The Capture and Interrogation of § 1651 Pirates: The Consequences of *United States v. Dire*[*]

INTRODUCTION

It has been over two centuries since the pirates of the "Golden Age" intimidated and endangered mariners on the high seas.[1] In his heyday, Edward Teach, better known as Blackbeard, led a fleet of pirates numbered in the hundreds.[2] During the early 1700s, however, the rising dependence on Caribbean plantations and the accompanying need for safe shipping channels brought a quick end to the "Golden Age" for pirates like Blackbeard.[3] Recently though, the international community has experienced an unfortunate increase in pirate attacks,[4] many of which have been attributed to Somali pirates.[5] Accurately labeled throughout history as *hostis humani generis*—"enemies of all mankind"[6]—modern pirates have a significant negative effect on global commerce, causing losses measuring over one billion dollars annually.[7] Consequently, international organizations such as the United Nations have made concerted efforts to urge member nations to cooperate and subdue piratical activities.[8] In addition, naval forces from around the world,

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1. *See* DAVID F. MARLEY, MODERN PIRACY 7–8 (2011) (discussing the rapid decline in piracy during the early eighteenth century).

2. *See id.* at 8.

3. *See id.* at 7–8 (noting that within a year of the peak of Blackbeard's power, his crew only included approximately twenty pirates).

4. From January through September 2011, pirate attack numbers reached their highest level since the International Maritime Bureau ("IMB") began monitoring piracy in 1991. *See As World Piracy Hits a New High, More Ships Are Escaping Somali Pirates, Says IMB Report*, INT'L CHAMBER COMM. (Oct. 18, 2011), http://www.iccwbo.org/News/Articles/2011/As-world-piracy-hits-a-new-high,-more-ships-are-escaping-Somali-pirates,-says-IMB-report/. Overall in 2011, the IMB reported 439 actual and attempted attacks, contrasted with only 263 actual and attempted attacks in 2007. *See* ICC INT'L MAR. BUREAU [IMB], PIRACY AND ARMED ROBBERY AGAINST SHIPS, REPORT FOR JAN. 1–SEPT. 30, 2012, at 5–6 (2012) [hereinafter IMB REPORT].

5. *See, e.g.*, IMB REPORT, *supra* note 4, at 5–6.

6. *See* United States v. Hasan (*Hasan I*), 747 F. Supp. 2d 599, 602 (E.D. Va. 2010), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012).

7. *See, e.g.*, GEOPOLICITY, THE ECONOMICS OF PIRACY: PIRATE RANSOMS & LIVELIHOODS OFF THE COAST OF SOMALIA 3 (2011) (estimating that Somali piracy cost the international community between $4.9 billion and $8.3 billion in 2010).

8. *See* S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010); S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (stressing the need to address failure of judicial systems of certain states to prosecute piracy and commending the efforts of member states to prosecute suspected pirates).

including those of the United States, have joined in partnership "to conduct counterpiracy operations" off of the east coast of Africa.[9] Unfortunately, the rapid proliferation of pirate attacks has not provided the governments engaged in anti-piracy initiatives with enough time to develop general piracy statutes[10] whose punishments are consistent with one another.[11]

In fact, within the United States federal court system, even the *interpretation* of the general piracy statute, 18 U.S.C. § 1651, has been inconsistent,[12] despite the fact that only three different disputes[13] have been heard under the current § 1651 definition of piracy: "Whoever, 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."[14] Interestingly, the United States District Court for the Eastern District of Virginia alone promulgated two conflicting interpretations—in *United States v. Hasan* ("*Hasan I*")[15]

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9. Combined Task Force ("CTF") 151 is one example of international military cooperation aimed at "suppress[ing] piracy in order to protect global maritime security and secure freedom of navigation for the benefit of all nations." *See Combined Task Force (CTF) 151*, COMBINED MARITIME FORCES, http://www.cusnc.navy.mil/cmf/151/index.html (last visited Mar. 10, 2013).

10. *See infra* Part II for a discussion on general and municipal piracy.

11. *See* EUGENE KONTOROVICH, THE PENALTIES FOR PIRACY 2 (2012) (Discussion Paper prepared for Oceans Beyond Piracy—A Project of One Earth Future Foundation) (discussing the "variance in . . . punishments" convicted pirates experience depending on which country "happen[s] to take custody of them"). Recently, China has invoked the harshest penalties for piracy, sentencing convicted pirates to death in two cases. *See id.* at 6–7. In stark contrast, India recently sentenced pirates "to seven years in prison." *Id.* at 7. Overall, from 2006 through early 2012, 209 Somali pirates received thirty-nine separate sentences. *Id.* While the discrepancy in punishments issued by various countries has resulted in "forum-shopping," that subject is outside the scope of this Recent Development. *Id.* at 4.

12. *Compare Hasan I*, 747 F. Supp. 2d 599, 640–41 (E.D. Va. 2010) (holding that the definition of § 1651 piracy includes "any illegal act of violence . . . committed for private ends . . . on the high seas"), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012), *with* United States v. Said, 757 F. Supp. 2d 554, 567 (E.D. Va. 2010) (interpreting the definition of piracy under 18 U.S.C. § 1651 to mean "sea robbery"), *vacated*, 680 F.3d 374 (4th Cir. 2012).

13. *Hasan I*, 747 F. Supp. 2d 599; *Said*, 757 F. Supp. 2d 554; United States v. Ali, Criminal No. 11-0106, 2012 WL 2870263 (D.D.C. July 13, 2012) (granting defendant's motion to dismiss the § 1651 piracy charge, but denying defendant's motion to dismiss the charge of aiding and abetting in piracy as defined by § 1651), *aff'd in part and vacated in part*, 2012 WL 3024763 (D.D.C. July 25, 2012). *Ali* will not be thoroughly discussed in this Recent Development for two reasons. First, *Ali*'s interpretation of § 1651 largely depends on the rationale used in both *Hasan I* and *Dire*. *See Ali*, 2012 WL 2870263, at *6–7. Second, *Ali* primarily focuses on whether the aiding and abetting statute, 18 U.S.C. § 2 (2006), or a conspiracy charge can expand the scope of § 1651. *See id.* at *6–11. This Recent Development is only concerned with the interpretation of § 1651 itself and its effects on Fifth Amendment rights.

14. 18 U.S.C. § 1651 (2006).

15. 747 F. Supp. 2d 599.

and *United States v. Said*[16]—within two months of each other.[17] In addition, courts in the United States face another problem while prosecuting pirates pursuant to § 1651: whether foreign detainees captured by U.S. officials are afforded Fifth Amendment protections and, if they are, whether interrogators properly adhere to the *Miranda* procedure[18] before questioning.[19]

Fortunately the Fourth Circuit, in *United States v. Dire*,[20] addressed both concerns: the inconsistencies in the interpretation of § 1651 and the *Miranda* rights issues.[21] In *Dire*, the five defendants, Abdi Wali Dire ("Dire"), Gabul Abdullahi Ali ("Ali"), Abdi Mohammed Umar ("Umar"), Abdi Mohammed Gurewardher ("Gurewardher"), and Mohammed Modin Hasan ("Hasan"), appealed the district court's denial of their motions to dismiss the § 1651 charges of "piracy as defined by the law of nations" and their motions to "suppress statements . . . made on April 4, 2010, when questioned aboard the USS Nicholas."[22] The defendants, Somali nationals, were detained for attacking the U.S.S. Nicholas after confusing it for a helpless "merchant ship."[23] In affirming the defendants' convictions under § 1651, the Fourth Circuit favored the interpretation that "the crime of piracy as defined by the law of nations" was not limited to a static definition of "robbery upon the sea."[24] The court held that a static definition of § 1651 did not comply

16. 757 F. Supp. 2d 554.

17. The fact that Naval Station Norfolk, "home [of] the Navy's largest concentration of naval forces," is located in the Eastern District of Virginia makes these conflicting interpretations even more peculiar. *See History of Naval Station Norfolk*, CNIC NAVAL STATION NORFOLK, http://www.cnic.navy.mil/NorfolkSta/About/History/index.htm (last visited Feb. 17, 2012). If the United States Navy continues to bring captured pirates to court in the United States, the Eastern District of Virginia is the likely venue of such proceedings.

18. *See infra* Part III for a discussion of the *Miranda* procedure.

