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## ***United States v. Dire: The Somali Pirates and the Fourth Circuit's Choice to Apply an Evolving "Law of Nations" to the Problem***

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# UNITED STATES *v.* DIRE: SOMALI PIRATES, AND THE FOURTH CIRCUIT’S CHOICE TO APPLY AN EVOLVING “LAW OF NATIONS” TO THE PROBLEM

SAMUEL B. RICHARD\*

**Abstract:** Maritime piracy poses a grave threat to global shipping. In the United States, federal law criminalizes piracy as defined by international law, or the law of nations. Recently, in *United States v. Dire*, the Fourth Circuit Court of Appeals interpreted the law of nations surrounding piracy. *Dire* concerned the conviction of five Somali nationals under the piracy statute. The defendants argued that piracy requires a robbery, and since no robbery occurred, their convictions should be overturned. Examining two differing approaches by lower District Courts, the Fourth Circuit concluded that piracy does not require robbery because the law of nations evolves with changing international consensus, rather than maintaining a static definition. This consensus stems from international agreements, such as the United Nations Convention on the Law of the Sea, whose definition of piracy lacks a robbery element. Therefore, the court upheld the convictions. *Dire* may potentially change the way U.S. courts apply international law.

## INTRODUCTION

Maritime piracy off the coast of Somalia poses a grave danger to commercial shipping in the region.<sup>1</sup> Estimates place the cost of pirate raids in the billions.<sup>2</sup> Since pirates operate supra-nationally, targeting vessels and crewmembers from around the world, these attacks are difficult for individual states to police.<sup>3</sup> In an attempt to provide unanimity to more efficiently combat this issue, the United Nations Convention on the Law of the Sea (UNCLOS), a global accord signed by 162 States

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<sup>1</sup> See Jim Michaels, *Pirates’ New Tactics Make Navies’ Job Harder*, USA TODAY, Jan. 7, 2011, at A6. In 2009 and 2010, pirates attacked over 300 ships. See *id.*

<sup>2</sup> See Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, 29 BERKELEY J. INT’L L. 399, 406–07 (2011).

<sup>3</sup> See Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed*, 33 FORDHAM INT’L L.J. 372, 404 (2009–2010).

concerning maritime issues, includes a piracy definition.<sup>4</sup> Despite the efforts of UNCLOS, there still exists a large need for further international agreement on the legal classification of piracy, as not every state is a signatory.<sup>5</sup> In 2012, the Fourth Circuit Court of Appeals, despite the United States not being party to UNCLOS, joined its consensus and applied the treaty's standard to 18 U.S.C. § 1651, the federal crime of piracy on the high seas.<sup>6</sup> *United States v. Dire* resolved a split between two district courts interpreting the statute, which labels piracy as "defined by the law of nations."<sup>7</sup> The law of nations refers to the body of common law "deducible by natural reason, and established by universal consent among the civilized inhabitants of the world . . . ."<sup>8</sup> Congress has the power to enact such laws through the define and punish clause of the United States Constitution.<sup>9</sup>

The key disagreement between the lower courts centered on whether or not piracy requires robbery.<sup>10</sup> One viewed the statute through the prism of international law present at the statute's enactment, which in that court's opinion included this element.<sup>11</sup> The other chose not to require robbery because congressional intent commanded the application of current global criterion.<sup>12</sup> The Fourth Circuit upheld the latter, ruling that § 1651 evolves with international custom.<sup>13</sup> This

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<sup>4</sup> See Yvonne M. Dutton, *Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?*, 86 TUL. L. REV. 1111, 1121–22 (2012). See generally United Nations Convention on the Law of the Sea, pmbl., Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. Article 101 defines piracy as: "any illegal acts of violence . . . committed for private ends by the crew or the passengers of a private ship . . . on the high seas, against another ship . . . ." UNCLOS, *id.*

<sup>5</sup> See Christopher Joyner, *Navigating Troubled Waters: Somalia, Piracy, and Maritime Terrorism*, 10 GEO. J. INT'L AFF. 83, 86 (2009).

<sup>6</sup> See Daniel Pines, *Maritime Piracy: Changes in U.S. Law Needed to Combat This Critical National Security Concern*, 36 SEATTLE U. L. REV. 69, 89 (2012); see also *United States v. Dire*, 680 F.3d 446, 459, 469 (4th Cir. 2012).

<sup>7</sup> 18 U.S.C. § 1651 (1948); see *Dire*, 680 F.3d at 451–52.

<sup>8</sup> Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations"*, 42 WM. & MARY L. REV. 447, 463 (2000) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 66).

