(a) (1987). A state also has "status as a legal person, with capacity to own, acquire, and transfer property, to make contracts and enter into international agreements, to become a member of international
For example, the governments of Brazil and the People’s Republic of China have been criticized for not attacking piracy. A series of multilateral piracy agreements, or “Piracy Charters,” would alleviate this problem by encouraging groups of states to create and enforce meaningful regional anti-piracy mechanisms.

A regional approach to the piracy issue appears particularly appropriate in light of the growing trend toward international regionalism. In the post-Second World War era, numerous states elected to create regional organizations as envisioned by the United Nations Charter. The Organization of American States (OAS), the North Atlantic Treaty Organization (NATO), and the Organization for African
organizations, [and] capacity to join with other states to make international law.” Id. at §§ 206(b)-(c).

101 See Increase in Piracy: Ships Most Often Hit in Indonesia, Brazil, supra note 71.

102 See Ellen, supra note 8, at 32-34; see also Faison, supra note 75, at 13 (discussing the lack of Chinese support for suppressing piracy in Southeast Asia); China Clippers, ECONOMIST, Mar. 26, 1994, at 44 (describing disturbing allegations that rogue elements of the naval component of the People’s Liberation Army (PLA) might even be responsible for some pirate activity in the South China Sea).

103 See Menefee, supra note 7, at 149-50.

104 See, e.g., JOSEPH S. NYE, INTERNATIONAL REGIONALISM v (1968) (calling regionalism, among other things, “the next big step forward in international cooperation”) (internal citations deleted). Regionalism in international politics typically arises when certain key factors are present, namely “social and cultural homogeneity . . . similar attitudes or similar patterns of external behaviour [sic] . . . a high degree of common ideals . . . political and/or economic interdependence . . . and a strong link of geographic contiguity.” Eibe Riedel, The Progressive Development of International Law at the Universal and Regional Level, in STRENGTHENING THE WORLD ORDER: UNIVERSALISM v. REGIONALISM 115, 132 (1990). See also generally Alan K. Henrikson, The United Nations and Regional Organizations: “King-Links” of a “Global Chain?,” 7 DUKE J. COMP. & INT’L L. 35 (1996) (further explaining the relevance of regionalism in modern geopolitics).

105 Regional organizations, as international organizations, have rights and duties under international law as provided for in the agreements creating them. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 223(b) (1987).

106 See U.N. CHARTER arts. 52, 53 (discussing the creation of “regional arrangements”).


rican Unity (OAU),¹⁰⁹ are but three examples where nation-states within a particular region have formalized relationships that provide for greater visibility and responsibility for achieving common objectives.¹¹⁰ Regional organizations can also effectively combat universal threats to security, including piracy.¹¹¹

At least one British shipping representative recently asked the United Kingdom to lead the establishment of an “international anti-piracy task force,” under the mandate of the United Nations.¹¹² However, such a United Nations-led anti-piracy campaign is unnecessary. The existing UNCLOS provides a jurisdictional avenue for the creation of regional groupings in maritime law:

Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.¹¹³

¹¹⁰ See Henrikson, supra note 104, at 38-52 (discussing the advantages of current regional arrangements).
¹¹¹ In January 1993, the U.N. Security Council in fact invited regional organizations “to give priority consideration to the study of the ways and means of strengthening their structures and functions” to respond to concerns “in the field of international peace and security.” Report of the Secretary-General on the Work of the Organization, U.N. GAOR, 49th Sess., Supp. (No. 1), at 92, U.N. Doc. A/49/1 (1994). Former U.N. Secretary-General Boutros Boutros-Ghali also noted that “greater involvement of regional organizations and arrangements . . . can provide special insights into conflicts in their regions and can sometimes respond more quickly militarily.” Boutros Boutros-Ghali, Beleaguered Are the Peacekeepers, N. Y. TIMES, Oct. 30, 1994, sec. 4, at 15. The Secretary-General’s logic appeared to be at work when, in December 1995, the United Nations officially transferred authority to NATO forces in Bosnia-Herzegovina for further implementation of the Dayton Peace Agreement. See Henrikson, supra note 104, at 36.
¹¹² Those In Peril On The Sea, supra note 2 (quoting Captain Grahame Hicks).
¹¹³ UNCLOS, supra note 23, at art. 311(3). The author notes that Menefee, too, recognizes this jurisdictional avenue. See Menefee, supra note 7, at 149.
UNCLOS appears to invite a regional, "Piracy Charter" enforcement approach to piracy provided that such Charters remain consistent with existing international rights and obligations.

