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## A Dire Need for Legislative Reform

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# A DIRE NEED FOR LEGISLATIVE REFORM

Patrick Dowdle \*

## INTRODUCTION

In November 2010, in *U.S. v. Hasan*, the United States District Court for the Eastern District of Virginia convicted five Somali defendants, including Abdi Wali Dire and Mohammed Modin Hasan of piracy under 18 U.S.C. § 1651, even though their attempted piracy was prevented by U.S. military intervention.<sup>1</sup> The Fourth Circuit affirmed the convictions for piracy in 2012 in *U.S. v. Dire*.<sup>2</sup> Section 1651 provides that, “[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”<sup>3</sup> The District Court used the definition of piracy from the United Nations Convention on the Law of the Sea [hereinafter “UNCLOS”]<sup>4</sup> to fulfill the “as defined by the law of nations” clause of § 1651.<sup>5</sup> The UNCLOS definition of piracy does not require the element of robbery, an element that was traditionally central to the commission of a piratical offense.<sup>6</sup> Thus, a

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<sup>1</sup> *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D.Va. 2010).

<sup>2</sup> *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012).

<sup>3</sup> 18 U.S.C. § 1651 (2012).

<sup>4</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter “UNCLOS”].

<sup>5</sup> *Hasan*, 747 F. Supp. 2d at 619.

<sup>6</sup> *Id.* at 641 (The Court interprets piracy consistently with customary international law as evidenced by UNCLOS and the High Seas Convention, which do not require the robbery element).

failed piracy, or one without actual robbery, can still be considered a crime of piracy under UNCLOS. The holding from *Dire* caused a split in United States case law.

Nineteenth century U.S. Supreme Court case law, under *U.S. v. Smith*, which was affirmed just months before *Hasan* in *U.S. v. Said*,<sup>7</sup> provides that the robbery element is required for a conviction of piracy.<sup>8</sup> The *Dire* Court migrated from this precedent to be more consistent with customary international law.<sup>9</sup> I submit that the Fourth Circuit's decision in *Dire* to veer from the dated U.S. case law precedent and apply the UNCLOS definition of piracy, exclusive of the robbery element, was proper. However, through an analysis of the numerous problems that stem from the current language of § 1651, the issue I present in this case note is whether the split in U.S. case law stemming from the ambiguity and arguably unconstitutional nature of § 1651 can be addressed by more effective means than by simply deferring to the definition of piracy under the law of nations.

In Section I of this note, I will lay out the several reasons why § 1651 needs reform. I will provide background information on modern day piracy, including its economic impact, and will then break down varying definitions of piracy and their applications in recent cases. I will explore the split in U.S. case law caused by the application of the UNCLOS definition of piracy in *Dire*, and will identify the quandaries that result from the UNCLOS definition. In Section II, I will address two specific problems stemming from § 1651 that came to light as a result of *Dire*: first, the inherent vagueness of §1651, which led to the differing interpretations and thus to the split in U.S. case law; and second, the mandatory life sentence conveyed by § 1651. To address these problems, in Section III, I will briefly provide a description of two possible solutions: judicial intervention and legislative reform. In understanding the need to embrace customary international law, and to progressively expand the law beyond the reach of current international norms, I will conclude that while the Fourth Circuit was cor-

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<sup>7</sup> *United States v. Said*, 757 F. Supp. 2d 554, 567 (E.D.Va. 2010). The *Said* decision was rendered in the same Court as the *Hasan* decision, just a few months prior.

<sup>8</sup> *United States v. Smith*, 18 U.S. 153, 153 (1820).

<sup>9</sup> *Dire*, 680 F.3d at 459.

rect to use a dynamic interpretation when defining piracy in *Dire*, a legislative amendment to § 1651 is the best means of addressing the aforementioned concerns.

## I. REASONS FOR REFORM

### *Piracy's Economic Impact*

Aside from the obvious impact on the lives of civilians and military personnel, piracy has a tremendous impact on the global economy.<sup>10</sup> Ninety-five percent of international trade is conducted on the high seas, and the estimated cost of pirate attacks ranges from \$12 billion to \$25 billion annually.<sup>11</sup> With every Somali pirate the United States Navy captures off the coast of Africa, the chances of more pirate attacks decreases, not just because specific pirates are in custody, but because these operations have the potential to be a general deterrent, making the high seas safer for all. Daniel Pines, Assistant General Counsel to the CIA<sup>12</sup>, stated,

“Altogether, the U.S. Navy has captured hundreds of pirates and thwarted numerous pirate attacks. The success rate of piracy attacks in the regions of U.S. naval patrols has dropped precipitously—from sixty-three percent in 2007 to thirty-four percent in 2008 and twenty-one percent in 2009. Attacks fell forty-three percent in 2011, due mainly to military presence.”<sup>13</sup>

Pines noted that most nations do not want to play an active role against piracy because this requires spending money for anti-piracy military action, special military training, transporting pirates, housing pirates in jails, and giving them trials.<sup>14</sup> “Much of the problem is expense: transporting pirates and witnesses to the United States, as well as the actual prosecution of pirates in United States courts, can run into the mil-

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<sup>10</sup> Daniel Pines, *Maritime Piracy: Changes in U.S. Law Needed to Combat This Critical National Security Concern*, 36 SEATTLE U. L. REV. 69, 82 (2012).

<sup>11</sup> *Id.* at 90.

<sup>12</sup> Pines, *Daniel L's Scholarly Papers*, SOC. SCI. RESEARCH NETWORK (2013), [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=915472](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=915472).

<sup>13</sup> Pines, *supra*, note 10, at 101-02.

<sup>14</sup> *Id.* at 79.

lions of dollars.”<sup>15</sup> Nations like the United States play an active role in anti-piracy, while so many others States unfortunately seem to be turning a blind eye. For the safety of civilians and military personnel, and for the benefit of the global economy, pirates cannot be allowed to terrorize the high seas. The U.S. Code must have the proper legislation to combat the serious economic threat piracy poses on the high seas.

### Somalia

Unfortunately, Somalia has become a hotbed for piracy.<sup>16</sup> Somalia's government has gone through an eight-year transitional period that culminated last year.<sup>17</sup> The turmoil-ridden country has recently asked other countries to come to their aid and has even instructed foreign military personnel to ignore international law in order to maintain peace and prevent uprising.<sup>18</sup> This lack of authority makes Somalia an ideal location for acts of piracy. The primary organization of Somali insurgents, al-Shabaab, is alleged to have connections to al-Qaeda. International security is just one more reason for the United States and any other viable countries to combat piracy.<sup>19</sup>

### Hired Mercenaries

Some merchants who rely on high sea trade have taken anti-piracy into their own hands. Captains of merchant vessels, disappointed both with the militaries of the world and the struggle to combat piracy, have taken it upon themselves to hire mercenaries to ward off Somali pirates.<sup>20</sup> This tactic,

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<sup>15</sup> *Id.* at 107.