19. *See* United States v. Hasan (*Hasan III*), 747 F. Supp. 2d 642, 672 (E.D. Va. 2010) (dismissing defendants' motions to suppress statements made aboard the USS Nicholas on April 4, 2010), *aff'd sub nom. Dire*, 680 F.3d 446. The district court had previously denied the defendants' motion to appoint a "mitigation expert" to testify during sentencing. *See* United States v. Hasan (*Hasan II*), 798 F. Supp. 2d 745, 745–46 (E.D. Va. 2011), *aff'd sub nom. Dire*, 680 F.3d 446. The *Hasan II* holding will not be discussed in this Recent Development because it was a minor procedural hearing that had no effect on the Fourth Circuit's legal inquiry into the definition of piracy.

20. 680 F.3d 446 (4th Cir. 2012).

21. *See id.* at 451–69 (addressing the application of 18 U.S.C. § 1651); *id.* at 469–75 (discussing the *Miranda* rights issue).

22. *See id.* at 449–51, 469. In addition, the Fourth Circuit addressed defendant Hasan's motion to dismiss charges pursuant to the Juvenile Delinquency Act, and reviewed the district court's refusal to merge counts ten through twelve of the indictment. *See id.* at 475–77. These issues fall outside of the scope of this Recent Development.

23. The opinion describes the U.S.S. Nicholas as a "mighty Navy frigate." *Id.* at 449.

24. *See id.* at 451, 468.

with Congress's intention that the statute invoke universal jurisdiction,[25] a form of jurisdiction that allows any nation to criminally charge any person for a crime, regardless of the location of the alleged crime and the accused's nationality.[26] The court reasoned that in order to "exercis[e] universal jurisdiction in piracy cases" § 1651 must be interpreted through the modern law of nations, which evolves over time.[27] Subsequently, after analyzing the modern law of nations—specifically focusing on article 101 of the United Nations Convention on the Law of the Sea ("UNCLOS")—*Dire* held that the crime of piracy in § 1651 included, inter alia, "any illegal act of violence . . . committed for private ends . . . on the high seas."[28]

Additionally, the Fourth Circuit affirmed the district court's denial of each defendant's motion to suppress statements made on April 4, 2010.[29] After considering the "totality of the circumstances" the court held that the defendants "knowingly and intelligently" waived their rights against self-incrimination.[30] The court came to its conclusion despite the fact that the defendants could not speak or understand English, were not familiar with the U.S. court system, were not literate, and lacked adequate education.[31]

The argument this Recent Development makes is twofold. It first argues that *Dire* establishes a strong, clear, and correct precedent for future courts to follow when interpreting 18 U.S.C. § 1651, a statute that was in great need of clarification due to the lack of relevant case law.[32] The Fourth Circuit's interpretation of § 1651 in *Dire* protects the individual right to due process and also preserves Congress's intent that the statute mirror the international community's ever-changing definition of piracy. Second, this Recent Development argues that the court forfeited an opportunity to distinguish *Dire* from other "totality of the circumstances" cases and failed to extend Fifth Amendment rights to foreign detainees. The Fourth Circuit's

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25. *See id.* at 469.

26. *See* Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 160–61 (2006) (explaining the dynamics of universal jurisdiction); *see also infra* notes 68–71 and accompanying text.

27. *See Dire*, 680 F.3d at 469.

28. *Id.* at 465 (quoting *Hasan I*, 747 F. Supp. 2d 599, 640–41 (E.D. Va. 2010), *aff'd sub nom. Dire*, 680 F.3d 446).

29. *See id.* at 475.

30. *See id.* (quoting *Hasan III*, 747 F. Supp. 2d 642, 670–71 (E.D. Va. 2010), *aff'd sub nom. Dire*, 680 F.3d 446).

31. *See id.* at 474.

32. The *Said* court announced that it was the first court to interpret 18 U.S.C. § 1651 "as it applies to alleged conduct in international waters" since the early nineteenth century. United States v. Said, 757 F. Supp. 2d 554, 558 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012).

discussion in *Dire* of the "totality of the circumstances" standard, although arguably correct, lacks the resolute approach taken in the § 1651 analysis. Especially when considering the unique facts of *Dire*, the court refused an ideal opportunity to explain the "totality of the circumstances" standard in a way that adequately extends a constitutional right to foreign detainees. By affirming the district court's holding in *Hasan III* that a detainee need only understand his *Miranda* rights in a "linguistic" manner,[33] the Fourth Circuit opened the door for future courts to gloss over the "totality of the circumstances" criteria. Overall, in a bizarre juxtaposition of approaches, *Dire* demonstrates a court's ability to sufficiently explain and improve upon centuries-old law, while also impeding the advancement of a constitutional right.

Analysis proceeds in three parts. Part I summarizes the facts and holding of *Dire*. Part II briefly discusses the history behind 18 U.S.C. § 1651 before turning to the current understanding of the statute, summarizing the two different interpretations taken in *Hasan I* and *Said*. Part II ultimately concludes that the Fourth Circuit was correct to adopt the *Hasan I* approach in *Dire*, interpreting § 1651 as reflective of the international community's contemporary definition of piracy and establishing that § 1651, as currently drafted, would perpetually invoke universal jurisdiction despite any future changes in international law. Part III opens with a brief review of *Miranda* rights and their effect on overseas interrogations before discussing the rationale behind *Dire*'s holding that the *Hasan* defendants "knowingly and intelligently" waived their *Miranda* rights. It concludes that the Fourth Circuit failed to take advantage of its opportunity in *Dire* to interpret the "totality of the circumstances" standard in a way that properly insulates the constitutional rights of foreign detainees.

I. *UNITED STATES V. DIRE*

Sometime during the early morning of April 1, 2010, off of the coast of Somalia, defendants Hasan, Dire, and Ali maneuvered a small vessel toward what they thought to be a "merchant ship."[34] The three Somalis were part of a pirate crew with the two other defendants, Umar and Gurewardher, who both waited on the crew's mothership.[35] As the assault boat approached the stern of the target

33. *See Hasan III*, 747 F. Supp. 2d at 670.

34. *See Hasan I*, 747 F. Supp. 2d 599, 601 (E.D. Va. 2010), *aff'd sub nom. Dire*, 680 F.3d 446.

35. *See* Brief of the United States at 5, *Dire*, 680 F.3d 446 (No. 11-4310(L)).

ship, Ali and Dire commenced attack and fired their AK-47s, attempting to intimidate the crew into surrender.[36] Unfortunately, the pirates were mistaken as to the identity of the target ship: it was in fact the U.S.S. Nicholas, a U.S. Navy frigate posing as a merchant ship.[37] Before the pirates could even attempt to board the Nicholas, the sailors returned fire and the three defendants retreated to reunite with their mothership.[38] The Nicholas crew gave chase and eventually apprehended and detained all five of the defendants.[39]

On April 4, 2010, while still aboard the Nicholas, the Naval Criminal Investigative Service ("NCIS") interviewed the five defendants individually.[40] Because none of the defendants could speak or understand English, the interrogator, Special Agent Michael Knox, interviewed each of them through an interpreter.[41] Prior to each individual interview, Knox verbally administered a memorized version of the *Miranda* warnings.[42] Knox informed the defendants that "they had the right to remain silent, and did not have to talk to him at all; that . . . they could request to be taken back to their holding area; and that" they could have a lawyer "if they wanted

36. *See id.* at 7. In addition, Hasan, the operator of the assault boat, carried a "loaded rocket-propelled grenade launcher," also known as an RPG. *See Dire*, 680 F.3d at 449.

37. *See* Brief of the United States, *supra* note 35, at 5 ("[T]he USS Nicholas, an Oliver Hazard Perry class frigate," was "engaged [in] a lighting scheme which caused the ship to appear like a merchant vessel" in order to "attract potential pirates.").

38. Counsel for defendants emphasized throughout the proceedings that the defendants never "board[ed] or even attempt[ed] to board NICHOLAS . . . until they were forcibly brought aboard . . . handcuffed and blindfolded." *See* Consolidated Opening Brief of Appellants at 5, *Dire*, 680 F.3d 446 (Nos. 11-4310(L), 11-4311, 11-4312, 11-4313, 11-4317), 2011 WL 2534187, at *5.