B. The Elements of a Piracy Charter

With the policy grounds in support of a regional Piracy Charter clearly identified, such a Charter should include the following minimum elements:

(1) Reaffirmation of a signatory State's obligation, as Party to the Piracy Charter, to suppress piracy according to the custom and practice of international law, including all relevant international agreements currently in force;

(2) The obligation of each Party to secure and promote the safety of the vessels, shipping, and nationals of all Parties to the Piracy Charter;

(3) The obligation among Parties to establish a regional enforcement mechanism to suppress piracy. This mechanism would take place within the framework of designated maritime zones, or "Joint Patrol Areas," (JPAs), in which each Party's navy and maritime law enforcement would police the region's waters, arrest individuals, and seize offending vessels.

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114 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301(2) (1987) ("[P]arty' means a state or international organization that has consented to be bound by the international agreement and for which the agreement is in force"). See also infra note 156 (providing the Restatement definition of "consent to be bound").

115 See UNCLOS, supra note 23, at arts. 100-07. This reaffirmation could include a restatement or reaffirmation of the definition of piracy under current international law. See id. at art. 101. See also supra notes 51-61 and accompanying text.

116 Language embodying these heightened obligations among the Parties to the Piracy Charter could be referenced to UNCLOS, with appropriate semantics to effect the necessary obligation. See UNCLOS, supra note 23, at arts. 100-07, 110-11.

117 Such JPAs have already been proposed in Southeast Asia by Malaysia and the Philippines. See Blanche & Blanche, supra note 66. Such proposals appear to be gaining support, for in November 1997, ships of the Malaysian and Philippine navies conducted a nine-day joint anti-piracy exercise, "Sea Malphi 1/97," off the coast of Malaysia. See Anti-Piracy Exercise, JANE'S DEF. WKLY, Nov. 19, 1997, at 14. From a military point of view, smaller navies are not really capable of maintaining a world-wide naval presence and power projection. See Lieutenant Derek A. Trinque, U.S. Navy, E-mail Transmission (Oct. 5, 1998) (providing additional support for the regional use of ROW ("Rest of World") navies to combat piracy) (on file with Case Western Reserve Journal of International Law). See generally, e.g.,
(4) A regional, uniform extradition procedure for apprehended pirates that changes the current practice to permit each State to prosecute pirates under its own laws.\textsuperscript{118} Instead, each Party which apprehends a pirate would be required to deliver up him or her to the nation-state whose property and/or nationals are deemed most reasonably damaged, injured, or otherwise negatively impacted in the piratical incident. These extradition decisions would be made by a regional, quasi-judicial "Piracy Commission."

C. Policy Implications Resulting from a Piracy Charter

The suppression of piracy through regional Piracy Charters results in several policy implications. Although private solutions represent one approach,\textsuperscript{119} "[h]istorically, it's when governments decide to step in that piracy has been brought under control."\textsuperscript{120} However, nation-states in the modern world interact throughout a range of complex interdependent relationships.\textsuperscript{121} This situation permits "[m]ilitarily and economically strong states . . . [to take advantage of] linking their own policies on some issues to other states’ policies on other issues."\textsuperscript{122}

\textsuperscript{118} Under current international law, a state which captures a pirate "may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships . . . or property" seized in such actions. Thus, there is no requirement that a state must do so. See UNCLOS, supra note 23, art. 105 (emphasis added).