<sup>16</sup> See S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010).

<sup>17</sup> Andrew J. Shapiro, Principal Deputy Assistant Sec'y, Bureau of Political-Military Affairs, The U.S. Government's Approach to Countering Somali Piracy, Remarks at Combating Piracy Week (Oct. 25, 2012) (transcript available at <http://www.state.gov/t/pm/rls/rm/199929.htm>).

<sup>18</sup> Jack Serle, *US and Others Have 'License to Ignore International Law' in Somalia*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Sept. 24, 2012), <http://www.thebureauinvestigates.com/2012/09/24/us-and-others-given-licence-to-ignore-international-law-in-somalia/>.

<sup>19</sup> Jonathan Masters, *Al-Shabaab*, COUNCIL ON FOREIGN RELATIONS (Feb. 5, 2013), <http://www.cfr.org/somalia/al-shabaab/p18650>.

<sup>20</sup> See David Axe, *Pirate-Fighters, Inc.: How Mercenaries Became Ships' Best*

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which has proven to be successful according to pirate expert Martin Murphy<sup>21</sup>, exemplifies the need to diminish piracy in the region spreading from Africa to India.<sup>22</sup>

“The world’s governments are waking up to the sobering fact that the gazillion-dollar warships they’ve sent to the Gulf of Aden and Indian Ocean can’t keep up with the region’s elusive pirates. The hijackers’ simple, brutal tactics are too effective. Their business model is too attractive. And they’ve got nothing to lose but their lives.”<sup>23</sup>

Numerous merchants have hired former Navy SEALs to protect their ships. It is difficult to blame those travelling on the high seas for trying to protect their crew and their goods, but fighting pirates with hired guns are not the alternative that will best deter pirate attacks. The goal is to end the violence, not to fight fire with fire.

*Assistant Secretary Andrew J. Shapiro, Bureau of Political-Military Affairs*

In an October, 2012 speech at Combating Piracy Week in London, England, addressing piracy in Somalia, Shapiro stated,

“This presented a perfect storm for the international community. Somalia, a failed state, provided pirates with a safe haven on one of the most strategically important shipping lanes in the world – where there was virtually an endless supply of potential targets to prey on. In an interconnected world, the impact of piracy in one area can ripple across the globe. People around

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*Defense*, WIRED, (Aug. 23, 2011, 6:30 AM), <http://www.wired.com/dangerroom/2011/08/pirate-fighters-incl/>.

<sup>21</sup> Diana Schemo, *100Reporters Panel: Stolen Seas*, 100REPORTERS NEW JOURNALISM FOR A NEW AGE (Feb. 5, 2013), <https://100r.org/2013/02/100reporters-panel-stolen-seas/> (describing how, “Martin Murphy, Ph.D., is a consultant, author and strategic analyst with an international reputation in the fields of piracy and unconventional conflict at sea. He has taught a course on ‘Piracy, Trade and War’ at Georgetown University and is a Senior Fellow at the Atlantic Council, where he is leading a major project on naval cooperation involving the U.S. Navy and its longest-standing allies”).

<sup>22</sup> *Axe*, *supra* note 20, at 2.

<sup>23</sup> *Id.* at 1.

the world depend on secure and reliable shipping lanes for their food, their energy, their medicine, and consumer goods brought by tankers and cargo ships. By preying on commercial ships in one of the world's busiest shipping lanes, pirates off the Horn of Africa were threatening more than just individual ships. They were threatening a central artery of the global economy – and that in turn means that they were threatening global and regional security.”<sup>24</sup>

Shapiro discussed how the rate of pirate attacks has decreased over the last few years and that fewer successful attacks means fewer hostage situations.<sup>25</sup> He applauds the progress the world is making in combatting piracy, but stresses that the ongoing rate of attacks is still unacceptable.<sup>26</sup> Shapiro quoted Secretary Clinton, who previously stated, “[w]e may be dealing with a 17<sup>th</sup> century crime, but we need to bring 21<sup>st</sup> century solutions to bear.”<sup>27</sup> For his goal of ending piracy, Shapiro listed his five tactical approaches: military power, collaboration with the private sector, legal enforcement, targeting networks, and development and governance.<sup>28</sup>

Shapiro ended his speech by stating that the greatest long-term solution to piracy is the re-establishment of stability in Somalia.<sup>29</sup> This is a goal that should not only be revered by the international community, but is also a goal that cannot be achieved overnight. The decreasing number of pirate attacks is promising, but as Shapiro mentioned in his speech, by *prosecuting* pirates nationally, the countries of the world can aid in the continual downfall of piracy, even as Somalia remains in a state of chaos.<sup>30</sup>

### *Countries Turning a Blind Eye*

The United States has emphasized its desire to play an active role in combatting piracy.<sup>31</sup> Unfortunately, many nations

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<sup>24</sup> Shapiro, *supra* note 17.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See, e.g.,* United States v. Hasan, 747 F. Supp. 2d 599 (E.D.Va. 2010).

let pirates go free, as a negative alternative to carrying out prosecutions.<sup>32</sup> Daniel Pines discussed the resistance of many nations to prosecute piracy, despite their ability to do so by way of universal jurisdiction.<sup>33</sup> The United Kingdom, for example, has instructed its Navy to resist from capturing pirates because such pirates could claim asylum under British law, should British forces try to return the pirates to their home countries.<sup>34</sup> In a two-month period in 2010, European ships captured 275 pirates and let 235 of them go.<sup>35</sup> This trending policy is certainly an ineffective means of deterring piracy. Pines regretfully noted, “Piracy is a high-profit, low-risk activity.”<sup>36</sup> It is not the duty of the United States to prosecute all piratical crimes, however, seeing that U.S. military has decided to taken an active approach, legislation is required.

### Universal Jurisdiction

There could be certain cases in which the United States does not need universal jurisdiction to prosecute pirates.<sup>37</sup> However, whether United States courts need to invoke universal jurisdiction or not, a proper statute will always be required to convict defendants in a suitable fashion.

It is no secret that piracy has reemerged as devastating crime that is affecting the international community. While other United States statutes require jurisdiction in order to prosecute defendants for a crime, all countries have universal jurisdiction to prosecute pirates on the high seas.<sup>38</sup> The perpetrators do not have to be American, the victims of the piracy do not have to be American, the crime does not have to be commit-

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<sup>32</sup> Pines, *supra* note 10, at 78-80, 115.

<sup>33</sup> *Id.* at 114-15.

<sup>34</sup> *Id.* at 79.

<sup>35</sup> *Id.* Pines mentioned that during the same two-month period, the United States caught 39 pirates and let about half of them go free as well.