39. The "sailors on the Nicholas observed a flashing light on the horizon" during the chase which was later identified as the mothership. *See* Brief of the United States, *supra* note 35, at 8. Subsequently, the Nicholas positioned itself between the two pirate vessels "to thwart the attempted reunion." *See id.* After approximately thirty minutes, the Navy crew captured the three defendants in the assault boat and then apprehended the other two defendants who had remained in the mothership. *See id.* The defendants, however, successfully disposed of a ladder, the AK-47s, and the RPG during the chase. *See id.*

40. *See* Brief of the United States *supra* note 35, at 9. NCIS also interviewed three of the defendants on April 2, 2010. *See Hasan III*, 747 F. Supp. 2d 642, 659–60 (E.D. Va. 2010), *aff'd sub nom. Dire*, 680 F.3d 446. One defendant, Gurewardher, successfully challenged the admission of his April 2 interview into evidence during the district court proceedings. *See id.* at 666. The April 2 interviews, however, were not at issue during *Dire*. *See Dire*, 680 F.3d at 470 n.17.

41. *See Dire*, 680 F.3d at 470. Another NCIS official, Special Agent Theodore Mordecai, also accompanied Knox and the interpreter during the interviews. *See id.* at 470. The interpreter, Aziz Ismail, "[spoke] the same dialect of Somali that [the] defendants [spoke]," and had already interpreted once for Knox during the April 2 interviews "via satellite telephone." *See id.*

42. *See id.*

[one]."[43] None of the defendants ever expressed a desire to speak to an attorney.[44] After Knox read each defendant his *Miranda* rights, he also administered a "cleansing statement" that again informed the defendants that they did not have to speak to him since they were participating in "a new interview."[45] None of the defendants ever signaled that they were confused or that they failed to understand Knox's warnings.[46] Afterwards, during questioning, Dire, Hasan, and Ali each individually, and voluntarily, confessed to their involvement in the Nicholas attack.[47] Moreover, all five defendants individually confessed that they were pirates.[48]

A grand jury eventually indicted each defendant on numerous charges, including "[p]iracy as defined by the law of nations" under 18 U.S.C. § 1651.[49] After the district court judge denied multiple motions,[50] a jury found each defendant guilty.[51] Subsequently, the court sentenced the defendants to eighty years in prison in addition to the "mandatory life sentence" called for by § 1651.[52]

On appeal, the defendants argued that their "attack on the USS Nicholas did not constitute piracy under 18 U.S.C. § 1651."[53] The defendants argued for a narrow interpretation of § 1651's definition of piracy, contending that piracy only included "seizing or otherwise robbing a vessel"—which the defendants clearly failed to do.[54] The Fourth Circuit, however, interpreted § 1651 to include the

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43. Knox purposefully "modified" the *Miranda* warnings since "getting a lawyer on the ship was impossible." *See Dire*, 680 F.3d at 470–71; *see also* Brief of the United States, *supra* note 35, at 10 (describing Special Agent Knox's administered *Miranda* warnings).

44. *See* Brief of the United States, *supra* note 35, at 11.

45. *See Dire*, 680 F.3d at 471.

46. Although the government witnesses' "recollections . . . varied slightly," none of them believed that the defendants misunderstood the warnings. *See id.*

47. The defendants were under minimal distress during the interviews. *See id.* at 470–71. Although each defendant was handcuffed, none of the U.S. officials that interviewed the defendants were "visibly armed." *See id.* at 470.

48. The information that each defendant offered during his individual interview was confirmed in the group interview. *See id.* at 471.

49. The grand jury indicted the defendants on fourteen different charges. *See id.* at 450.

50. *See Hasan I*, 747 F. Supp. 2d 599, 642 (E.D. Va. 2010) (denying defendants' motions to dismiss the § 1651 charge of piracy), *aff'd sub nom. Dire*, 680 F.3d 446; *see also Hasan III*, 747 F. Supp. 2d 642, 672 (E.D. Va. 2010) (denying "[d]efendants' motions to suppress the statements they made during the April 4, 2010 interviews"), *aff'd sub nom. Dire*, 680 F.3d 446.

51. After an eleven-day trial, the defendants were found guilty on every charge except one that the judge "dismissed . . . for being multiplicitous" with another charge. *See Dire*, 680 F.3d at 450 (describing the procedural history of the dispute).

52. *See id.*

53. *See id.* at 451.

54. *See id.*

defendants' conduct, deriving its definition from international agreements, legislative history, and domestic and foreign case law.[55]

The defendants also argued that the district court erred in denying the "motions to suppress [the April 4th] statements."[56] The defendants' argument was twofold.[57] First, the defendants contended that the NCIS agents did not sufficiently administer the *Miranda* warnings.[58] In the alternative, the defendants argued that even if the *Miranda* warnings were adequate, it was impossible for them to have "validly waived their Fifth Amendment rights against self-incrimination."[59] The Fourth Circuit, however, rejected the defendants' argument and ultimately held that, under "the totality of the circumstances," each defendant "knowingly and intelligently waived [his] Fifth Amendment rights against self-incrimination."[60] Thus, the court affirmed the life sentences.[61]

The Fourth Circuit's decision in *Dire* regarding § 1651 is both decisive and forward-looking. Due to the dearth of cases dealing with 18 U.S.C. § 1651 from 1820 to 2009, district courts had minimal guidance on how to interpret "piracy as defined by the law of nations."[62] After *Dire*, however, American courts that adjudicate piracy cases have a strong path to follow: *Dire* offers a firm and credible explanation for holding that the general piracy statute must be interpreted through "customary international law."[63]

II. 18 U.S.C. § 1651: UNIVERSAL JURISDICTION REQUIRED

Before discussing why *Dire* correctly relied on international agreements in order to interpret 18 U.S.C. § 1651's "piracy as defined

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55. *See id.* at 469 (relying primarily on the United Nations Convention on the Law of the Sea ("UNCLOS") in order to determine the prevailing international understanding); *id.* at 467–68 (discussing the legislative history of 18 U.S.C. § 1651); *id.* at 452–58 (analyzing foreign and domestic case law).

56. *See id.* at 469.

57. *See id.* In addition to the two arguments already mentioned, the defendants argued that the district court erred by "declining to merge" the sentences of three of the fourteen counts against them. *See id.* at 476. Each defendant was convicted of three crimes under 18 U.S.C. § 924(c) (2006), which incriminated the carrying and use of the defendants' AK-47s and RPG. *See id.* at 476–77. Furthermore, one of the defendants, Hasan, argued that all charges should be dropped against him under the Juvenile Delinquency Act. *See id.* at 475. The Fourth Circuit affirmed the district court's rejection of both arguments. *See id.* at 476–77.

58. *See id.* at 473.

59. *See id.* at 474.

60. *See id.* at 473 (quoting *Hasan III*, 747 F. Supp. 2d 642, 670–71 (2010), *aff'd sub nom. Dire*, 680 F.3d 446).

61. *See id.* at 477.

62. *See supra* note 32 and accompanying text.

63. *See Dire*, 680 F.3d at 459–66.

by the law of nations," it is necessary to first examine the characteristics of general piracy and the development of general piracy statutes in the United States.

To begin with, there are two different types of piracy offenses: municipal piracy and general piracy.[64] The vital difference between the two is that general piracy statutes invoke universal jurisdiction, whereas municipal piracy statutes only invoke more traditional, limited forms of jurisdiction.[65] Commentators succinctly describe municipal piracy as a crime against the laws of a particular nation.[66] Thus, an enforcing nation can only prosecute violators for piracy that occurred within that nation's "municipal jurisdiction."[67] In contrast, general piracy is defined "as a violation of the law of nations."[68] As a result, any country, even though it does not have conventional jurisdiction, may "define and prescribe punishment for . . . [general piracy]" since nearly every country considers it to have "universal concern."[69] A country cannot, however, simply invoke universal jurisdiction "by calling [any crime in general] piracy."[70] The substantive elements of the particular crime must first be defined in accordance with the contemporary international understanding.[71]

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64. *See Hasan I*, 747 F. Supp. 2d 599, 606 (E.D. Va. 2010), *aff'd sub nom. Dire*, 680 F.3d 446 (citing Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 166 (2009)).

65. *See Dire*, 680 F.3d at 463 (citing *Hasan I*, 747 F. Supp. 2d at 637). Any nation punishing an individual pursuant to a municipal piracy statute has jurisdiction over acts that occur within that nation's territory and for acts that occur outside of the territory, if committed by "nationals" of that nation. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)–(2) (1987). A nation also traditionally has jurisdiction over an act committed outside of its territory by foreign nationals as long that act "has or is intended to have a substantial effect within its territory," and has jurisdiction over any individual for an act "directed against the security of [the enforcing nation]." *See id.* § 402(1)(c), (3).

66. *See, e.g.*, Kontorovich, *supra* note 64, at 166 ("Nothing limited what a nation could dub piracy, but such statutory piracy could only be punished within the particular state's municipal jurisdiction.").