\textsuperscript{119} Private solutions include, among other things, arming merchant ship crews with weapons to repel pirates, embarking so-called "sea marshals" aboard vessels like sky marshals, and utilizing improved communications technology to report piracy incidents. See, e.g., Terence Fokas, The Barbary Coast Revisited: The Resurgence of International Maritime Piracy, 9 U.S.F. MAR. L.J. 427, 447-49 & nn.144, 149, 150 & 153 (1997).

\textsuperscript{120} Gibson, supra note 6 (quoting IMB Director Pottengal Mukundan) (emphasis added).

\textsuperscript{121} Such relationships include, among other things, multiple channels of interaction, an absence of hierarchy among issues, and only a marginal use of military force. See Robert O. Keohane & Joseph S. Nye, Jr., Complex Interdependence, Transnational Relations, and Realism: Alternative Perspectives on World Politics, at 258-59, in THE GLOBAL AGENDA: ISSUES & PERSPECTIVES (2d ed., Charles W. Kegley, Jr. & Eugene R. Wittkopf eds., 1988).

\textsuperscript{122} Id. at 263.
Recognizing this paradigm of state behavior, an excellent way to encourage the creation of Piracy Charters would be to link regional piracy suppression to existing regional organizations led by leading regional powers.\textsuperscript{123} Thus, by strategically linking Piracy Charters to \textit{existing} multilateral regional agreements, a higher level of attention would potentially be paid to the legal enforcement of piracy laws.

Moreover, a regional Piracy Charter would be easier to establish and coordinate because of the smaller number of parties involved as compared to the current international legal regimes designed to combat piracy.\textsuperscript{124} Nation-states from within a region, which are familiar with the region's languages, geography, and piracy threat-profiles in the area, would likely improve the effectiveness of a regional solution.\textsuperscript{125} As a result, a Piracy Charter would likely allow the establishment of an effective law enforcement regime to be established much more expeditiously than multi-year, multilateral negotiations sponsored by the United Nations.\textsuperscript{126} Additionally, a regional Piracy Charter, negotiated by a smaller number of nation-states, could avoid a key pitfall in large multilateral negotiations: that the final product reflects, not the best possible solution, but the "lowest common denominator" among a multiplicity of negotiators.\textsuperscript{127}

There are a host of existing regional agreements through which Piracy Charters may be established in the next century.\textsuperscript{128} When establishing a Piracy Charter for the Americas, a logical starting point is the existing OAS.\textsuperscript{129} The nations of the Western Hemisphere have

\textsuperscript{123} See supra notes 104-11 and accompanying text.

\textsuperscript{124} "It is much easier to achieve consensus... when there are [fewer]... negotiating parties." See Andrew A. Faye, \textit{APEC and the New Regionalism: GATT Compliance and Prescriptions for the WTO}, 28 LAW & POL'Y INT'L BUS. 175, 206 & n.159 (1996) (quoting \textit{A New Trading Order: Asia Becomes the World's Strategic Linchpin}, ASIAWEEK, Dec. 7, 1994, at 19, 19).

\textsuperscript{125} See Fokas, supra note 119, at 450-51.

\textsuperscript{126} See id.

\textsuperscript{127} The so-called "Lowest Common Denominator" (LCD) approach to harmonize transnational legal regimes "attempts to identify areas of similarity and then adopts standards which are held in common by all of the [negotiating] states." Louis F. Del Duca, \textit{Teachings of the European Community Experience for Developing Regional Organizations}, 11 DICK. J. INT'L L. 485, 498 (1993).

\textsuperscript{128} See generally, e.g., Menefee, supra note 7, at 149-50.