<sup>9</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>10</sup> Compare *United States v. Said*, 757 F. Supp. 2d 554, 559 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012) (requiring robbery), with *United States v. Hasan*, 747 F. Supp. 2d 599, 623 (E.D. Va. 2010) (not requiring robbery).

<sup>11</sup> See *Said*, 757 F. Supp. 2d at 567.

<sup>12</sup> See *Hasan*, 747 F. Supp. 2d at 623.

<sup>13</sup> See *Dire*, 680 F.3d at 469.

decision has the potential to dramatically affect how courts assess future and current statutes.<sup>14</sup>

Part I of this Comment provides a brief summary of the facts of *Dire* and examines its procedural history. Part II analyzes the legal basis for the two judicial readings of § 1651, and the logic behind the Fourth Circuit's opinion to not require robbery. Finally, Part III discusses whether it is prudent to apply UNCLOS's definition to § 1651, and the broader impact this may have on the application of international law within the United States.

## I. BACKGROUND

*United States v. Dire* arose out of an incident on April 1, 2010, when five men,<sup>15</sup> operating in international waters, utilized a rocket-propelled grenade and AK-47s to assault the USS *Nicholas*, a U.S. Navy frigate disguised as a merchant ship.<sup>16</sup> After exchanging gunfire, the military captured, detained, and brought the men to the United States.<sup>17</sup> A grand jury indicted the defendants on numerous charges, including piracy under 18 U.S.C. § 1651, which states that: “[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations . . . shall be imprisoned for life.”<sup>18</sup>

Prior to trial, the defendants moved to dismiss the piracy charge.<sup>19</sup> They contested that the law of nations delineated by § 1651 must be narrowly interpreted as “robbery at sea.”<sup>20</sup> Because the defendants neither boarded the USS *Nicholas*, nor took property, they argued their actions did not constitute piracy.<sup>21</sup> The district court, hearing this motion in *United States v. Hasan (Hasan I)*,<sup>22</sup> held that § 1651 is a unique, universal jurisdiction crime governed by current international norms.<sup>23</sup> *Hasan I* stated that UNCLOS's piracy definition pertained to § 1651

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<sup>14</sup> See *id.*; Michael T. Morley, Note, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109, 114 (2002).

<sup>15</sup> *United States v. Dire*, 680 F.3d 446, 449–51 (4th Cir. 2012). All Somalis, the defendants are Abdi Wali Dire, Gabul Abdullahi Ali, Abdi Mohammed Umar, Abdi Mohammed Gurewardher, and Mohammed Modin Hasan. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 449.

<sup>18</sup> *Id.* at 450; see also 18 U.S.C. § 1651 (1948).

<sup>19</sup> *Dire*, 680 F.3d at 451.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See *id.* at 451 n. 3. The difference in lead defendants between *Hasan I* and *Dire* is due to *Dire* being the first to file for appeal. See *id.*

<sup>23</sup> See *id.* at 454; see also *United States v. Hasan*, 747 F. Supp. 2d 599, 623 (E.D. Va. 2010).

because it represented such a global standard.<sup>24</sup> *Hasan I* also noted that UNCLOS is similar to the Geneva Convention on the High Seas (High Seas Convention), which the United States had ratified.<sup>25</sup> Since UNCLOS requires illegal acts of violence like the defendants', and not robbery, *Hasan I* denied the motion.<sup>26</sup> The jury found the five defendants guilty of all charges.<sup>27</sup>

On Dire's appeal, the Fourth Circuit recognized that these facts bore similarities to another case, *United States v. Said*, where defendants had attacked a vessel without seizing the ship.<sup>28</sup> In *Said*, the district court held that the statute's text and *stare decisis* required that the definition of piracy entail robbery.<sup>29</sup> Given the choice of upholding either court, *Dire* relied on *Hasan I* after examining the difference between § 1651 and other statutes based on the law of nations.<sup>30</sup> In conjunction, the Fourth Circuit issued a companion opinion rejecting *Said's* holding, and remanding the case.<sup>31</sup>

## II. DISCUSSION

*United States v. Dire* elucidated a divergence between *United States v. Said* and *United States v. Hasan (Hasan I)* over the principles used to interpret § 1651.<sup>32</sup> These differing methods stemmed from the lack of an explicit definition of the law of nations in the United States Constitution.<sup>33</sup> The Constitution only references international law once.<sup>34</sup> The Define and Punish Clause gives Congress the power: "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."<sup>35</sup> Although this clause grants the authority to enact 18 U.S.C. § 1651, it offers no guidance as to what precise law of nations to apply.<sup>36</sup> This lack of direction precipitated the division be-

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<sup>24</sup> See *Hasan*, 747 F. Supp. 2d at 640.

<sup>25</sup> See *id.* at 620; Pines, *supra* note 6 at 89.