<sup>36</sup> *Id.* at 80.

<sup>37</sup> If the crime is committed against an American defendant, takes place in American jurisdiction, or has an impact on the United States, the United States would not need to invoke universal jurisdiction. See Roger O’Keefe, *Universal Jurisdiction*, 2 JICJ 735, 752-59 (2004).

<sup>38</sup> Eugene Kontorovich, “A Guantanamo on the Sea”: The Difficulty of Prosecuting Pirates and Terrorists, 98 CALIF. L. REV. 243, 251-52 (2010).

ted in the United States, and the crime does not need to have any effect on the United States.<sup>39</sup> Since piracy is a crime that affects every country that uses the high seas, any country can validly prosecute pirates.<sup>40</sup> Pirates are universally considered to be condemned as *hostis humani generis*, or enemies of all mankind.<sup>41</sup> The District Court in Hasan quoted Justice Marshall stating, “[t]hat piracy, under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offense against all.”<sup>42</sup> In this regard, universal jurisdiction is an important mechanism in combatting piracy.

The District Court in Hasan held that Congress maintains the special power to criminalize piracy in a manner consistent with the exercise of universal jurisdiction vis-à-vis the Define and Punish Clause of the Constitution.<sup>43</sup> The universal nature of piracy suggests the need for uniformity with international law. The question then becomes which law to apply.

#### *Defining Piracy: Robbery or No?*

Courts grappling with the definition of piracy have searched through various cases to find precedent. The Privy Council of England was confronted with a case related to the definition of piracy with *In re Piracy Jure Gentium* in 1934.<sup>44</sup> The court there held that actual robbery is not an essential element in the crime of piracy *jure gentium*.<sup>45</sup> The Privy Council also ruled that a frustrated attempt to commit a piratical robbery is equal to piracy *jure gentium*.<sup>46</sup> To reach this decision, the court relied on a 1926 League of Nations subcommittee re-

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<sup>39</sup> See O’Keefe, *supra* note 38, at 752-59.

<sup>40</sup> *Id.*

<sup>41</sup> *Hasan*, 747 F. Supp. 2d at 602 (citing Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 139-53 (2004)); Kontorovich, *supra* note 39 (citing LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 272, at 325-26 (1905)).

<sup>42</sup> *Dire*, 680 F.3d at 454.

<sup>43</sup> *Hasan*, 747 F. Supp. 2d at 616.

<sup>44</sup> *Dire*, 680 F.3d at 457-58 (citing *In re Piracy Jure Gentium*, [1934] A.C. 586, 596-97).

<sup>45</sup> *Id.* at 458.

<sup>46</sup> *Id.*

port, which stated, “According to international law, piracy consists in sailing the seas for private ends without authorization from the government of any state with the object of committing depredations upon property or acts of violence against persons.”<sup>47</sup>

Looking further abroad, the High Court of Kenya heard a piracy case in 2006.<sup>48</sup> In *Republic v. Ahmed*, the defendant was convicted for piracy *jure gentium* based on the modern definition of piracy from international treaties that encompasses acts of violence and detention.<sup>49</sup>

### UNCLOS

The law of nations, or customary international law, defines piracy through UNCLOS.<sup>50</sup> The United States is not a party to UNCLOS,<sup>51</sup> “but has recognized that its baseline provisions reflect customary international law.”<sup>52</sup> Under UNCLOS, piracy includes acts of violence committed on the high seas for private ends, but without any actual takings.<sup>53</sup> Article 101 of UNCLOS states,

Piracy consists of any of the following acts: a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; c) any act of inciting or intentionally facilitating an act

<sup>47</sup> *Id.*

<sup>48</sup> *See Hasan*, 747 F. Supp. 2d at 618 (citing *Ahmed v. Republic*, (2009) 1 K.L.R. 198 (H.C.K.) (Kenya)).

<sup>49</sup> *See id.* at 747.

<sup>50</sup> *Id.* at 469.

<sup>51</sup> Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 23 January 2013, UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, (Jan. 23, 2013), [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm).

<sup>52</sup> *United States v. Alaska*, 503 U.S. 569, 588 n. 10, (1992).

<sup>53</sup> *See* UNCLOS, art. 101.

described in subparagraph a or b.

The UNCLOS definition of piracy is well structured, modern, and does not require the robbery element.<sup>54</sup> The United States Code lacks such a detailed statute.

### The United Kingdom and UNCLOS

With the Piracy Act of 1837, the United Kingdom enacted legislation for offenses of piracy:

Whoever, with intent to commit or at the time of or immediately before or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony and being convicted thereof shall be liable to imprisonment for life.<sup>55</sup>

This legislation has since been abolished. With the Merchant Shipping and Maritime Security Act 1997, section 26, the United Kingdom simply incorporated therein, Article 101 of UNCLOS to be consistent with the modern definition of piracy *jure gentium*.<sup>56</sup>

### The Djibouti Code of Conduct and UNCLOS

Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Jordan, Kenya, Madagascar, Maldives, Mauritius, Oman, Saudi Arabia, Seychelles, Somalia, Sudan, UAE, United Republic of Tanzania, Yemen, South Africa, and Mozambique have signed the Djibouti Code of Conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden.<sup>57</sup> In its definition of general piracy, the

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<sup>54</sup> *Id.*

<sup>55</sup> *Victoriae Reginae, An Act to Amend Certain Acts Relating to the Crime of Piracy*, CAP LXXXVIII (July 17, 1837) [http://www.legislation.gov.uk/ukpga/1837/88/pdfs/ukpga\\_18370088\\_en.pdf](http://www.legislation.gov.uk/ukpga/1837/88/pdfs/ukpga_18370088_en.pdf).

<sup>56</sup> Merchant Shipping and Maritime Security Act 1997, LEGISLATION.GOV.UK art. 26(1) (1997), <http://www.legislation.gov.uk/ukpga/1997/28/section/26>.

<sup>57</sup> *Djibouti Code of Conduct*, OCEANS BEYOND PIRACY (2012), <http://oceansbeyondpiracy.org/matrix/activity/djibouti-code-conduct>.