\textsuperscript{129} See Charter of the Organization of American States, supra note 107. Some Latin American navies, such as that of Honduras, also have patrols in the Western Hemisphere aimed at suppressing piracy. See Honduras: Navy Resumes Coastal Patrols,
other possible alternatives as well. For example, a Piracy Charter in the Americas could also be linked to the forthcoming expansion of the already existing North American Free Trade Agreement (NAFTA). To effect this linkage, the United States, motivated by its national interest to protect hemispheric trade and the safety of individuals, could promote an additional track of anti-piracy negotiations in future talks that lead to the establishment of the Free Trade Area of the Americas (FTAA). These negotiations, which would include experienced diplomats, academics, and practitioners of maritime law and policy, could focus on establishing a separate protocol to the FTAA, embodying a "Piracy Charter" for the Americas. Thus, either through the OAS or an FTAA, a Pan-American Piracy Charter could eventually be in force from the Arctic Circle to Tierra del Fuego early in the next century.

In Africa, several bilateral or multilateral regional arrangements exist, including the Economic Community of West African States and the Preferential Trade Area, through which African Piracy

\[\text{PERISCOPE-DAILY DEF. NEWS CAPSULES, May 1, 1997, available at 1997 WL 7724030.}\]


\[131 \text{ The FTAA was proposed by U.S. President William J. Clinton to the leadership of thirty-four Latin and South American nations during the Summit of the Americas held at Miami, Florida in late 1994. This initiative would be created through the aggrandizement of NAFTA and would provide, by the year 2005, a free-trade area throughout the Western Hemisphere. See Look to the South: U.S. Exports Would Grow in Hemispheric Free-Trade Zone, PRR. POST-GAZETTE, Dec. 4, 1996, at A22.}\]

\[132 \text{ Once negotiations are concluded on the FTAA, including the protocol on piracy creating the Piracy Charter of the Americas, each state would be obligated to ratify the treaty in accordance with its respective domestic constitutional requirements. The unique constitutional framework of the United States grants to the President the power to establish treaties with other states with the advice and consent of the U.S. Senate. See U.S. CONST. art. II, § 2, cl. 2 (establishing the treaty-making power of the President with the advice and consent of the Senate). Treaties thereby become, along with the Constitution itself and all laws made in pursuance of the Constitution, "the Supreme Law of the Land." See U.S. CONST. art. VI, cl. 2 (the Supremacy Clause).}\]

\[133 \text{ See Treaty of the Economic Community of West African States, May 28, 1975, 14 I.L.M. 1200.}\]

\[134 \text{ The Preferential Trade Area is an economic grouping of eastern and southern African nations. See Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States, Dec. 21, 1981, 21 I.L.M. 479.}\]
Charters could be established. Specifically, the OAU agreed in June 1991 to establish the African Economic Community before 2020. Given these efforts to promote regional economic cooperation in Africa, the suppression of piracy may occur through a similar linkage to existing multilateral organizations and/or trade expansion agreements on the African continent.

Similarly, in Southeast Asia, a region severely hit by modern pirates, the Association of South East Asian Nations (ASEAN) could provide an excellent vehicle for the suppression of piracy. Several ASEAN states, including Malaysia and the Philippines, proposed the creation of JPAs required by the Piracy Charter. Some coordinated operations also exist among the police forces of Indonesia, Singapore, Thailand and the Philippines, which have reduced piracy incidents. Building upon such Southeast Asian initiatives, a Piracy Charter for South East Asia linked to an existing organization like ASEAN could enhance the battle against piracy in the Malacca Straits and the South China Sea.