<sup>26</sup> See *Hasan*, 747 F. Supp. 2d at 640–42.

<sup>27</sup> *Dire*, 680 F.3d at 450. The defendants received sentences of life plus 80 years. *Id.*

<sup>28</sup> See *id.* at 450–51.

<sup>29</sup> See *id.* at 451–54; see also *United States v. Said*, 757 F. Supp. 2d 554, 559 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012). The government appealed the court's ruling in *Said*. See *Dire*, 680 F.3d at 452 n. 5.

<sup>30</sup> See *Dire*, 680 F.3d at 466–69.

<sup>31</sup> See *Dire*, 680 F.3d at 452 n. 5; see also *United States v. Said*, 680 F.3d 374, 375 (4th Cir. 2012).

<sup>32</sup> See *United States v. Dire*, 680 F.3d 446, 551–52 (4th Cir. 2012).

<sup>33</sup> See *id.* at 551–52; Stephens, *supra* note 8, at 452.

<sup>34</sup> See *Dire*, 680 F.3d at 551–52.

<sup>35</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>36</sup> See *United States v. Hasan*, 747 F. Supp. 2d 599, 605 (E.D. Va. 2010).

tween *Said* and *Hasan I* concerning the proper utilization of the law of nations towards § 1651.<sup>37</sup> The Fourth Circuit in *Dire* first explained both statutory interpretations before reaching its own conclusion.<sup>38</sup>

The *Dire* opinion begins by unraveling *Said's* limited approach to applying the law of nations to piracy.<sup>39</sup> *Said* employed a classic canon of statutory interpretation to require robbery.<sup>40</sup> It stated that any reading of § 1651 had to begin with, “[the law’s] ordinary meaning at the time of its enactment.”<sup>41</sup> *Said* recognized that the language of § 1651 originated in an 1819 law (Act of 1819) passed by Congress.<sup>42</sup> Further, *Said* stated that no legislative history suggested that the meaning of piracy had changed since.<sup>43</sup> Therefore, to the court, the lack of any countervailing congressional intent meant § 1651 reflected customary international law from 1819.<sup>44</sup> To determine what this custom consisted of, *Said* relied on the United States Supreme Court’s (Supreme Court) 1820 decision in *United States v. Smith*, which interpreted the Act of 1819.<sup>45</sup>

In *Smith*, the Court consulted various sources to determine the law of nations concerning piracy.<sup>46</sup> Utilizing doctrines espoused by the scholarly works of “all the great writers on maritime law,” the Court determined that piracy is robbery committed at sea.<sup>47</sup> *Said* employed this definition in its interpretation of § 1651 because it found the precedent created in *Smith* significant.<sup>48</sup> *Said* indicated that the acknowledgement of the authority of *Smith* by other Circuit Courts reinforced this posi-

<sup>37</sup> Compare *Hasan*, 747 F. Supp. 2d at 604 (“[T]he Framers understood the law of nations to consist of . . . the general norms governing the behavior of national states with each other . . .”), with *United States v. Said*, 757 F. Supp. 2d 554, 557 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012) (merely stating that there is a set of international laws distinct from domestic United States law).

<sup>38</sup> See *Dire*, 680 F.3d at 452–53, 67.

<sup>39</sup> See *id.* at 452.

<sup>40</sup> See *Said*, 757 F. Supp. 2d at 559 (citing *Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267, 275 (1994)); see also *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . .”).

<sup>41</sup> See *Said*, 757 F. Supp. 2d at 559.

<sup>42</sup> See *Dire*, 680 F.3d at 452 (citing Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14). The only major difference between this 1819 statute and § 1651 is that the crime carried a sentence of death in 1819, instead of the current mandatory life sentence. See *id.*

<sup>43</sup> See *Said*, 757 F. Supp. 2d at 562.

<sup>44</sup> See *id.* at 559.

<sup>45</sup> See *id.*

<sup>46</sup> See *United States v. Smith*, 18 U.S. (5. Wheat) 153, 160–61 (1820).

<sup>47</sup> See *id.* at 161–62.