Djibouti Code of Conduct uses the modern definition of piracy *jure gentium* from Article 101 of UNCLOS.<sup>58</sup>

*U.S. v. Hasan*

On April 1, 2010, on the high seas between Somalia and the Seychelles, five defendants, including Abdi Wali Dire and Mohammed Modin Hasan, mistook the USS Nicholas for a vulnerable merchant ship and attacked the Navy frigate.<sup>59</sup> The USS Nicholas was on a counter-piracy mission in the Indian Ocean, disguised as a merchant vessel.<sup>60</sup> Shortly after midnight on April 1, 2010, an attack skiff operated by defendants Dire, Hasan, and Ali approached the Navy ship.<sup>61</sup> Hasan had a rocket-propelled grenade while Dire and Ali had AK-47 assault rifles.<sup>62</sup> The other two defendants, Umar and Gurewardher, were on the mother ship some distance away.<sup>63</sup> Dire and Ali fired at the Navy ship in order to obtain its surrender.<sup>64</sup> These shots came close to the crewmembers aboard the USS Nicholas, but fortunately there were no casualties.<sup>65</sup> The USS Nicholas's crew then responded and an exchange of fire ensued, lasting less than thirty seconds, at which point the three defendants turned their skiff around and fled for the mother ship.<sup>66</sup> The USS Nicholas pursued the defendants.<sup>67</sup> Commander Kesslering of the USS Nicholas was tactically able to keep his frigate located between the skiff and the mother ship.<sup>68</sup> Defendants

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<sup>58</sup> Protection of Vital Shipping Lanes, art. 1, Apr. 3, 2009, C 102/14 IMO art. 1, <http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf>.

<sup>59</sup> *Hasan*, 747 F. Supp. 2d at 601.

<sup>60</sup> *United States v. Dire*, 680 F.3d 446, 449 (4th Cir. 2012).

<sup>61</sup> *Hasan*, 747 F. Supp. 2d at 601.

<sup>62</sup> *Dire*, 680 F.3d at 449.

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* at 450 (explaining how this attempted strike by the defendants is consistent with a pattern of recent Somali pirate attacks, in which pirates seize a merchant vessel, return to Somalia with the vessel and the crew, and attempt to negotiate a ransom).

<sup>65</sup> *Id.* at 449.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *See id.* (describing Commander Kesslering's goal of preventing reunion between the skiff and the mothership).

Dire, Ali, and Hasan threw their weapons and a ladder into the Indian Ocean.<sup>69</sup> After about thirty minutes, the USS Nicholas captured the three defendants on the attack skiff and then the two defendants aboard the mother ship.<sup>70</sup>

Once in custody aboard the USS Nicholas, the defendants separately admitted that they willingly participated in the scheme to hijack a merchant vessel on April 1, 2010, and they even gave details about the operation.<sup>71</sup> The five defendants, all Somalis, were transported to Virginia, where they were indicted and tried for, *inter alia*, piracy as proscribed by 18 U.S.C. § 1651.<sup>72</sup>

After an eleven-day trial, the defendants were convicted in the United States District Court for the Eastern District of Virginia on counts 1 through 14, with the exception of count 13.<sup>73</sup> The defendants were sentenced to life in prison plus 960 months.<sup>74</sup> Specifically, the court imposed mandatory life sentences for Count 1, piracy as defined by the law of nations under § 1651.<sup>75</sup> The court also imposed concurrent sentences of 120 months for Count 2, an attack to plunder a vessel<sup>76</sup>, and concurrent sentences of 120 months each for Counts 5 and 6, assault with a dangerous weapon within a special maritime jurisdiction.<sup>77</sup> The defendants also received concurrent sentences of 240 months each for Counts 3, 4, 7, 8, 9, and 14, for an act of violence against persons on a vessel,<sup>78</sup> conspiracy to perform an

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<sup>69</sup> *Id.* The ladder was to be used to board the merchant vessel.

<sup>70</sup> *Id.* A second attack skiff that appeared on radar, but never closed on the USS Nicholas, was not found.

<sup>71</sup> *Id.* at 450.

<sup>72</sup> *Id.*; 18 U.S.C. § 3238 (2012) (providing that the “trial of all offenses begun or committed upon the high seas...shall be [tried] in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought”).

<sup>73</sup> *Id.* The defendants were not convicted for count thirteen because the Court felt count thirteen was duplicative of count twelve.

<sup>74</sup> *Id.* This sentence amounted to life in prison plus eighty years.

<sup>75</sup> *Id.* The first count was heatedly contended by the defendants in *Hasan*, after the same District Court had declined to convict pirates in a similar situation under § 1651 just months before in *Said*.

<sup>76</sup> 18 U.S.C. § 1659 (2012).

<sup>77</sup> 18 U.S.C. § 113(a)(3) (2012).

<sup>78</sup> 18 U.S.C. §§ 2291(a)(6), 2290(a)(2) (2012).

act of violence against persons on a vessel,<sup>79</sup> assault with a dangerous weapon on federal officers and employees,<sup>80</sup> conspiracy involving a firearm and a crime of violence,<sup>81</sup> and conspiracy to carry an explosive during the commission of a felony,<sup>82</sup> respectively. The court imposed additional consecutive sentences of 300 months each for Counts 10 and 11, for using, carrying, and possessing a firearm in relation to a crime of violence,<sup>83</sup> and 360 months under Count 12 for using, carrying, and possessing a destructive device in relation to a crime of violence.<sup>84</sup>

### The Split: Said and Hasan

In United States legislation, crimes are defined specifically by requisite elements.<sup>85</sup> The piracy provision in § 1651 simply defers to the law of nations without providing specific elements, which indicates that the United States acquiesces to the definition of piracy as it is defined by the current customary international law.<sup>86</sup> The defendants in *Said* and *Hasan*, attempted to fight the constitutionality of such a vague provision. While the *Said* defendants were successful, just a few months later, the *Hasan/Dire* defendants were not.

Dire, along with his co-defendants, appealed the decision of the District Court, primarily on the ground that they never completed the attempted piracy.<sup>87</sup> The defendants argued that because piracy is robbery at sea, and they only boarded the USS Nicholas as captives and took no property, they should not have been convicted of piracy under § 1651.<sup>88</sup>

The omission of specifically laid out elements in § 1651 led to the interpretive split in *Said* and *Hasan*. In *Said*, the court

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<sup>79</sup> 18 U.S.C. §§ 2291(a)(9), 2290(a)(2) (2012).

<sup>80</sup> 18 U.S.C. §§ 111(a)(1), (b) (2012).

<sup>81</sup> 18 U.S.C. § 924(o) (2012).

<sup>82</sup> 18 U.S.C. § 844(m) (2012).

<sup>83</sup> 18 U.S.C. 924 (c)(1)(A)(iii) (2012).

<sup>84</sup> 18 U.S.C. §§ 924(c)(1)(A), (c)(1)(B)(ii) (2012).

<sup>85</sup> See e.g., *Criminal Law: An Overview*, LEGAL INFO. INST., [http://www.law.cornell.edu/wex/criminal\\_law](http://www.law.cornell.edu/wex/criminal_law) (last visited Feb. 16, 2014).

<sup>86</sup> 18 U.S.C. § 1651 (2012).

<sup>87</sup> *Dire*, 680 F.3d at 451.

<sup>88</sup> *Id.*

found § 1659<sup>89</sup> to be applicable to the “attack to plunder a vessel,” and thus held that it would be redundant to hold the defendants liable for the same conduct under § 1651.<sup>90</sup> The *Dire* Court affirmed the *Hasan* convictions under both § 1651 and § 1659.