67. Any nation can define piracy however its law-making body pleases under municipal piracy statutes. *See id.* at 166; *supra* note 65 and accompanying text.

68. *See, e.g.*, *Hasan I*, 747 F. Supp. 2d at 606.

69. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). Thus, any nation's court can adjudicate acts that happen entirely outside of its borders, even if the act does not affect the nation or any of its citizens. *See Hasan I*, 747 F. Supp. 2d at 606–07.

70. *See* Kontorovich, *supra* note 64, at 166.

71. *See, e.g.*, Colangelo, *supra* note 26, at 161 ("[U]niversal adjudicative jurisdiction depends upon the definitional substance of the crime as prescribed by universal prescriptive jurisdiction."). *But see* United States v. Said, 757 F. Supp. 2d 554, 563 (E.D. Va. 2010) (holding that "contemporary international law sources" are too unsettled to provide an interpretation of 18 U.S.C. § 1651, which invokes universal jurisdiction), *vacated*, 680 F.3d 374 (4th Cir. 2012).

Although the difference between municipal and general piracy seems fairly evident, in practice the joint use of the term "piracy" has confused the legal community since at least the late eighteenth century.[72] One early victim of this confusion was the United States Congress, which neglected to invoke universal jurisdiction in its first attempt to criminalize general piracy by statute.[73] Congress quickly corrected its failure by passing the Act of 1819,[74] an early version of 18 U.S.C. § 1651.[75] However, before *Dire* clarified two cases that addressed § 1651, United States courts only had one other opportunity to interpret the phrase included in both the Act of 1819 and 18 U.S.C. § 1651—"piracy as defined by the law of nations."[76] Yet, the Supreme Court heard that case, *United States v. Smith*,[77] in 1820. The timespan between *Smith* and *Dire* highlights the importance of the Fourth Circuit's decision: without the luxury of extensive case law,[78] *Dire* successfully clarified a statute almost two centuries old and preserved the integral concept of universal jurisdiction.[79]

A. The Development of 18 U.S.C. § 1651

Congress explicitly derives its power to criminalize general piracy from the "Define and Punish Clause" in Article I, Section 8 of the Constitution[80]: "Congress shall have Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[81] Congress first attempted to enact a

72. *See* Kontorovich, *supra* note 64, at 167; *see also* 10 ANNALS OF CONG. 600 (1800) (commenting on the jurisdictional confusion between general piracy and municipal piracy).

73. *See* United States v. Palmer, 16 U.S. 610, 619, 645 (1818) (holding that the Act of 1790, ch. 9, § 8, 1 Stat. 112, failed to apply to acts perpetrated by "subjects of a foreign state" against foreign vessels).

74. *See* Act of Mar. 3, 1819, ch. 77, 3 Stat. 510, *amended by* Act of Jan. 30, 1823, ch. 7, 3 Stat. 721; *Hasan I*, 747 F. Supp. 2d 599, 612 (E.D. Va. 2010), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012).

75. *See Dire*, 680 F.3d at 452–53 (citing *Said*, 757 F. Supp. 2d at 556, 562).

76. *See Hasan I*, 747 F. Supp. 2d at 614. The two cases referred to are *Hasan I* and *Said*.

77. 18 U.S. 153 (1820) (holding that the Act of 1819 successfully invoked universal jurisdiction through its general piracy statute).

78. *See supra* notes 17, 30 and accompanying text.

79. *See Dire*, 680 F.3d at 468–69.

80. *See id.* at 455 (citing *Hasan I*, 747 F. Supp. 2d at 605); Kontorovich, *supra* note 64, at 162–64 (explaining that the Framers borrowed the constitutional piracy language from the Articles of Confederation).

81. U.S. CONST. art. I, § 8. The fact that the "Define and Punish Clause" lists "Piracies" in such close proximity to "Felonies" has led some commentators and jurors to interpret the provision incorrectly "as granting a single power." Kontorovich, *supra* note 64, at 159 (citing United States v. Suerte, 291 F.3d 366, 374 (5th Cir. 2005) (indicating that

general piracy statute pursuant to its "Define and Punish" powers through the Act of 1790.[82] Section 8 of the Act declared that "any person or persons . . . upon the high seas" who committed "murder or robbery" would be deemed a pirate and sentenced to death.[83] However, Chief Justice John Marshall stated conclusively in *United States v. Palmer*[84] that section 8 did not invoke universal jurisdiction because its language only prohibited acts committed against the United States—not acts that were considered crimes against humanity.[85] Shortly thereafter, Congress took another shot at enacting a general piracy statute.[86]

In response to *Palmer*, Congress passed the Act of 1819,[87] which invoked universal jurisdiction.[88] Section 5 of the Act stated:

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the terms "Piracies" and "Felonies" can be substituted for one another)). However, piracy has been recognized as a crime of universal jurisdiction since the 1600s. *See* Eugene Kontorovich, *The Piracy Analogy: Modern Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 190 (2004). The fact that piracy has historically invoked universal jurisdiction "suggests that its separate enumeration" in the Define and Punish Clause explicitly permits "Congress to exercise universal jurisdiction over that particular type of offense—but not over other high seas crimes or international law offenses." Kontorovich, *supra* note 64, at 159.

82. Act of April 30, 1790, ch. 9, § 8, 1 Stat. 112; *see also Hasan I*, 747 F. Supp. 2d at 612; Kontorovich, *supra* note 64, at 175.

83. The pertinent segment of the Act of 1790, Section 8, includes the following:

> That if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a country, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death . . . .

§ 8, 1 Stat. at 113–14.

84. 16 U.S. 610 (1818).

85. *See id.* at 631–34. Chief Justice Marshall's opinion was not lacking in controversy though. *See, e.g.*, Kontorovich, *supra* note 64, at 187 (arguing that Marshall's interpretation of the statute was "nonobvious and . . . strained"). John Quincy Adams in particular disagreed with Marshall's view that the Act of 1790 did not invoke universal jurisdiction, insisting that "if human language means anything, [the Act of 1790 has] made general piracy, by whomsoever and wheresoever . . . cognizable by the Circuit Court." *See* JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS: HIS DIARY FROM 1795 TO 1848, at 363 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1875).

86. *See Hasan I*, 747 F. Supp. 2d at 612.

87. Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 510–14, *amended by* Act of Jan. 30, 1823, ch. 7, 3 Stat. 721; *see also Hasan I*, 747 F. Supp. 2d at 612 ("The very next year after [*Palmer*], Congress enacted a new piracy law in the Act of 1819.").

> That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, *as defined by the law of nations*, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death.[89]

Within a year of its enactment, the Supreme Court interpreted section 5 of the Act of 1819 in *United States v. Smith*.[90]

Smith involved a defendant who, along with his crew, mutinied and detained his captain, violently commandeered another vessel in port, and then set out on the high seas, where he participated in the "plunder and robbery" of a another ship.[91] Since the Court did not have traditional forms of jurisdiction over the defendant's actions, the defendant was charged with piracy under section 5 of the 1819 Act.[92] The first issue before the Court was whether, through section 5, Congress had validly applied its power under the "Define and Punish Clause" by depending on the law of nations to define piracy.[93] Justice Story's opinion answered affirmatively, declaring that Congress clearly defined piracy by integrating its interpretation with the law of nations.[94] Justice Story stated that essentially every nation included "robbery, or forcible depredations upon the sea, *animo furandi*, [as] piracy."[95] Thus, section 5 validly invoked universal jurisdiction, rendering the defendant guilty.[96] Congress had successfully drafted a general piracy statute.[97]

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88. *See generally* United States v. Smith, 18 U.S. 153 (1820) (holding that by criminalizing piracy according to the "law of nations," section 5 of the Act of 1819 "sufficiently and constitutionally" extended United States courts' jurisdiction over acts committed on the high seas against foreign vessels).

89. Act of Mar. 3, 1819, § 5, 3 Stat. at 513–14 (emphasis added).

90. 18 U.S. 153 (1820). *Smith* and *Palmer* are still the only two cases the Supreme Court has heard regarding a general piracy statute. *See Hasan I*, 747 F. Supp. 2d at 614.

91. *Smith*, 18 U.S. at 154.

92. *See id.* at 154–55.

93. *See id.* at 158.

94. *See id.* at 159–60. After determining that Congress had intended to define piracy in accordance with the law of nations, Justice Story then addressed whether "piracy [as] defined by the law of nations" adequately defined piracy with "reasonable certainty." *See id.* at 160.