<sup>48</sup> See *Said*, 757 F. Supp. 2d at 560.

tion.<sup>49</sup> In doing so, the *Said* court rejected any application of UNCLOS to § 1651.<sup>50</sup>

*Said* also did not apply UNCLOS to § 1651 because the court expressed that the treaty does not adequately define piracy.<sup>51</sup> It held that despite a piracy definition in UNCLOS that applied to most global States, the *interpretation* of UNCLOS varied.<sup>52</sup> No single court enforces UNCLOS.<sup>53</sup> Various States apply UNCLOS differently, especially with regards to punishment, which ranges from three years to life imprisonment.<sup>54</sup> *Said* warned that because UNCLOS's piracy definition lacked unanimity, it could cause § 1651 to become vague, violating defendants' rights to due process.<sup>55</sup> Because vague criminal statutes do not provide reasonable and fair notice about what the law is, they are often rendered unconstitutional.<sup>56</sup> *Said* held that a static, unchanging, and clear definition of piracy as robbery at sea avoided the issue of constitutionality altogether.<sup>57</sup>

Since the opinion in *Dire* sought to reconcile two distinct district court opinions, after analyzing *Said*, the Fourth Circuit focused on *Hasan I's* rejection of a concrete definition of piracy requiring robbery.<sup>58</sup> In contrast to the *Said* court's reliance on rules of statutory interpretation, the court in *Hasan I* focused on the uniqueness of piracy in relation to the law of nations.<sup>59</sup> Importantly, piracy had long been viewed as the only crime with universal jurisdiction.<sup>60</sup> According to the opinion, even the Framers of the Constitution held this belief: piracy is a strictly universal jurisdiction crime.<sup>61</sup> Universal jurisdiction allows any state to arrest and domestically prosecute pirates captured on the high seas.<sup>62</sup>

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<sup>49</sup> See, e.g., *Taveras v. Taveraz*, 477 F.3d 767, 772 n. 2 (6th Cir. 2007) ("A fundamental element of the offense of piracy is that the acts of *robbery* . . . ." (emphasis added)); *United States v. Madera-Lopez*, 190 F. App'x 832, 836 (11th Cir. 2006).

<sup>50</sup> See *Said*, 757 F. Supp. 2d at 565–66.

<sup>51</sup> See *id.* at 563.

<sup>52</sup> See *id.* at 565–66.

<sup>53</sup> See *id.* at 565.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* at 566.

<sup>56</sup> See Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 284 (2003).

<sup>57</sup> See *Said*, 757 F. Supp. 2d at 566.

<sup>58</sup> See *Dire*, 680 F.3d at 454; *Hasan*, 747 F. Supp. 2d at 623.

<sup>59</sup> Compare *Hasan*, 747 F. Supp. 2d at 602–04 (rejecting an approach solely utilizing statutory interpretation), with *Said*, 757 F. Supp. 2d at 559 (relying on the plain meaning of piracy in the original piracy statute).

<sup>60</sup> See *Hasan*, 747 F. Supp. 2d at 605.

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

*Hasan I* specified that one of the main purposes of the Define and Punish Clause is to do just this—criminalize piracy subject to universal jurisdiction.<sup>63</sup>

After determining the Framers' intent, *Hasan I* articulated that only laws applying to "general piracy" can exert universal jurisdiction over the crime.<sup>64</sup> General piracy contravenes the law of nations and is limited "to those offenses that the international community agrees constitute piracy."<sup>65</sup> *Hasan I* ruled that therefore, piracy statutes in the United States must apply international law.<sup>66</sup> Despite this obligation, Congress initially struggled to coherently integrate global custom with United States piracy law.<sup>67</sup> Because there are no judge-made federal criminal statutes, Congress had to explicitly incorporate any international definition of piracy into the law.<sup>68</sup> Congress eventually settled upon the general language of § 1651, embodied in the Act of 1819, to subject the definition of piracy to international law.<sup>69</sup>

*Hasan I* held that this legislative history illustrated congressional intent to make § 1651 adaptable enough to broadly apply international law to piracy.<sup>70</sup> *Hasan I* indicated that inevitable changes to international law might alter the meaning of general piracy.<sup>71</sup> To allow for flexibility in response to changing international law, Congress simply referenced the law of nations in § 1651.<sup>72</sup> This decision prevented the statute from constantly needing to be revised.<sup>73</sup> Rather, according to *Hasan I*, "any future change in the definition of general piracy under the law of nations would be automatically incorporated into United States law."<sup>74</sup>

In holding that the current international custom controlled, *Hasan I* traced the changes in the definition of piracy to identify such a consensus.<sup>75</sup> Unlike *Said*, *Hasan I* did not view *Smith* as binding, declaring that it allowed for the possibility that piracy might not always re-

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<sup>63</sup> *See id.*

<sup>64</sup> *See id.* at 605–06.

<sup>65</sup> *See id.* at 606.

<sup>66</sup> *See Hasan*, 747 F. Supp. 2d at 612–14 (detailing the history of piracy statutes in the United States, and how they always meant to criminalize general piracy).

<sup>67</sup> *See id.* at 609.

<sup>68</sup> *See id.* at 609–10.

<sup>69</sup> *See id.* at 614.

<sup>70</sup> *See id.* at 623.

<sup>71</sup> *See id.* at 624.

<sup>72</sup> *See Hasan*, 747 F. Supp. 2d at 623–24.