The *Hasan* Court interpreted § 1651 “as an unequivocal demonstration of congressional intent ‘to incorporate ... any subsequent developments in the definition of general piracy under the law of nations.’”<sup>91</sup> The *Hasan* court disagreed with the *Said* court regarding § 1651 and § 1659 stating, “the defendants defectively ignored the distinct jurisdictional scopes provided by § 1651 and 1659. While § 1659 applies only to acts by United States citizens or foreign nationals ‘set[ting] upon’ U.S. citizens or U.S. ships, § 1651 provides for the prosecution of general piracy with the ability to invoke universal jurisdiction.”<sup>92</sup>

On appeal, the *Dire* Court stated, “[t]he defendants would have us believe that, since the *Smith* era, the United States’ proscription of general piracy has been limited to ‘robbery upon the sea.’ But that interpretation of our law would render it incongruous with the modern law of nations and prevent us from exercising universal jurisdiction in piracy cases.”<sup>93</sup> The Court continued, “[t]he defendants’ position is irreconcilable with the noncontroversial notion that Congress intended in § 1651 to define piracy as a universal jurisdiction crime...we are constrained to agree with the district court that § 1651 incorporates a definition of piracy that changes with advancements in the law of nations.”<sup>94</sup> This analysis from *Dire* led to the proper decision in affirming *Hasan*, as the international community

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<sup>89</sup> 18 U.S.C. § 1659 (2012). “Whoever, upon the high seas or other waters within the admiralty and maritime jurisdiction of the United States, by surprise or open force, maliciously attacks or sets upon any vessel belonging to another, with an intent unlawfully to plunder the same, or to despoil any owner thereof of any moneys, goods, or merchandise laden on board thereof, shall be fined under this title or imprisoned not more than ten years, or both.”

<sup>90</sup> *Said*, 757 F. Supp. 2d at 562-63.

<sup>91</sup> *Dire*, 680 F.3d at 460 (citing *Hasan* 747 F. Supp. 2d at 446).

<sup>92</sup> *Id.* at 463.

<sup>93</sup> *Id.* at 468-69.

<sup>94</sup> *Id.* at 469.

has removed the robbery requirement from the crime of piracy in nearly all of its multilateral treaties, including UNCLOS.<sup>95</sup> However, issues still linger with respect to the vagueness of § 1651 and its automatic life-imprisonment sentence.

### Why UNCLOS?

The Fourth Circuit in *Dire* affirmed the District Court's decision to convict the defendants of piracy.<sup>96</sup> To support its judgment, the court resorted to the definition of piracy as laid out in UNCLOS.<sup>97</sup> This definition is deemed customary international law because present therein are the two elements required for a treaty to crystallize into such binding law: *opinio juris* and state practice.<sup>98</sup> "*Opinio juris*" is the subjective element of customary international law, as it refers to the common opinions of the countries of the world regarding certain international practices.<sup>99</sup> "State practice" is the objective element, which requires that the custom be practiced generally in the international community.<sup>100</sup> Because the UNCLOS definition of piracy has crystallized into customary international law, the Fourth Circuit in *Dire* chose to apply this definition to be in accordance with the law of nations. The Court stated, "As of April 1, 2010, the law of nations...defined piracy to *include* acts of violence committed on the high seas for private ends without an actual taking...the definition of general piracy under modern customary international law is, at the very least, reflected in...Article 101 of the 1982 UNCLOS."

The *Dire* court chose to refer to the UNCLOS, even though the United States is not a party to the convention, because so many countries in the world are party to UNCLOS.<sup>101</sup> Therefore, while UNCLOS is not binding on the U.S., it is used

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 477.

<sup>97</sup> *Id.* at 469.

<sup>98</sup> Christopher Greenwood, *Sources of International Law: An Introduction*, AUDIOVISUAL LIBRARY OF INT'L LAW pt. 2 (2008), [http://untreaty.un.org/cod/avl/pdf/ls/greenwood\\_outline.pdf](http://untreaty.un.org/cod/avl/pdf/ls/greenwood_outline.pdf).

<sup>99</sup> *Opinio Juris (International Law)*, LEGAL INFORMATION INSTITUTE, [http://www.law.cornell.edu/wex/opinio\\_juris\\_international\\_law](http://www.law.cornell.edu/wex/opinio_juris_international_law).

<sup>100</sup> Greenwood, *supra* note 98.

<sup>101</sup> *Hasan*, 747 F. Supp. 2d at 633; UNCLOS.

as evidence of customary international law. The United States is party to the Geneva Convention on the High Seas, which has nearly the exact same definition of piracy as UNCLOS.<sup>102</sup> The Fourth Circuit chose to use UNCLOS rather than the Geneva Convention because UNCLOS is better known around the world<sup>103</sup> and because UNCLOS was written more recently than the Geneva Convention.<sup>104</sup> For a treaty to evolve into a 'norm' of international law, it must be accepted by a majority of states, especially those most affected by the treaty.<sup>105</sup> Sixty-three states have ratified the Geneva Convention on the High Seas,<sup>106</sup> and 161 have ratified UNCLOS.<sup>107</sup> This is an overwhelming majority, as there are currently 192 states party to the United Nations.<sup>108</sup> All of the nations bordering the Indian Ocean on the east coast of Africa, including South Africa, Mozambique, Tanzania, Kenya, and Somalia, are party to UNCLOS.<sup>109</sup>

The defendants in *Hasan* harped on the definition of general piracy from *Smith*, but the District Court ruled that since *Smith* was 200 years old and half a world away, these Somali defendants would likely have been more cognizant of the UNCLOS definition, than that from *Smith*, as Somalia had just ratified UNCLOS in 1989.<sup>110</sup>

#### Problems with the Definition of Piracy from UNCLOS

While the Fourth Circuit in *Dire* stated that the definition of piracy under UNCLOS has crystallized into customary international law, Daniel Pines argues that there are problems with the definition of piracy under UNCLOS that could cause difficulties for United States courts in the future.<sup>111</sup> The

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<sup>102</sup> *Hasan*, 747 F. Supp. 2d at 633.

<sup>103</sup> *Id.* at 634.

<sup>104</sup> *Id.* at 620.

<sup>105</sup> *See, e.g.*, Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055.

<sup>106</sup> *Hasan*, 747 F. Supp. 2d at 633.

<sup>107</sup> *Id.*; UNCLOS.

<sup>108</sup> *Hasan*, 747 F. Supp. 2d at 633.

<sup>109</sup> *Id.* at 634.

<sup>110</sup> *Id.* at 639.

<sup>111</sup> Pines, *supra* note 10, at 90.