95. *See id.* at 161.

96. *See id.* at 158–63.

97. By its own terms, the provisions of the Act of 1819 only remained effective until 1820. *See* Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 514. Thus, Congress extended the effect of the 1819 Act by passing the Act of 1820, which explicitly stated "[t]hat the fifth section of [the Act of 1819] be . . . continued in force." *See* Act of May 15, 1820, ch. 113, § 2, 3 Stat. 600, 600; *see also* United States v. Corrie, 25 F. Cas. 658, 662–63 (C.C.D. S.C.

Section 5 the 1819 Act survives today as § 1651, titled "Piracy Under Law of Nations," in Title 18, Chapter 81 of the United States Code.[98] The only notable difference between § 1651 and its 1819 predecessor is the penalty for conviction.[99] Whereas the Act of 1819 mandated a death sentence for anyone convicted under its general piracy provision,[100] § 1651 prescribes a mandatory life sentence.[101] Remarkably, although the international community has experienced a plethora of technological advancements in "maritime operations" since the Act of 1819,[102] the substantive content of the general piracy statute has remained the same for over 150 years.[103] This lack of revision has provoked the criticism of some commentators;[104] however, until Congress addresses the provisions of § 1651, *Dire* should provide sufficient guidance to courts that prosecute modern pirates.

B. Dire*'s Modern Interpretation of 18 U.S.C. § 1651*

Although the key phrase in the general piracy statute—"piracy as defined by the law of nations"—remained the same over the years, the law of nations itself has changed dramatically.[105] At the time of *Smith*, the Supreme Court interpreted the law of nations concerning

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1860) (discussing the background of the Act of 1820 and its effect on condemning the slave trade as piracy).

98. 18 U.S.C. § 1651 (2006); *see also* Samuel Pyeatt Menefee, *"Yo Heave Ho!": Updating America's Piracy Laws*, 21 CAL. W. INT'L L.J. 151, 161 (1990) (stating that § 1651 is "obviously derived from section 5 of the Act of March 3, 1819").

99. *See Hasan I*, 747 F. Supp. 2d 599, 614 (E.D. Va. 2010) ("The only significant difference between 18 U.S.C. § 1651 and § 5 of the Act of 1819 is the penalty prescribed: the former substitutes mandatory life imprisonment for death, the mandatory penalty prescribed by the latter."), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012); Menefee, *supra* note 98, at 161 ("The only major difference is that life imprisonment has been substituted for the death penalty.").

100. *See* Act of Mar. 3, 1819, § 5, 3 Stat. at 514 ("[E]very such offender or offenders shall, upon conviction . . . be punished with death.").

101. *See* 18 U.S.C. § 1651 ("Whoever . . . commits the crime of piracy as defined by the law of nations . . . shall be imprisoned for life.").

102. In regard to "maritime operations," there have been drastic advancements in technology, including: "[s]ubmarines, offshore platforms, pipelines . . . cables . . . bombs . . . [and] telephones." *See* Menefee, *supra* note 98, at 160.

103. *See id.* at 158.

104. *See generally id.* (offering revisions to Chapter 81 of the United States Code). The fact that the last prosecution for piracy in the United States (before the recent uptick) occurred in 1885 may have something to do with the consistency in the text of general piracy statutes over the years. *See* The Ambrose Light, 25 F. 408, 417 (S.D.N.Y. 1885) (holding that anyone using a vessel to commit acts of violence is a pirate, if not "duly commissioned by some proper authority").

105. *See Hasan I*, 747 F. Supp. 2d 599, 630 (E.D. Va. 2010) (referring to "the proliferation of international organizations and multilateral agreements"), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012).

piracy by examining the writings of commentators, studying "the general usage and practice of nations," and analyzing "judicial decisions" around the world.[106] The method used to ascertain the definition of piracy as interpreted by the law of nations has not changed since *Smith*;[107] however, the sources themselves have.[108] This change in international law, along with the dearth of pirate prosecutions over the past century and a half, has created confusion in interpreting 18 U.S.C. § 1651.[109] The United States District Court for the Eastern District of Virginia, by issuing two conflicting interpretations of § 1651 in cases with similar facts,[110] became the poster child for this confusion.[111]

1. *Said* Compared with *Hasan I*

The Eastern District of Virginia proffered two very different interpretations of § 1651 within a span of only two months.[112] In the first case, *United States v. Said*, the district court depended heavily upon the Supreme Court's interpretation of piracy in *United States v. Smith* and declared that "piracy as defined by the law of nations" meant "sea robbery."[113] District Judge Raymond Jackson emphasized that "*Smith* is the only case to ever directly examine the definition of piracy under § 1651."[114] Thus, the court reasoned, since Congress never substantially changed the text of § 1651 after *Smith*, then it

106. *See* United States v. Smith, 18 U.S. 153, 160–61 (1820).

107. *See Dire*, 680 F.3d at 456–57 (citing *Hasan I*, 747 F. Supp. 2d at 614, 616 & n. 16); United States v. Said, 757 F. Supp. 2d 554, 563 (E.D. Va. 2010) ("In order to determine whether a particular rule is a part of customary law in the international community, courts must consider concrete evidence of the customs and practices of the States through not only formal laws and scholarly work, but also controlling judicial actions." (citation omitted)), *vacated and remanded*, 680 F.3d 374 (4th Cir. 2012).

108. In fact, the international community did not formally work together to create an international definition of piracy until 1958, well after *Smith*. *See* Barry Hart Dubner, *The Law of International Sea Piracy*, 11 N.Y.U. J. INT'L L. & POL. 471, 471 (1979) (describing the work of the 1958 United Nations Conference on the Law of the Sea). Yet even since then, international events have caused commentators to recommend that piracy laws be updated in international agreements. *See id.*; *see also* ALFRED P. RUBIN, THE LAW OF PIRACY 373–96 (2d ed. 1998) (discussing the events in the twentieth century that have influenced the international understanding of piracy and comparing the different approaches taken by commentators and nations in interpreting the law of piracy).

109. *See supra* notes 14–17 and accompanying text.

110. *See Hasan I*, 747 F. Supp. 2d at 601; *Said*, 757 F. Supp. 2d at 556–57. Both cases dealt with a situation where the defendants failed to actually board and seize the target vessel.

111. *See supra* notes 17–19 and accompanying text.

112. *See supra* note 17 and accompanying text.

113. *See Said*, 757 F. Supp. 2d at 567.

114. *Id.* at 559.

must still hold "precedential significance."[115] Judge Jackson explicitly rejected the government's broad interpretation of piracy, which relied on "contemporary international law sources."[116] The court believed that deriving a definition of piracy from such "unsettled" sources would prevent the defendants from receiving due process, whereas the "clear and authoritative" definition of piracy as "sea robbery" would not.[117]

The lower court proceeding of *Dire* itself—*United States v. Hasan* ("*Hasan I*")—provided the second version of § 1651's interpretation.[118] Similar to the defendants' argument in *Said*, the *Hasan I* defendants argued that *Smith* restricted the interpretation of "piracy as defined by the law of nations" to "robbery upon the sea."[119] The court's opinion, written by District Judge Mark Davis, swiftly dismissed the defendants' conclusion, hinting that the Supreme Court decision in *Smith* "was limited by the facts of the case before it."[120] While the court conceded that the international definition of piracy certainly *included* robbery at sea, other federal cases subsequent to *Smith* described a broader definition of piracy that included acts of "mere violence."[121]

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115. *See id.* at 560–63. The court referred to the 1901 Report to the Commission to Revise and Codify the Criminal Penal Laws of the United States, which stated that "robbery or forcible depredation on the high seas, without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility" constituted piracy as defined by the law of nations. *See id.* at 562 (quoting ALEX C. BOTKIN ET AL., PENAL CODE OF THE UNITED STATES: REPORT OF THE COMMISSION TO REVISE AND CODIFY THE CRIMINAL AND PENAL LAWS OF THE UNITED STATES XXVI (1901)). The court also mentioned that, despite a comprehensive revision of Title 18 of the United States Code, § 1651 never experienced any significant change except for a reduction in punishment. *See id.* In addition, the court stated that since another statute, 18 U.S.C. § 1659, specifically addressed the defendants' actions, § 1651 cannot be read to punish the same conduct; this would render § 1659 "superfluous." *See id.* at 562–63.

116. *See id.* at 563.

117. *See id.* at 566–67.