<sup>73</sup> *See id.* at 624.

<sup>74</sup> *See id.*

<sup>75</sup> *See id.* at 630–37.



quire robbery.<sup>76</sup> Rather, the court considered modern international concords that might represent the international definition of piracy.<sup>77</sup> *Hasan I* utilized these accords because if a large majority of states consistently follow them, treaties like UNCLOS can develop into customary international law applicable to non-signatories, including the United States.<sup>78</sup>

*Hasan I* held that while UNCLOS might not be binding as a treaty against the United States, its definition of piracy could be applied to § 1651.<sup>79</sup> To support this premise, the court mentioned that piracy is defined almost identically in UNCLOS as in the High Seas Convention, which *is* binding on the United States.<sup>80</sup> Nevertheless, *Hasan I* held that the High Seas Convention did not apply to § 1651 because with only sixty-three ratifying states, it did not represent international custom to the same extent that UNCLOS potentially could.<sup>81</sup> Furthermore, *Hasan I* stated that since President Reagan, every executive administration had recognized UNCLOS as international custom on “traditional uses” of the ocean” such as piracy.<sup>82</sup>

Since over 160 of the United Nations’ 192 member States are party to UNCLOS, *Hasan I* stated that this represented compelling evidence that it embodied customary piracy law.<sup>83</sup> The court then ruled that because UNCLOS signified international custom, its definition of piracy did in fact apply to § 1651 specifically.<sup>84</sup> This definition does not require an actual taking, but rather includes “any illegal act of violence or detention . . . .”<sup>85</sup> *Hasan I* decided that because the defendants illegally and violently attacked the USS *Nicholas*, the indictment could meet this definition, and therefore the court did not dismiss the piracy charge.<sup>86</sup>

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<sup>76</sup> See *id.* at 622 (“[I]f the definition of piracy under the law of nations can evolve over time . . . there is no need to conclusively determine the contours of *Smith*.”). In the eye of the court, this applied even if *Smith* represented the authoritative definition of piracy in 1820, since Congress intended the crime of piracy to change with changes to the law of nations. Compare *id.* (holding that *Smith* did not bind the Fourth Circuit to require robbery as an element of robbery), with *Said*, 757 F. Supp. 2d at 560 (holding that *Smith* represented the clearest precedence on the issue of whether piracy requires robbery).

<sup>77</sup> See *Hasan*, 747 F. Supp. 2d at 635.

<sup>78</sup> See *id.* at 633.

<sup>79</sup> See *id.* at 634.

<sup>80</sup> See *id.* at 633, 633 n. 29.

<sup>81</sup> See *id.* at 633–34.

<sup>82</sup> See *id.* at 634 (quotations omitted).

<sup>83</sup> See *Hasan*, 747 F. Supp. 2d at 633–34.

<sup>84</sup> See *id.* at 635, 640.

<sup>85</sup> See UNCLOS, *supra* note 4, art. 101; see also *Hasan*, 747 F. Supp. 2d at 640.

<sup>86</sup> See *Hasan*, 747 F. Supp. 2d at 641.

After articulating the competing arguments in *Said* and *Hasan I*, the Fourth Circuit in *Dire* undertook its own independent inquiry.<sup>87</sup> Although *Dire* upheld the specific interpretation of § 1651 set forth by *Hasan I*, the Fourth Circuit supplemented the lower court's analysis in a novel manner.<sup>88</sup> In particular, the Fourth Circuit focused on the varying uses of the law of nations in the language of a variety of statutes.<sup>89</sup>

*Dire* found that in other instances, Congress had explicitly stated that the law of nations *of a certain time period* should apply.<sup>90</sup> In the absence of such an explicit mention of the international law that governed a statute, *Dire* stated that the approach in *Hasan I*, advocating for an evolving law of nations, should be followed.<sup>91</sup> Therefore, because § 1651 did not make any mention of which law of nations to use, contemporary international law applied.<sup>92</sup> The court then agreed that the modern definition of piracy could be found in UNCLOS, and that the crime did not require robbery.<sup>93</sup>

### III. ANALYSIS

*Dire* presents two distinct explanations of the law of nations.<sup>94</sup> *United States v. Said* interpreted piracy to require robbery, based on the text of § 1651 and *stare decisis*.<sup>95</sup> *Hasan I* focused on Congress's underlying intent to police general piracy, necessitating a definition incorporating evolving international norms that currently do not require robbery.<sup>96</sup> The holdings of these cases are mutually exclusive, since § 1651 cannot both require robbery, and not require robbery.<sup>97</sup> The Fourth Circuit made its choice with its decision in *Dire*.<sup>98</sup> Upholding *Hasan I*, not

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<sup>87</sup> See *Dire*, 680 F.3d at 454, 465, 467–68.