UNCLOS definition, for example, specifies that pirates must be seeking private ends.<sup>112</sup> This ignores potential piracy with other objectives, such as political agendas or terrorism.<sup>113</sup> UNCLOS also only defines piracy as taking place on the high seas.<sup>114</sup> Piracy is one of the few crimes that grants universal jurisdiction to the international community because no one has sole jurisdiction over the high seas.<sup>115</sup> While most piracy cases will likely occur on the high seas, the UNCLOS definition of piracy would not apply in a case where a vessel was hijacked in a country's exclusive economic zone.<sup>116</sup> Therefore, potential defendants could find a loophole if they pirated a vessel near a state's shoreline.

Furthermore, the UNCLOS definition does not set out specific punishments for the various offenses of piracy.<sup>117</sup> Pines notes, "Piracy has always been an international crime enforced by national laws, the exact terms of which have varied between jurisdictions."<sup>118</sup> The United States should not be leaving the definition of piracy up to customary international law, while still imposing a mandatory life sentence. UNCLOS lays out specific provisions for piracy, and they do not all contain automatic life sentences. The United States takes the provisions from UNCLOS to define acts of piracy under § 1651, and then applies an automatic life sentence.

The UNCLOS definition is thus too narrow, in that will not be applicable in the circumstances just mentioned, and it does not lay out specific punishments. The United States has already begun, and should continue to play an active role in the fight against piracy. Simply deferring to the UNCLOS definition of piracy is not the most effective means of combatting the crime.

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<sup>112</sup> *Id.* at 91.

<sup>113</sup> *Id.* at 91-92.

<sup>114</sup> *Id.* at 90-91.

<sup>115</sup> Kontorovich, *supra* note 39, at 251-52.

<sup>116</sup> UNCLOS, art. 55.

<sup>117</sup> *See* UNCLOS.

<sup>118</sup> Pines, *supra* note 10, at 99.

## SECTION II

*Problem 1: Ambiguity*

Under any interpretation, § 1651 is unconstitutionally vague. Justice Sutherland noted in *Connally v. General Construction Co.* that the terms of a statute must be explicit to inform those subject to the statute; otherwise, the statute is unconstitutionally vague as it violates due process of law.<sup>119</sup> The crime of piracy is not explicitly defined in § 1651; rather, the provision defers to the definition provided by the law of nations, which is constantly evolving. The District Court in *Hasan* applied the definition of piracy from UNCLOS.

Until the *Hasan* case in 2010, the last United States court case addressing the definition of piracy was *U.S. v. Smith*, roughly 200 years ago.<sup>120</sup> In its 1820 decision, the United States Supreme Court held that the crime of piracy requires the specific element of ‘robbery at sea.’<sup>121</sup> Following the Virginia District Court’s 2010 decision in *Said*, United States case law leading up to *Hasan* and *Dire* maintained that defendants who fail to complete a robbery at sea, on account of an intervention by the United States Navy, could not be convicted under § 1651.<sup>122</sup> Then, in *U.S. v. Dire*, the Fourth Circuit disregarded that prior case law and held that U.S. courts should apply a more expansive definition of piracy.<sup>123</sup>

The Fourth Circuit in *Dire* ruled that under the law of nations, customary international law as provided by the Geneva Convention on the High Seas and the United Nations Convention on the Law of the Sea, defines piracy to merely include acts of violence.<sup>124</sup> These international, multilateral treaties leave out the element of robbery. United States courts, as evinced in *Dire*, appear to be embracing this trend. According to *Dire*, United States courts are now interpreting § 1651 by re-

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<sup>119</sup> *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

<sup>120</sup> *Dire*, 680 F.3d at 456; *United States v. Smith*, 18 U.S. 153 (1820).

<sup>121</sup> *Smith*, 18 U.S. at 154.

<sup>122</sup> *Said*, 757 F. Supp. 2d at 554.

<sup>123</sup> *Dire*, 680 F.3d at 446.

<sup>124</sup> *Id.* at 458-69.

ferring to the definition of piracy from UNCLOS,<sup>125</sup> however, this exact definition is not evident from the text of § 1651. The United States Code unequivocally lacks a black law modern definition of piracy with elements to embody this contemporary standpoint.

The current text of § 1651 is consistent with customary international law in its very language. The deference to the law of nations signifies that the United States yields to customary international law when defining piracy. Section 1651 is problematic, however, because it does not distinguish to which definition of piracy in customary international law the United States seeks to refer. This ambiguity led to the split in case law between *Said* and *Hasan/Dire*. It is not fair for a court to be able to not convict defendants of piracy one day, and then convict others for the same conduct just a few months later.

Additionally, the Fourth Circuit's decision in *Dire* is only binding in its jurisdiction. As there is no Supreme Court case law addressing the definition of piracy since *Smith* in 1820, should this issue arise in a different U.S. jurisdiction, the result would be unknown. Piracy statutes are not required for all crimes on the high seas, however, for those are the most serious, there must be uniformity.

Defendants convicted of piracy have two persuasive arguments with respect to the application of § 1651 and its ambiguity. First, as mentioned above, based on binding United States case law, the most recent Supreme Court conviction for piracy in the United States held that robbery is a required element.<sup>126</sup> Second, the definition of piracy (and the law of nations in general) evolves over the years.<sup>127</sup>

The *Hasan* Court rejected the defendants' ambiguity argument. In reversing *Smith*, the Court determined that "§ 1651's express incorporation of the definition of piracy provided

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<sup>125</sup> *Hasan*, 747 F. Supp. 2d at 640.

<sup>126</sup> *United States v. Smith*, 18 U.S. 153 (1820) (This is inconsistent with the latest decision of the Fourth Circuit in *Dire*).

<sup>127</sup> *Said*, 757 F. Supp. 2d at 566 (If "the Court accepted the Government's request to adopt the definition of piracy from these debatable international sources whose promulgations evolve over time, defendants in United States courts would be required to constantly guess whether their conduct is proscribed by § 1651").

by “the law of nations,” which is today synonymous with customary international law, provides fair warning of what conduct is proscribed by the statute.”<sup>128</sup> The Fourth Circuit in *Dire* affirmed this holding. However, by simply reading the language of § 1651, the definition of piracy used in U.S. courts is not clear. Furthermore, courts admit that this definition will change over time. While it is difficult to empathize with those standing trial for piracy, providing explicit elements of crimes is a vital means of protecting the Due Process of law in the U.S. judicial system.

The United States is striving to be consistent with international law, as piracy is clearly an issue with international consequences. Without indicating which definition will be followed in the future United States courts, defendants may be able to frustrate attempted prosecutions.<sup>129</sup> It was up to the District Court in both *Hasan* and *Said* to decide the present-day definition of piracy based on international law at the time of the arrests. By acknowledging the opposite outcomes from the same District Court in the same year, consistency with international law is a noticeable issue that necessitates immediate consideration. As customary international law evolves, the alleged consistency provided by the language of § 1651 will be subject to alteration.