118. 747 F. Supp. 2d 599, 640–41 (E.D. Va. 2010) (holding that the definition of § 1651 piracy includes "acts of violence . . . committed for private ends . . . on the high seas"), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012).

119. *See id.* at 620–21 (quoting United States v. Smith, 18 U.S. 153, 162 (1820)).

120. *See id.* at 621. The court noted that the facts in *Smith* demonstrated "a classic case of piracy" where an individual "attacked and captured a . . . vessel" while on the high seas. *See id.* (citing *Smith*, 18 U.S. at 154).

121. *See id.* at 621–22 (citing The Ambrose Light, 25 F. 408, 423 (S.D.N.Y. 1885) ("No doubt indiscriminate violence and robbery on the high seas are piracy."); Dole v. New England Mut. Ins. Co., 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (holding that piracy includes "cruising upon the seas without a commission and with the intent to rob"); The Chapman, 5 F. Cas. 471, 474 (N.D. Cal. 1864) (interpreting piracy to include "[n]ot only . . . actual robbery . . . but [also] cruising on the high seas without commission, and with intent to rob")).

Moreover, unlike the court's approach in *Said*, Judge Davis determined that the court need not circumscribe itself using *Smith* since the "definition of piracy under the law of nations can evolve over time."[122] Subsequently, after examining the statutory language of § 1651,[123] discussing the Supreme Court's interpretation of "the phrase law of nations,"[124] and studying the contemporary international consensus on the definition of piracy,[125] the court determined UNCLOS to be the best source for interpreting § 1651.[126] According to article 101 of UNCLOS, the definition of piracy includes "any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew . . . of a private ship . . . on the high seas, against another ship."[127] Furthermore, in striking contrast to *Said*, and much to the defendants' chagrin, the court did not consider its reliance on "customary international law" to be so indeterminate as to violate the defendants' Fifth Amendment rights to due process.[128]

2. The *Dire* Clarification

Fortunately, the inconsistency displayed by the Eastern District of Virginia did not stew for very long. Within a year of *Hasan I*'s decision, the Fourth Circuit heard the defendants' appeal in *United States v. Dire*.[129] After considering the defendants' argument and the approach taken by the *Said* court, the Fourth Circuit ultimately adopted the reasoning of *Hasan I*.[130] The court agreed with the decision in *Hasan I* that the "law of nations" had changed over time, and "had for decades encompassed [the defendants'] violent

122. *See id.* at 622; *supra* notes 105–08 and accompanying text.

123. *See Hasan I*, 747 F. Supp. 2d at 623–25.

124. *See id.* at 625–30 (internal quotation marks omitted).

125. *See id.* at 630–37.

126. *See id.* at 640–41. UNCLOS is an international agreement meant "to settle, in the spirit of mutual understanding and co-operation, all issues relating to the law of the sea." *See* Preamble to the United Nations Convention of the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994); *see also infra* notes 163–70 and accompanying text.

127. *See* United Nations Convention of the Law of the Sea, *supra* note 126, art. 101, 1833 U.N.T.S. at 436.

128. *See Hasan I*, 747 F. Supp. 2d at 640.

129. The court heard the argument on September 20, 2011, and issued the decision on May 23, 2012. 680 F.3d 446, 446 (4th Cir. 2012).

130. *See id.* at 466–69 (introducing the defendants' argument); *id.* at 451–54 (analyzing the approach taken by the *Said* court); *id.* at 467 (concluding that the *Hasan I* court's approach was appropriate).

conduct."[131] Thus, the court established, at least for the time being, the UNCLOS definition of piracy as the prevailing "law of nations."[132]

The Fourth Circuit's decision to impute the UNCLOS definition of piracy into 18 U.S.C. § 1651 was prudent for a number of reasons. First, by relying on an international agreement as widely accepted as UNCLOS—which had been ratified by an overwhelming 161 Member States of the United Nations before the district court issued its *Hasan I* ruling[133]—the court preserved Congress's intent that § 1651 invoke universal jurisdiction.[134] Moreover, the Fourth Circuit's adoption of the UNCLOS piracy definition also safeguarded the defendants' due process right of "fair warning."[135] The court thoroughly explained that international sources were not too "unsettled" to rely upon, thus the defendants had adequate notice of what actions § 1651 prohibited.[136] Ultimately, by using an international agreement as prevalent as UNCLOS, the Fourth Circuit firmly established that § 1651's "piracy as defined by the law of nations" evolves over time, always echoing the "developing international norms" regarding piracy.[137]

Before beginning its discussion of the modern international definition of piracy, the Fourth Circuit necessarily established that Congress intended for § 1651 to change in accordance to international law.[138] The court highlighted the fact that Congress enacted the Act of 1819, § 1651's predecessor, in response to *United States v. Palmer*[139]—a case that underscored the notion that Congress cannot unilaterally define general piracy in any manner that is inconsistent with the prevailing international understanding.[140] The Fourth Circuit stated that an implicit consequence of *Palmer*'s holding established that "developing international norms may alter [general piracy]'s accepted definition."[141] Thus, since Congress utilized the "law of nations" language to define piracy in the Act of 1819,[142] the court concluded

131. *Id.* at 469 (stating that the recent coordination between different countries "to combat the escalating scourge of piracy" reinforced the notion that the definition of piracy in UNCLOS, an international agreement, should be inserted into § 1651).

132. *See id.*

133. *See id.* at 462 (citing *Hasan I*, 747 F. Supp. 2d at 633–34).

134. *See id.*; *Hasan I*, 747 F. Supp. 2d at 624–25; Brief for the United States, *supra* note 35, at 17–24.

135. *See Dire*, 680 F.3d at 464 (quoting *Hasan I*, 747 F. Supp. 2d at 638).

136. *See id.* at 460–65.

137. *See id.* at 460–61 (quoting *Hasan I*, 747 F. Supp. 2d at 623).

138. *See id.* at 459–60.

139. 16 U.S. 610 (1818)

140. *See id.* at 630–34.

141. *See Dire*, 680 F.3d at 460 (quoting *Hasan I*, 747 F. Supp. 2d at 624).

142. *See* Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14.

that Congress intended that the Act "automatically incorporate" any change in the international "definition of general piracy."[143]

Assuming that § 1651 is largely the same statute as the Act of 1819,[144] the *United States v. Smith* decision, which confirmed that the 1819 Act invoked universal jurisdiction,[145] forces the conclusion that § 1651 piracy must reflect the contemporary international definition.[146] The logical sequence effectively forecloses the argument for a static definition of piracy under § 1651 and, as demonstrated by the following arguments, emphasizes the futility of the *Dire* defendants' reliance on *Smith*.

First, *Dire* correctly accepted "that *Smith* neither foreclosed the possibility that piracy included conduct other than robbery nor precluded the possibility that the definition of piracy under the law of nations" could expand in the future.[147] When determining the contemporary international definition of piracy in the early nineteenth century, the *Smith* Court explicitly stated that, "whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery . . . is piracy."[148] The *Smith* language only indicates society's agreement that the definition of piracy *includes* robbery, not that the definition is limited to robbery.

Even if one is tempted to side with the defendants' position that *Smith* does restrict the definition of piracy to "robbery . . . upon the sea,"[149] once one recalls that *Smith* interpreted the phrase "as defined by the law of nations" to invoke universal jurisdiction,[150] logic immediately rejects the idea of a static definition for § 1651 piracy because universal jurisdiction necessarily denotes an application of contemporary international legal standards,[151] which are much broader than mere robbery.[152] The argument for a static definition is as follows: the phrase "law of nations" must be interpreted as it was

143. *See Dire*, 680 F.3d at 460 (quoting *Hasan I*, 747 F. Supp. 2d at 623).

144. *See supra* Part II.A.

145. *See* United States v. Smith, 18 U.S. 153, 158–62 (1820).

146. *See Dire*, 680 F.3d at 468–69 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 761 (2004) (Breyer, J., concurring in part and concurring in the judgment) (stating that universal jurisdiction requires "substantive uniformity among the laws of [the exercising] nations")); *Hasan I*, 747 F. Supp. 2d at 609 (explaining that a criminal statute must reflect "the international consensus definition" in order for the enforcing nation to claim universal jurisdiction).

147. *See Dire*, 680 F.3d at 459 (quoting *Hasan I*, 747 F. Supp. 2d at 621).

148. *Smith*, 18 U.S. at 161.

149. *Id.*

150. *Id.* at 163.

151. *See supra* notes 68–71 and accompanying text.