<sup>88</sup> See *id.* at 467–69.

<sup>89</sup> See *id.* at 467–68.

<sup>90</sup> See *id.* at 468. The 4th Circuit reiterated its point by saying that if Congress had wished for piracy to require robbery, “the Act of 1819 could easily have been drafted to specify that piracy consisted of ‘piracy as defined *on March 3, 1819* [the date of enactment], by the law of nations,’ or solely of, as the defendants would have it, ‘robbery upon the sea.’” See *id.*

<sup>91</sup> See *id.* at 467–68.

<sup>92</sup> See *id.* at 468–69.

<sup>93</sup> See *Dire*, 680 F.3d at 469.

<sup>94</sup> See *United States v. Dire*, 680 F.3d 446, 451–52 (4th Cir. 2012).

<sup>95</sup> See *United States v. Said*, 757 F. Supp. 2d 554, 567 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012).

<sup>96</sup> See *United States v. Hasan*, 747 F. Supp. 2d 599, 640 (E.D. Va. 2010).

<sup>97</sup> Compare *Hasan*, 747 F. Supp. 2d at 640 (requiring robbery), with *Said*, 757 F. Supp. 2d at 567 (not requiring robbery).

<sup>98</sup> See *Dire*, 680 F.3d at 467.

*Said*.<sup>99</sup> Despite the danger of granting Congress broad power to enact legislation incorporating international law, *Dire* must serve as a model for tackling the issue of piracy.<sup>100</sup>

#### A. *The Said Court's Faulty Interpretation of Piracy*

The validity of the holding in *Dire* is clearer when compared to the flawed logic of the *Said* court.<sup>101</sup> The most compelling rationale behind the *Said* opinion asserts that requiring robbery is supported by *stare decisis*.<sup>102</sup> Justice Louis Brandeis wrote that, “[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”<sup>103</sup> As the only Supreme Court decision interpreting the Act of 1819, *Smith* is binding precedent on this narrow issue.<sup>104</sup> But even if *Smith* properly concluded that the law of nations then required robbery, it is not relevant if Congress intended the definition to shift.<sup>105</sup>

If § 1651 incorporates a fluid definition of piracy, then there is no *stare decisis* to be honored.<sup>106</sup> *Smith* simply stated that piracy in 1820 required robbery.<sup>107</sup> The opinion never discounted that piracy might someday require different elements.<sup>108</sup> Therefore § 1651 is not defined by the precedent of *Smith* if the intent of the law is to adjust to changing circumstances.<sup>109</sup>

#### B. *The Need for a Fluid Definition of Piracy*

Piracy law in the United States must change alongside shifting international norms because otherwise the problem cannot be tackled on an international level.<sup>110</sup> *Dire* and *Hasan I* make it clear that Congress intended the United States to assert universal jurisdiction over the

<sup>99</sup> See *id.* at 453 n. 5, 469.

<sup>100</sup> See Morley, *supra* note 14 at 111, 114. See generally *Dire*, 680 F.3d at 469.

<sup>101</sup> See *Dire*, 680 F.3d at 451–52.

<sup>102</sup> See *id.* at 451–52; *Said*, 757 F. Supp. 2d at 559.

<sup>103</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

<sup>104</sup> See *Said*, 757 F. Supp. 2d at 559.

<sup>105</sup> See *Hasan*, 747 F. Supp. 2d at 622.

<sup>106</sup> See *id.*

<sup>107</sup> See *United States v. Smith*, 18 U.S. 153, 161 (1820).

<sup>108</sup> See *Hasan*, 747 F. Supp. 2d at 621.

<sup>109</sup> See *id.* at 622.

<sup>110</sup> See, e.g., Bento, *supra* note 2 at 400 (“Effective anti-piracy efforts require uniformity of law, such that legal solutions suppress piracy internationally rather than treat its symptoms in an ad hoc local or regional fashion.”).

crime of piracy.<sup>111</sup> It is far more difficult to achieve this goal if piracy necessitates a fixed definition requiring robbery.<sup>112</sup> For example, the defendants in *Dire* contested that a robbery requirement meant they could not *even be charged* with piracy under § 1651.<sup>113</sup> But they only failed to commit robbery because they attacked the USS *Nicholas*, an armed vessel.<sup>114</sup> Just as the pirates in *Said*, these Somalis lacked the fire-power to capture a ship sent specifically to prevent an attack on an actual merchant vessel.<sup>115</sup> The intent to commit an act of piracy still existed.<sup>116</sup> The United States cannot adequately enforce § 1651 if the mere act of policing it renders it much more difficult to charge defendants with the crime.<sup>117</sup>