Be it in the Americas, Africa, or Southeast Asia, the enactment of regional Piracy Charters would renew international commitments to piracy suppression and create a much-needed confidence-building

136 See supra notes 104-11 and accompanying text.
137 ASEAN was established primarily as a defense arrangement in 1967, although its focus has been expanded to include trade and political matters as well. See Sherry M. Stephenson, ASEAN and the Multilateral Trading System, 25 LAW & POL’Y INT’L BUS. 439, 439-441 (1994).
138 See Blanche & Blanche, supra note 66.
140 Counter-piracy operations by the navies of Australia, Malaysia, Thailand, the Philippines, and Indonesia are already a major priority. See Russ Swinnerton, Piracy Remains A Concern for Southeast Asian Nations, DEF. NEWS, Aug. 25, 1997, at 8. Thus, cooperative efforts within a regional framework would be a logical extension of such efforts. ASEAN member state navies are becoming increasingly capable as well. See generally, e.g., Sam Bateman, ASEAN’s Tiger Navies: Catching Up or Building Up?, JANE’S NAVY INT’L, Apr. 1, 1997, at 18.
measure among leading shipping nations and their respective merchant marines. Care must be taken that Piracy Charters not be empty promises. However, new commitments to combat piracy would create new multilateral obligations for the military and maritime police forces of parties to the Charter.

Given that "anti-piracy patrols have always been the most effective weapon" against piracy, regional navies cruising in JPAs on a regularized employment schedule would now have an effective means by which to visit, board, search, and seize offending vessels and their crews under international law. Moreover, in an era of increased budgetary constraints for national defense that results in the cutback of various world navies' assets, a regional Piracy Charter approach makes good economic sense.

Several additional policy implications flow from the Piracy Charter's regional extradition approach. Under current international law, all states are empowered to suppress piracy and apprehend pirates as an exercise of universal jurisdiction. Although a regional Piracy Charter does not disturb this status quo, it would require parties to the Piracy Charter when apprehending a pirate on the high seas to deliver

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141 Fokas, supra note 119, at 460. Indeed, "[t]he United States has a long history of using its Navy for high seas law enforcement [and] . . . suppression of piracy was one of the very first missions assigned to the nation's Navy." Christopher A. Abel, Note, Not Fit for Sea Duty: The Posse Comitatus Act, The United States Navy, and Federal Law Enforcement at Sea, 31 WM. & MARY L. REV. 445, 477 (1990). Even today, the United States Code expressly authorizes the U.S. Navy to suppress piracy. See id. at 478 & n.195 (citing 33 U.S.C. §§ 381, 382). One is also reminded that the only way the United States finally crushed the commercial threats and tribute demands of the Barbary States was when it "sent warships to the Mediterranean [in 1801-1807] and broke the pirates' hold on American commerce." See RICHARD J. BARNET, THE ROCKETS' RED GLARE: WHEN AMERICA GOES TO WAR, THE PRESIDENTS & THE PEOPLE 39 (1990). See also HAGAN, supra note 10, at 54-62.

142 See supra notes 51-61 and accompanying text. Article 110(1) of UNCLOS also provides for additional enforcement activities at sea if such actions "derive from powers conferred by treaty," as is the case under the author's proposed Piracy Charter. See UNCLOS, supra note 23, at art. 110(1). See also Michael Vatikiotis, Gunboat Diplomacy, FAR E. ECON. REV., June 16, 1994, at 22, 23 (stating that piratical incidents against Russian shipping in the East China Sea ended when the Russian Navy took up station in the region and "threatened to blow pirates out of the water").

143 See Batchelor, supra note 14.

144 See id.

145 See UNCLOS, supra note 23, at art. 105 (stating that "every State may seize a pirate ship").
up this pirate to the nation-state whose property and/or nationals are deemed most reasonably damaged, injured, or otherwise negatively impacted in the piratical incident.\textsuperscript{146}

This change in international law, as embodied in regional Piracy Charters, is necessary to overcome the reluctance of certain states to effectively enforce their obligation to suppress piracy.\textsuperscript{147} By requiring the delivering up of an apprehended pirate to the nation-state most reasonably affected, the Piracy Charter recognizes that nation's predominant self-interest: a given state, whose nationals and/or property have been injured in a piracy incident, is likely to be much more willing to prosecute a pirate within its own judiciary than perhaps another state which has merely apprehended the pirate and, for political reasons, may not even want to prosecute the offender.\textsuperscript{148}