152. *See supra* notes 123–32 and accompanying text.

when originally drafted, in the early nineteenth century.[153] Therefore, since *Smith* declared that the law of nations dictates that piracy equals robbery committed while at sea,[154] then piracy under § 1651 must be limited to the same definition.[155] However, if, as *Smith* decisively established, the phrase "law of nations" invokes universal jurisdiction, and if, in order to invoke universal jurisdiction, the definition of piracy must reflect contemporary international understanding,[156] then a static definition of piracy cannot exist: the statute would lose universal jurisdiction after any slight change in the international definition of piracy.[157] Congress could not have intended to perpetually monitor international law and revise the general piracy statute accordingly; if it had, then why would Congress use the language "as defined by the law of nations" rather than specifically enumerating the elements of the statute?[158] Such a reading requires significantly tortured logic. In contrast, the reasoning that the Fourth Circuit adopted—that § 1651 must reflect any changes in the international understanding of general piracy—follows the rationale in *Smith* and establishes *Dire* as well-reasoned precedent.

In addition, the Fourth Circuit's adoption of UNCLOS's article 101 to interpret § 1651 "piracy as defined by the law of nations" further enhances *Dire*'s value as guidance for piracy cases in the near future. After determining that the *Smith* Court looked to "the general usage and practice of nations"[159] in order to ascertain the contemporary international definition of piracy,[160] the Fourth Circuit examined two eminent international agreements that dealt directly with general piracy: the Geneva Convention on the High Seas[161] and

153. *See Hasan I*, 747 F. Supp. 2d 599, 623 (E.D. Va. 2010), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012).

154. As previously discussed, *Smith* does not require this conclusion. *See supra* notes 149–52 and accompanying text.

155. *See, e.g.*, Consolidated Reply Brief of Appellants at 3–5, *Dire*, 680 F.3d 446 (Nos. 11-4310(L), 11-4311, 11-4312, 11-4313, 11-4317), 2011 WL 3360447, at *4.

156. *See supra* notes 149–51 and accompanying text.

157. *See Hasan I*, 747 F. Supp. 2d at 624.

158. *See id.* at 623 (citing Ex Parte Quirin, 317 U.S. 1, 29–30 (1942) (holding that Congress, by utilizing the language "law of war," authorized courts to determine offenses rather than trying to include "every offense against the law of war" in the wording of the statute). Furthermore, if piracy under § 1651 requires a static nineteenth century definition, then a possibility arises that the statute would criminalize "acts that no longer are considered offenses against the law of nations." *See id.* at 625.

159. United States v. Smith, 18 U.S. 153, 160 (1820).

160. *Dire*, 680 F.3d at 456 (quoting *Hasan I*, 747 F. Supp. 2d at 616).

161. Convention on the High Seas, art. 15, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962).

UNCLOS.[162] The court wisely acknowledged the United States never ratified UNCLOS;[163] however, the court noted that the United States represented "one of . . . sixty-three parties" privy to the Geneva Convention on the High Seas,[164] which "defines piracy in exactly the same terms as [UNCLOS], with only negligible stylistic changes."[165] Furthermore, the court reinforced the notion that the United States agreed in principle to UNCLOS by emphasizing that the United States only disapproved of one provision of the treaty—a deep seabed mining clause that was completely extraneous to the piracy provisions.[166]

Even if one dismisses the court's convincing rationale as to why the United States concurs in the UNCLOS definition of piracy despite its failure to ratify the treaty, the evidence that UNCLOS represents "customary international law" cannot be disputed. A treaty reflects a consensus of "international law" once ratified by "an overwhelming majority of States" who also follow the tenets of the treaty "uniformly and consistently."[167] Since 161 out of the 192 Member States of the United Nations ratified UNCLOS, the agreement easily meets the "overwhelming majority" criteria, thus establishing UNCLOS as the prevailing modern international law.[168] Once a treaty, such as UNCLOS, crosses this threshold of acceptance, the rules it represents apply to all nations, even those "*that have not ratified it.*"[169] Therefore, opponents to the idea that the United States

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162. United Nations Convention of the Law of the Sea, *supra* note 126, art. 101, 1833 U.N.T.S. at 436.

163. *Dire*, 680 F.3d at 459. The court noted, however, that although the United States did not ratify UNCLOS, it "recognize[s] that its baseline provisions reflect customary international law." *Id.* (internal quotation marks omitted) (citing United States v. Alaska, 503 U.S. 569, 588 n.10 (1992)).

164. *Id.* at 458; *see also Hasan I*, 747 F. Supp. 2d at 633.

165. *Dire*, 680 F.3d at 459 (quoting *Hasan I*, 747 F. Supp. 2d at 620).

166. *See id.* (citing *Hasan I*, 747 F. Supp. 2d at 619). Furthermore, while contemporary writers do disagree with secondary issues pertaining to the definition of piracy, many agree that the UNCLOS core definition of general piracy embodies the consensus international understanding. *See, e.g.*, Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 26–39 (2007) (discussing whether terrorist activities fall under UNCLOS's "for private ends" requirement).

167. *Dire*, 680 F.3d at 461 (quoting *Hasan I*, 747 F. Supp. 2d at 633) (internal quotation marks omitted).

168. *See Dire*, 680 F.3d at 462 (quoting *Hasan I*, 747 F. Supp. 2d at 633–34).

169. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 138 (2d Cir. 2010) (citing 1 LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW § 626, at 1261 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1996)).

supports the piracy provision in UNCLOS have weak footing; UNCLOS inarguably reflects "customary international law."[170]

The court's reliance on an international agreement such as UNCLOS also serves to protect a defendant's right to due process.[171] The primary concern with defining § 1651 based upon "customary international law" is that potential defendants cannot reasonably "receive fair warning" as to which particular actions the law prohibits.[172] The defendants in *Dire* argued that such a "flexible definition" unfairly exposed individuals "to punishment for crimes that are unconstitutionally vague."[173] However, *Smith* itself established that the phrase "piracy under the law of nations" constituted a definition no more ambiguous than if "Congress had . . . enumerated the elements of the offense . . . itself."[174] Utilizing UNCLOS as a guide for interpreting the "law of nations" limits a defendant's "guessing as to what international sources to consult"[175] to a minimum.[176] The high standard the court required UNCLOS to reach in order to "become customary international law"[177] implicitly notified the defendants as to the actions prohibited under § 1651: only exceptionally conspicuous international agreements pass the "law of nations" threshold.[178] Furthermore, in *Dire* itself, since Somalia ratified UNCLOS, it is likely that the Somali defendants knew more about the UNCLOS definition of piracy than they knew about any United States definition.[179]

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170. *See Hasan I*, 747 F. Supp. 2d at 634 ("UNCLOS's definition of piracy therefore represents a widely accepted norm . . . that has been recognized by an overwhelming majority of the world."). The Fourth Circuit noted that Kenya, the "country . . . most involved in prosecuting piracy," also used the UNCLOS definition of piracy to adopt its own statutes criminalizing general piracy. *See Dire*, 680 F.3d at 463 (quoting *Hasan I*, 747 F. Supp. 2d at 636). In addition, the fact that the United States and Somalia have both ratified a treaty that includes the same definition of general piracy as is included in UNCLOS lends further support to the proposition that UNCLOS represents contemporary international law. *See Dire*, 680 F.3d at 462 (citing *Hasan I*, 747 F. Supp. 2d at 633–34).

171. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

172. *See* Consolidated Opening Brief of Appellants, *supra* note 38, at 43.

173. *Dire*, 680 F.3d at 464 (quoting *Hasan I*, 747 F. Supp. 2d at 637–38); Consolidated Opening Brief of Appellants, *supra* note 38, at 40.

174. *See Hasan I*, 747 F. Supp. 2d at 639 (quoting United States v. Smith, 18 U.S. 153, 159–60 (1820)).

175. Consolidated Opening Brief of Appellants, *supra* note 38, at 45.

176. *See Dire*, 680 F.3d at 464; *Hasan I*, 747 F. Supp. 2d at 639.

177. *See supra* notes 167–70 and accompanying text.

178. *See Dire*, 680 F.3d at 464 (quoting *Hasan I*, 747 F. Supp. 2d at 639).