*Dire* adequately address these policy needs.<sup>118</sup> Incorporating modern international law allows the United States to effectively combat piracy.<sup>119</sup> The importance of combating piracy through effective prosecution is clear: Congress's right to enact laws against piracy is a distinct enumerated power.<sup>120</sup> A flexible definition of piracy more practically and ably reflects the intent of the Framers.<sup>121</sup> Congress could have explicitly stated that piracy requires robbery.<sup>122</sup> Instead, as *Hasan I* illustrated, Congress consciously made § 1651 broad enough to allow piracy to adapt to changes in international law without constantly having to be amended.<sup>123</sup> *Said* ignored this congressional intent when it declared that piracy's definition could not change.<sup>124</sup> As *Dire* properly shows, this is a misinterpretation of the law of nations.<sup>125</sup>

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<sup>111</sup> See *Hasan*, 747 F. Supp. 2d at 605; see also *Dire*, 680 F.3d at 469.

<sup>112</sup> See *Dire*, 680 F.3d at 451. Requiring robbery leads to any defendant who simply failed to get onto a vessel having a complete defense to the crime of piracy. See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> See *id.* at 449.

<sup>115</sup> See *id.*; *Said*, 757 F. Supp. 2d at 556–57.

<sup>116</sup> See *Dire*, 680 F.3d at 449.

<sup>117</sup> See, e.g., *Dire*, 680 F.3d at 451.

<sup>118</sup> See *id.* at 469.

<sup>119</sup> See *id.* See generally Sterio, *supra* note 3 (arguing that a broader piracy statute, treating pirates as terrorists, is the best way to combat the issue).

<sup>120</sup> See U.S. CONST. art. I, § 8, cl. 10.

<sup>121</sup> See *Hasan*, 747 F. Supp. 2d at 624.

<sup>122</sup> See *Dire*, 680 F.3d at 468.

<sup>123</sup> See *Hasan*, 747 F. Supp. 2d at 624.

<sup>124</sup> See *Said*, 757 F. Supp. 2d at 559.

<sup>125</sup> See *Dire*, 680 F.3d at 467.

C. *A Fluid Piracy Definition Does Not Violate Due Process*

On the other hand, *Said* correctly emphasized the significance of § 1651 remaining clear rather than vague.<sup>126</sup> Given the extreme penalty attached to the crime, defendants must reasonably and fairly know what constitutes piracy.<sup>127</sup> Otherwise, there is a danger that defendants' rights to due process might be violated.<sup>128</sup> This notion seemingly lends strong support to piracy requiring an act of robbery.<sup>129</sup> Such an unchanging definition is clear and concise.<sup>130</sup> Conversely, as stated by the *Said* court, linking piracy to an ever evolving set of international standards might not provide enough notice to defendants.<sup>131</sup>

This contention is irrelevant because applying UNCLOS's definition to § 1651 does not violate due process.<sup>132</sup> UNCLOS is supported by the vast majority of states in the United Nations.<sup>133</sup> Therefore, it is widely known to represent international piracy law.<sup>134</sup> Even though *Said* may correctly claim that UNCLOS is applied differently in distinct states, its definition of piracy is still uniform.<sup>135</sup> Such an overwhelming consensus is not unconstitutionally vague.<sup>136</sup> UNCLOS clearly defines piracy as illegal acts of violence.<sup>137</sup> The defendants reasonably should have known at the time of the attack that their actions could be piracy.<sup>138</sup> And because § 1651 expressly states that the law of nations applies to piracy, the defendants also received notice that any actions that potentially violated the law of nations could be charged as crimes in the United States.<sup>139</sup> Due process remained intact for the defendants in *Dire*.<sup>140</sup>

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<sup>126</sup> See *Said*, 757 F. Supp. 2d at 566; see also Goldsmith, *supra* note 56 at 284.

<sup>127</sup> See 18 U.S.C. § 1651 (1948); Goldsmith, *supra* note 56 at 284.

<sup>128</sup> See *Said*, 757 F. Supp. 2d at 566.

<sup>129</sup> See *id.*

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See *Hasan*, 747 F. Supp. 2d at 638.

<sup>133</sup> See *id.* at 635; Dutton, *supra* note 4 at 1121.

<sup>134</sup> See *Dire*, 680 F.3d at 469; *Hasan*, 747 F. Supp. 2d at 635.

<sup>135</sup> See *Said*, 757 F. Supp. 2d at 564; *Hasan*, 747 F. Supp. 2d at 639.

<sup>136</sup> See *Hasan*, 747 F. Supp. 2d at 639.

<sup>137</sup> See UNCLOS, *supra* note 4, art. 101.