\textsuperscript{146} The legal standard articulated here is the construction of the author. The author is unaware of this precise formulation existing in scholarship, or in any custom, practice, or agreement in international law. This proposed standard is reasonable, however, given the nature of the piracy threat and when evaluated against commonly accepted choice of law principles, whereby "[e]ach state has its own methods and rules for determining whether particular issues in a suit involving foreign elements should be determined by its own local law rules or by those of another state." \textit{Restatement (Second) of Conflict of Laws} § 2 cmt. a(3) (1971). At section 6(2), the Restatement articulates seven factors "relevant to the choice of the applicable rule of law," which are:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

\textit{Id.} § 6(2)(a)-(g).

The rules articulated in the Restatement "conform . . . to the requirements of public international law." \textit{Id.} § 2 cmt. d.; \textit{see also id.} at §10 ("Interstate and International Conflict of Laws"). Given this situation, as well as the author's analysis of piracy against these seven factors, this legal standard is appropriate to require regional extradition for piracy offenses, particularly in view of the enhanced uniformity and predictability of result that may arise from applying the author's standard. \textit{See infra} notes 148-60 and accompanying text.

\textsuperscript{147} \textit{See} Ellen, \textit{supra} note 8, at 32.

To further this objective, each Piracy Charter would establish a new regional institution, known as a "Piracy Commission." The Piracy Commission would have the authority to fairly and neutrally judge which nation-state's property and/or nationals are "most reasonably damaged, injured, or otherwise negatively impacted" by an incident of piracy. Although quasi-judicial in nature, the Piracy Commission would not be a supranational criminal court in which to try alleged pirates apprehended in that Piracy Charter region. Rather, the Piracy Commission would have the limited responsibility of administering regional piracy extradition procedures among the parties to the Piracy Charter.

Based on the facts of each case, the Piracy Commission would determine which nation-state's property and/or nationals are "most reasonably damaged, injured, or otherwise negatively impacted" in an incident of piracy. Each Party to the Charter would be bound to the discussing the advantage of allowing a nation-state to apply its own criminal law to offenders not nationals of that nation-state).

149 See id. at 755 (advocating the creation of a generic "criminal commission" instead of a permanent international criminal tribunal). It is upon this model that the author conceived of the concept of a regional "Piracy Commission." While not a court, the Commission would be advantaged by drawing its membership from each Party to the Piracy Charter, similar to the composition of the International Court of Justice. See, e.g., STAT. OF THE INT'L CT. OF J., 15 U.N.C.I.O. Docs. 355-57 (1945), arts. 2 and 9.

150 In July 1998, negotiations were concluded at an international conference in Rome to establish the first-ever International Criminal Court. The Piracy Commission approach preferred by the Author is quite different from the supranational criminal court approach recently adopted in Rome. See Thomas W. Lippman, America Avoids the Stand: Why the U.S. Objects to a World Criminal Court, WASH. POST, July 26, 1998, at C1. The United States, however, has elected not to join the treaty at this time. Id.

151 Extradition is "a cooperative criminal process between states whereby a treaty partner surrenders to the requesting partner an individual physically present in its territory who has been accused or convicted of an offense." Case Note, United States v. Humberto Alvarez-Machain: Government-Sponsored International Kidnapping as an Alternative to Extradition?, 15 U. HAW. L. REV. 179, 184 & n.32 (analyzing United States v. Alvarez-Machain, 112 S. Ct. 2188, 2194 (1992)).

152 Various commentators have proffered proposals for a world-wide extradition treaty. See, e.g., Richard Allan, Terrorism, Extradition & International Sanctions, 3 ALB. L. J. SCI. & TECH. 327, 337-41 (1993). This Note, however, proposes a regional extradition agreement for piracy alone under a Piracy Charter framework.
extradition decisions of the Piracy Commission. Thus, a regional Piracy Commission stands to inject the threat of real enforcement for piratical attacks into international law for the first time.