The 2012 Edition of the United States Code, under Title 18, section 1651, includes a section, ‘Historical and Revision Notes,’ which states:

“In the light of far-reaching developments in the field of international law and foreign relations, the law of piracy is deemed to require a fundamental reconsideration and complete restatement, perhaps resulting in drastic changes by way of modification and expansion. Such a task may be regarded as beyond the scope of this project. The present revision is, therefore, confined to the making of some obvious and patent corrections. It is recommended, however, that at some opportune time in the near future, the subject of piracy be entirely reconsidered and the law bearing on it modified and restated in accordance with the needs of the times.”<sup>130</sup>

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<sup>128</sup> *Hasan*, 747 F. Supp. 2d at 638.

<sup>129</sup> *See, e.g., Said*, 757 F.Supp.2d at 556.

<sup>130</sup> 18 U.S.C. ch. 81 (2012), available at <http://uscode.house.gov/download/>

There appears no better time to modify the United States statutes than now, in the wake of these recurring piracy cases. This ambiguity leaves United States legislation without a clear definition of piracy. Courts should not just look to UNCLOS, as this caused a split in case law, and as mentioned above, the UNCLOS definition has flaws. United States courts should treat UNCLOS more like the United Nations Convention Against Torture [hereinafter “Torture Convention”].<sup>131</sup> U.S. Courts rely on the Torture Convention; however, United States legislation contains its own torture statute.<sup>132</sup> The torture statute has specified elements of the crime, and leaves it up to courts to impose proper sentencing.<sup>133</sup> Having the elements of a crime like torture is valuable, because customary norms are always evolving. Additionally, contemporary courts like the International Criminal Court have expressed a desire to move away from customary international law and have given priority to statutory regulation.<sup>134</sup> Customary international law is a respected source of international law, however, statutory elements provide for much more effective adjudication.

*Problem 2: The Mandated Life-Sentence*

The automatic life-sentence imposed by § 1651 amounts to cruel and unusual punishment under the Eighth Amendment to the Constitution. The Eighth Amendment states, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>135</sup> Justice Brennan, in *Furman v. Georgia*, stated that a severe punishment, which is obviously inflicted in a wholly arbitrary fashion, is classified as cruel and unusual punishment.<sup>136</sup> It is un-

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pls/18C81.txt.

<sup>131</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GA. Res. 39/46 Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/708, Annex (1984), *reprinted in* 23 I.L.M. 1027 (1984) [hereinafter “Torture Convention”].

<sup>132</sup> 18 U.S.C. 2340(A) (2012).

<sup>133</sup> *See Id.*

<sup>134</sup> *See* Rome Statute of the International Criminal Court, arts. 21(1)(a),(b), July 17, 1998.

<sup>135</sup> U.S. CONST. amend VIII.

<sup>136</sup> *Furman v. Georgia*, 408 U.S. 238, 281 (1972).

doubtedly problematic to issue an automatic life-sentence for a crime that is both undefined in United States legislation and constantly evolving as the Law of Nations develops.

The defendants in both *Said* and *Dire* argued that the automatic life-sentence imposed by § 1651 violated their constitutional rights.<sup>137</sup> In *Said*, the court analyzed both § 1651 and § 1659.<sup>138</sup> The *Said* court held that when defendants attempt to pirate a merchant vessel, but never complete the robbery, the defendants should be convicted under § 1659 instead of § 1651, and should thus receive no more than ten years in prison.<sup>139</sup> To distinguish between the two provisions of the United States Code, the court in *Said* compared an unsuccessful piracy attempt on a vessel to throwing a rock at a vessel.<sup>140</sup> The *Said* court found it illogical to automatically imprison a defendant for life for a violent assault on a vessel, (which could be a failed piracy or merely throwing a rock at a vessel), when there is no actual piracy.<sup>141</sup> The defendants in *Dire* raised a similar argument, but the Fourth Circuit affirmed *Hasan* and imposed the life-sentence.<sup>142</sup> As a result, the *Said* decision was overturned, and the *Said* defendants were also subjected to the mandated life sentence.

The *Hasan* and *Dire* courts rejected the defendants' constitutional arguments regarding the mandated life sentence. The two Courts gave no explanation regarding the life sentence, except that it appropriately followed the convictions under § 1651. The defendants' argument concerning the life-imprisonment is convincing, as United States courts have proven to be inconsistent in their punishments of defendants that fail at attempted piracies. The courts' conduct in *Dire* violates the 8<sup>th</sup> amendment because it applies an automatic life sentence for offenses that unquestionably do warrant such. When drafting § 1651, it is likely that piracy was meant to apply to the actual pirating of a ship, which deserves a life sentence. Assault on a vessel is incomparable.

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<sup>137</sup> *Dire*, 680 F.3d at 454.

<sup>138</sup> *Said*, 757 F. Supp. 2d at 562 (quoting 18 U.S.C. § 1659 (2012)).

<sup>139</sup> *Id.* at 562.

<sup>140</sup> *Id.* at 563.

<sup>141</sup> *Id.*

<sup>142</sup> *Dire*, 680 F.3d at 454.

Most recently, the Eastern District of Virginia distinguished the *Dire* Court's implementation of the automatic life sentence. The *Said* defendants were initially found not guilty of piracy in accordance with *Smith*, but the *Dire* Court overturned this decision. On remand to the Eastern District, on February 28, 2014, the Court held that the statutory mandatory life sentence imposed on the defendants, who were convicted of piracy under the law of nations, violated the Eighth Amendment.<sup>143</sup> This holding is entirely appropriate, as customary international law, specifically UNCLOS, does not provide for automatic life sentences. The *Said* Court was proper in this reversal, and the *Dire* Court should follow in this fashion.

All piracy cases are not the same, which is why the definition of piracy requires specific punishments. Courts should be able to align sentences based on the gravity of the offenses in a particular series of events.<sup>144</sup> Besides piracy, there are no other robbery offenses in United States legislation that result in automatic life-imprisonment.<sup>145</sup>

Piracy is indubitably a crime that warrants severe punishment. When defendants successfully pirate a merchant vessel, the life-imprisonment sentence seems appropriate and maybe even lenient. However, due to modern technology and increasing military presence around the horn of Africa, the cases are not always this simple. The definition of piracy needs to be narrowed, with particular punishments so as not to violate the Eighth Amendment. The other option would be committing to the life sentence, but should this be the case, Courts should not be taking the definition of piracy from UNCLOS, which does not apply such sentencing. Recent cases like *Said* and *Dire* have made it clear that while applying customary international law definitions is appropriate, United States courts require judicial discretion when issuing punishments, instead of having to automatically hand out life-sentences.