<sup>138</sup> See *Hasan*, 747 F. Supp. 2d at 640.

<sup>139</sup> See *id.*

<sup>140</sup> See *id.* at 638.

D. *A Fluid Definition of Piracy Is Consistent with Notions of Federalism*

Following *Dire*'s application of customary law potentially creates new problems concerning federalism.<sup>141</sup> Mainly, such a reading could greatly enhance the power of the federal government to apply current international law to the United States.<sup>142</sup> This argument states that if granted the power to apply contemporary international law, the Define and Punish Clause supersedes the other enumerated powers.<sup>143</sup> For example, Congress could control trade it might not be able to justify regulating under the Commerce Clause if the new law conformed to contemporary international custom.<sup>144</sup>

These fears are unfounded.<sup>145</sup> The Define and Punish Clause is mostly concerned with the issue of piracy.<sup>146</sup> Piracy is the only crime that asserted universal jurisdiction when the Framers drafted the Constitution.<sup>147</sup> *Hasan I* stated that contemporary international law could more clearly achieve this aim than a stationary definition requiring robbery.<sup>148</sup> Because piracy is such a unique law, this is a clear limiting principle preventing future courts from holding that the law of nations also evolves in other statutes besides § 1651.<sup>149</sup>

The holding in *Dire* does not grant Congress sweeping new power to apply customary international law.<sup>150</sup> There are simply not many other crimes like piracy that enjoy a unique relationship with the law of nations.<sup>151</sup> *Dire* illustrated the distinctive nature of piracy by comparing it with other examples of crimes and civil regulations grounded in the law of nations.<sup>152</sup> Unlike § 1651, many such crimes and regulations explicitly applied the law of nations at the time Congress enacted the

<sup>141</sup> See *Dire*, 680 F.3d at 469; Morley, *supra* note 14 at 114, 142–43.

<sup>142</sup> See Morley, *supra* note 14, at 114, 142–43.

<sup>143</sup> See *id.* at 111.

<sup>144</sup> See *id.* at 111–12. No clause of the Constitution can render other clauses moot. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect . . .”). The same is true of statutes. See *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (“[An] elementary canon of construction [is] that a statute should be interpreted so as not to render one part inoperative.”).

<sup>145</sup> See *Dire*, 680 F.3d at 469; Morley, *supra* note 14 at 114, 142–43.

<sup>146</sup> See U.S. CONST. art. I, § 8, cl. 10.

<sup>147</sup> See *Dire*, 680 F.3d at 454–55.

<sup>148</sup> See *Hasan*, 747 F. Supp. 2d at 623.

<sup>149</sup> See *Dire*, 680 F.3d at 454–55. *But see* Morley, *supra* note 14 at 114.

<sup>150</sup> See *Dire*, 680 F.3d at 467–68. *Dire* did not even mention the possibility that its holding could be used to increase Congressional power, rather focusing on piracy’s unique status. See *id.*

<sup>151</sup> See *id.* at 467.

<sup>152</sup> See *id.* at 467–68.

statute.<sup>153</sup> The fact that this is not the case in § 1651 provides further indication that piracy holds a unique position in federal law.<sup>154</sup> Applying an evolving law of nations to piracy does not mean every other law mentioning the law of nations will also change over time.<sup>155</sup>

#### CONCLUSION

An evolving definition of piracy based on international custom and the law of nations provides law enforcement with a more effective tool for combating such a large problem. This is despite the fact that reading § 1651 textually and requiring a static definition of piracy as robbery at sea is less likely to create vagueness that might violate a defendant's right to due process. This reading is also backed by precedent from the Supreme Court stating that this is what piracy equated to when Congress first passed the underlying language of § 1651. Piracy is not an ordinary crime; it is one of the few—if not the only—crimes that the Framers understood to invoke universal jurisdiction. Its definition is closely tied to defining the law of nations. The law of nations represents the custom that has arisen from the interactions of states on the global stage. Faced with such a unique crime, vagueness concerns are less important. It is more prudent to use an ever evolving law of nations of piracy in order to reflect changes that take place in the world.

The nature of piracy has changed greatly in the nearly two and a half centuries since the passage of the Constitution. Pirates do not attack from vessels with sails. They act swiftly and suddenly. Requiring a nearly 200 year old definition to apply to the current state of piracy is absurd on its face. It provides an inadequate answer to a growing problem. It is important that the international community be capable of stopping piracy. This includes the United States. The Fourth Circuit has taken an important step to establishing a legal standard that allows for the proper handling of the crime of piracy. Hopefully, other Circuit Courts, if ever faced with a similar situation, will follow suit.

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<sup>153</sup> *See id.* at 468.

<sup>154</sup> *See id.*

<sup>155</sup> *See id.*