Alternatively, a Piracy Charter could establish a regional "Piracy Court" that would try and punish pirates apprehended within a region's JPA. However, a Piracy Commission approach appears preferable for several reasons. First, there is no one settled international "criminal code" for piracy that a Piracy Court could apply against apprehended pirates and which Piracy Charter states could negotiate within a reasonable amount of time. Thus, a potential result would be the lowest common denominator of negotiations. Secondly, states may be much less willing to be bound to the jurisdiction of a regional criminal tribunal that would determine the fate of its nationals and/or property outside of that state's own legal system.

In addition, scholars have expressed concerns that supranational criminal tribunals, like a regional Piracy Court, would potentially dis-

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153 The United States, for example, will not generally grant a requesting nation extradition without an effective extradition treaty — embodied in an agreement such as a Piracy Charter. See Chien, supra note 151, at 184 (citing Factor v. Laubenheimer, 290 U.S. 276, 287 (1933)).

154 See generally Daniel B. Pickard, Comment, Security Council Resolution 808: A Step Toward a Permanent International Court for the Prosecution of International Crimes and Human Rights Violations, 25 GOLDEN GATE U. L. REV. 435, 460 (1995) (stating that an "[a]bsence of an international criminal code and the continuing insistence by states on the retention of an archaic concept of national sovereignty in an absolute and uncompromising manner" has [until recently] prevented the creation of an international criminal court). Analogizing international criminal codes to piracy law, the author believes that a similar disadvantage would result if a regional organization were to adopt a Piracy Court-style model versus a Piracy Commission that utilizes an extradition-style approach.

155 See Del Duca, supra note 127, at 498.

156 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 312(1)-(3) (explaining that "[a]n international agreement enters into force when all the negotiating states have expressed consent to be bound . . ." and that states thereupon become obligated "to refrain from acts that would defeat the object and purpose of the agreement").

157 In declining to sign the treaty establishing the International Criminal Court, the United States, among other things, specifically objected to the Court having potentially unfettered jurisdiction over United States nationals. See Lippman, supra note 150, at C1; see also Fred Hiatt, The Trouble With the War-Crimes Court, WASH. POST, July 26, 1998, at C7; Pickard, supra note 154, at 440-41.
rupt the existing system of international law and organizations. In this view, decisions of a regional Piracy Court might conflict with centuries of international custom, practice, and agreements, as well as with the prerogatives of existing international institutions such as the United Nations Security Council. The regional piracy extradition approach, administered through a multinational Piracy Commission, avoids each of these potential problems, encourages the maximum number of states to cooperate in the suppression of piracy, and builds confidence among Parties to the Piracy Charter that piracy will be promptly and firmly punished out of a state's own self-interest.

IV. CONCLUSION

Piracy's legal-historical background, the nature of its threat, and an understanding of geopolitics mandate a new approach to suppressing piracy around the globe. The Piracy Charter approach, establishing regionalized enforcement mechanisms linked to existing regional organizations, will finally put an effective maritime law enforcement regime behind the previously empty recitation that "every State may seize a pirate ship." By adopting a regional Piracy Charter approach, the nations of the world can cooperate now to banish the legacy of Lord Byron's Corsair "to other times," and effectively suppress piracy in the 21st century.

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158 See Lippman, supra note 150, at C4; Hiatt, supra note 157, at C7. See also Timothy C. Evered, An International Criminal Court: Recent Proposals and American Concerns, 6 PACE INT'L L. REV. 121, 124 & n.12 (1994).
159 See Evered, supra note 158, at 124; see also supra notes 21-23 and accompanying text.
160 See supra notes 145-48 and accompanying text.
161 UNCLOS, supra note 23, at art. 105.