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<sup>143</sup> *United States v. Said*, 2014 WL 806230 (E.D.Va. 2014).

<sup>144</sup> See *supra* text accompanying note 131.

<sup>145</sup> See 18 U.S.C. ch. 103 (2012), available at <http://www.law.cornell.edu/uscode/text/18/part-1/chapter-103>.

## SECTION III

In the wake of cases like *Dire* and *Said*, the unconstitutionality of § 1651 needs to be addressed. The United States courts and legislature are on the right track by embracing customary international law, however, a solution is needed to progressively expand the law beyond the current reach of customary international law and UNCLOS.

*Solution 1: Judicial Intervention*

A possible means of clarifying the elements for the crime of piracy in the United States would be for the Supreme Court to hear a piracy case and update its interpretation of § 1651. The last Supreme Court case dealing with piracy was heard in 1820,<sup>146</sup> so it would be beneficial for the Court to weigh in on the crime while taking into account modern advancements in piracy and piracy prevention. After the Fourth Circuit affirmed the District Court's decision in *Dire*, the defendants petitioned the United States Supreme Court by a writ of certiorari.<sup>147</sup> The Supreme Court denied the petition on January 22, 2013, and thus the ambiguity remains.<sup>148</sup>

By delivering a decision, the Supreme Court could have issued modern law that would be binding on all U.S. jurisdictions.<sup>149</sup> Until the Supreme Court hears a piracy case implicating § 1651, the Fourth Circuit's holding from *Dire*, while not binding in other jurisdictions, will act as persuasive precedent.<sup>150</sup> The Supreme Court could have granted the writ and held that the definition of piracy from UNCLOS is binding on U.S. courts, or in the alternative, that *Smith* is still good law. The *Dire* Court interpreted § 1651 by applying the UNCLOS definition of piracy, which while aiding with the vagueness of the statute, does not solve the mandated life sentence issue. The Supreme Court could have determined that while the defi-

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<sup>146</sup> United States v. Smith, 18 U.S. 153 (1820).

<sup>147</sup> United States v. Dire, 680 F.3d 446 (4th Cir. 2012), *cert. denied*, 133 S.Ct. 982 (U.S. 2013).

<sup>148</sup> *Id.*

<sup>149</sup> See Barbara Bintliff, *Mandatory v. Persuasive Cases*, WEST GROUP (2001), [http://faculty.law.lsu.edu/toddbruno/mandatory\\_v\\_\\_persuasive.htm](http://faculty.law.lsu.edu/toddbruno/mandatory_v__persuasive.htm).

<sup>150</sup> See *Id.*

tion of piracy from UNCLOS will be applied under the law of nations, the mandated life sentence is no longer applicable. By redacting this clause from § 1651, the Court could have granted judicial discretion to courts dealing with piracy issues in forthcoming trials.

Regardless of potential judicial intervention, customary international law is constantly evolving. Therefore, even if the Supreme Court weighed in with a decision defining piracy and the punishments therein, a statute would still be a more effective means of implementing law to address prospective circumstances.

### Solution 2: Legislative Reform

The more effective solution for addressing the problems set forth by § 1651 would be for Congress to write a legislative reform. It is vital that the United States has a valid, detailed, piracy statute, for piracy is a crime unlike any other.

Should Congress choose to amend the United States Code, Congress has the ability to write anything it desires. Congress did, after all, draft the current version of § 1651. Ideally, Congress could look to its current provision in § 1651 and acknowledge that U.S. legislation demands a clear and precise definition of piracy to avoid the constitutional issues of vagueness and cruel and unusual punishment while still maintaining consistency, and even reaching beyond current customary international law. By amending § 1651, Congress could be much more precise in laying out the elements of piracy and the specific punishments that correspond with the piratical offenses. Without Supreme Court intervention, Congress alone has the ability to contribute to achieving the goal of the United States to act as a general deterrent to piracy. Congress can write an amendment to make the procurement of proper convictions of pirates more proficient.

The UNCLOS definition of piracy is clearly respectable, as it is applied by states across the world, including the United States. However, the definition is too narrow. An amendment is needed to clarify the elements, address the issues of vagueness and sentencing, and to further expand the law. Upon the implementation of some much needed legislative clarification,

U.S. courts would no longer face the problems arising from cases like *Said* and *Dire*, and could more systematically convict pirates upon their detentions.

### CONCLUSION

An amendment to § 1651 will not stop piracy or get other countries to prosecute pirates, but it would address the recent split in U.S. case law. United States piracy legislation dates back to the Constitution.<sup>151</sup> The provision of United States Constitution addressing piracy was originally written in 1787.<sup>152</sup> The original provision of § 1651 of the United States Code was written over one hundred years ago.<sup>153</sup> With advances in modern technology, both the offense of piracy and piracy prevention have changed considerably. United States courts have recently struggled with the ability to convict and sentence defendants charged with the crime of piracy. UNCLOS, a treaty from 1982, contains the most modern definition of piracy, and was used by the Fourth Circuit in *U.S. v. Dire* and in case law since<sup>154</sup>.

A legislative amendment to the United States Code to update the definition of piracy to be in accordance with UNCLOS is imperative. Given the resurgence of pirate attacks in recent times, a stringent and detailed legislative amendment could act as a general deterrent to piracy on the high seas. The United States is heading in the right direction with its current piracy case law, but an issue of such magnitude deserves statutory explication. Simply because pirates are caught prior to carrying out their planned robbery, they should not allow them to escape a conviction of piracy altogether. However, with an updated statute, proper punishments could be issued for specific crimes.

The United States' law should embody the goal of its military to prevent piracies from occurring before they take place.

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<sup>151</sup> U.S. CONST. art. 1, § 8, cl. 10.

<sup>152</sup> U.S. CONST. art. VII.

<sup>153</sup> See 18 U.S.C. 1651, (2012), available at [http://www.law.cornell.edu/uscode/text/18/1651?quicktabs\\_8=2#quicktabs-8](http://www.law.cornell.edu/uscode/text/18/1651?quicktabs_8=2#quicktabs-8).

<sup>154</sup> See *United States v. Salad*, 908 F. Supp. 2d 730 (E.D.Va 2012) (applying UNCLOS).

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*A DIRE NEED FOR LEGISLATIVE REFORM*

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A modern, binding definition of piracy in the United States should be drafted to reflect the definition of piracy in accordance with the Geneva Convention on the High Seas, UNCLOS, and customary international law, while also building on newer, more precise principles to take into account the recent progression in the recurring offenses of piracy. By identifying a precise and less expansive definition of piracy, United States Congress would essentially be able to reward United States military efforts by appropriately convicting and sentencing captured pirates. There would be no constitutional claims as to vagueness or mandated life sentences, and instead would exist black letter law capable of properly convicting the wide array of piratical crimes currently being committed on the high seas.