179. *See id.*

Determining that 18 U.S.C. § 1651—which carries a mandatory life sentence[180]—updates itself automatically to reflect the contemporary international definition of piracy undoubtedly raises concerns.[181] However, the Fourth Circuit's opinion in *Dire* greatly diminishes those concerns. In adopting UNCLOS to interpret § 1651's "piracy as defined by the law of nations" the Fourth Circuit both preserves Congress's intent to invoke universal jurisdiction and protects the defendants' due process right of fair warning. Although the court's adoption of UNCLOS will serve as strong precedent in the near future, the method behind the Fourth Circuit's choice—choosing to focus on preserving "[general] piracy's unusual status as a crime . . . subject to universal jurisdiction"[182]—will prove to be the most useful guidance for future courts. Despite minimal direction from case law, *Dire* successfully clarifies the centuries-old language in 18 U.S.C. § 1651 to allow a flexible, yet determinate definition of general piracy.[183]

III. *MIRANDA* RIGHTS FOR FOREIGN PIRATES: THE "TOTALITY OF THE CIRCUMSTANCES" FAÇADE

Since its decision in 1966, the seminal case *Miranda v. Arizona*[184] has provoked constant discourse among jurists and commentators.[185]

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180. *See* 18 U.S.C. § 1651 (2006) ("Whoever, 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.").

181. In addition to the concerns already discussed, the *Dire* defendants also argued that interpreting § 1651 to include the defendants' actions would cause another charge, under 18 U.S.C. § 1659—a municipal piracy statute—to become superfluous. *See Dire*, 680 F.3d at 463. The court, however, rejected the argument, stating that the two crimes possess "distinct jurisdictional scopes." *Id.* (quoting *Hasan I*, 747 F. Supp. 2d at 637). The court noted that § 1651, the general piracy statute, applies to an act committed by any individual against any other individual or ship. *Id.* (quoting *Hasan I*, 747 F. Supp. 2d at 637). In contrast, § 1659 only applies to acts committed against "U.S. citizens or U.S. ships." *Id.* (quoting *Hasan I*, 747 F. Supp. 2d at 637).

182. *Id.* at 454.

183. *See id.* at 456–69.

184. 384 U.S. 436 (1966).

185. *See, e.g.*, Jessica Schneider, Note, *The Right to Miranda Warnings Overseas: Why the Supreme Court Should Prescribe a Detailed Set of Warnings for American Investigators Abroad*, 25 CONN. J. INT'L L. 459, 464 (2010) (discussing the immediate criticisms of *Miranda*). Even the *Miranda* decision itself was controversial, passing with a five-to-four majority, the minority of which fervently dissented. *See Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) ("Viewed as a choice based on pure policy, these new rules prove to be a highly debatable, if not one-sided, appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances."); *id.* at 537 (White, J., dissenting) ("In sum, for all the Court's expounding on the menacing atmosphere of police interrogation procedures, it has failed to supply any foundation for the conclusions it draws or the measures it adopts.").

Within the past decade, however, more issues have arisen.[186] As a result of the "war on terror" stemming from the terrorist attacks of September 11, 2001, interrogations of foreign detainees have increased,[187] thus prompting a thorough discussion among commentators concerning *Miranda* implications.[188] Similarly, in part because of the recent focus on anti-piracy initiatives,[189] there has been an increase in interrogations of foreign detainees while at sea.[190] Accordingly, the constitutional issues implicated in such interrogations are becoming increasingly evident.

The facts of *Dire* presented a paradigmatic opportunity for analysis of these constitutional issues: an interrogation of foreign detainees by United States officials while in international waters.[191] Furthermore, considering that the government did not object to the application of Fifth Amendment rights,[192] *Dire* seemed to set the stage for a comprehensive examination of *Miranda*'s application to foreign detainees overseas. In a succinct six-page summary, however, the Fourth Circuit retreated from the emphatic approach it manifested during its general piracy analysis.[193] The Fourth Circuit

186. *See, e.g.*, Schneider, *supra* note 185, at 459.

187. *See* James McGarrah, Dir., Dep't of Defense Office for the Admin. Review of the Det. of Enemy Combatants, Defense Department Special Briefing on Administrative Review Boards for Detainees at Guantanamo Bay (July 8, 2005) (transcript available at http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3171) (stating that the then-current prison population at Guantanamo Bay was approximately 520 detainees, down from the peak of around 700).

188. *See, e.g.*, Amos N. Guiora, *Due Process and Counterterrorism*, 26 EMORY INT'L L. REV. 163, 182–85 (2012) (discussing the lawfulness of the "detention, interrogation, and trial" of terrorism defendants and paying particular attention to the granting of *Miranda* to detainees); Wadie E. Said, *Coercing Voluntariness*, 85 IND. L.J. 1, 5–6 (2010) (emphasizing the shortcomings of the "voluntariness test" used to determine whether a statement obtained during an interrogation performed abroad was inappropriately coerced).

189. *See supra* notes 10–11 and accompanying text.

190. *See Hasan III*, 747 F. Supp. 2d 642, 666–68 (E.D. Va. 2010) (interrogation of Somali nationals while aboard a Navy frigate), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012); *see also* Major Winston G. McMillan, *Something More Than a Three-Hour Tour: Rules for Detention and Treatment of Persons at Sea on U.S. Naval Warships*, ARMY LAW., Feb. 2011, 31, 31 & n.6 (introducing some the factors that have caused the increase in the amount of interrogations of foreign detainees while at sea). *See generally* Amitai Etzioni, *Somali Pirates: An Expansive Interpretation of Human Rights*, 15 TEX. REV. L. & POL. 39, 40–41 (2010) (discussing the difficulties that arise when prosecuting pirates captured upon the high seas).

191. *See Dire*, 680 F.3d at 470–71.

192. Since the government did not argue against *Miranda*'s application to the interrogation at hand, the court "assume[d] without deciding that the" foreign defendants had Fifth Amendment rights. *See id.* at 473 & n.19.

193. *See id.* at 469–75 (discussing the *Miranda* rights issue); *id.* at 451–69 (analyzing the general piracy statute, 18 U.S.C. § 1651 (2006)).

accepted the district court's holding without independently analyzing whether the defendants waived their rights, and thus glossed over the "totality of the circumstances" standard. Ultimately, the court held that the defendants waived their rights to counsel under the "totality of the circumstances" since "a criminal suspect [need not] know and understand every possible consequence of a waiver of the Fifth Amendment privilege."[194] Consequently, the Fourth Circuit's decision in *Dire* failed to effectively provide Fifth Amendment rights to foreign detainees and left the door open for other courts to follow suit.

A brief review of *Miranda* rights and those situations in which law enforcement might be excused from administering them is helpful before examining the rationale in *Dire*. The basic rule stemming from *Miranda v. Arizona* establishes that before making any testimonial statements a detainee

> must be warned . . . that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[195]

Miranda further mandates that any evidence acquired from the questioning of an individual who has not been adequately warned of his or her Fifth Amendment rights will not be admissible at trial.[196]

Although *Miranda* established a firm rule that law enforcement officials must inform a detainee of his or her rights before questioning, it did not establish any abstract standard by which to gauge whether a detainee has waived those rights.[197] In response, the Supreme Court developed the "totality of the circumstances" standard: in order to determine whether a detainee properly waived his or her *Miranda* rights a court must consider "the particular facts and circumstances . . . including the background, experience, and conduct of the [detainee]."[198] In addition, such waiver "must have

194. *Id.* at 475 (quoting Colorado v. Spring, 479 U.S. 564, 574 (1987)) (internal quotations marks omitted).

195. Miranda v. Arizona, 384 U.S. 436, 479 (1966).

196. *See id.*

197. *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2262 (2010) ("Although *Miranda* imposes on the police a rule that is both formalistic and practical when it prevents them from interrogating suspects without first providing them with a Miranda warning, . . . it does not impose a formalistic waiver procedure that a suspect must follow to relinquish those rights." (citations omitted)).

198. North Carolina v. Butler, 441 U.S. 369, 374 (1979) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[199]

While the Supreme Court emphasized *Miranda*'s importance in controlling law enforcement during interrogations,[200] the Court also acknowledged certain situations where "countervailing interests" could create exceptions to *Miranda*'s ruling.[201] *New York v. Quarles*[202] represents the most notable exception to the rule—the "public safety" exception.[203] The *Quarles* Court stated that the *Miranda* doctrine did not apply in full force to "a situation in which police officers ask questions reasonably prompted by a concern for the public safety."[204] Thus, *Quarles* indicated that the *Miranda* rule was largely tailored to prevent coercive interrogations from occurring in situations that present a low risk to the public safety, such as those conducted in the confines of police custody.[205]

The fact that *Miranda* was primarily designed for interrogations in low-risk situations becomes problematic for courts when determining whether the doctrine should apply to overseas interrogations—where possible hostilities toward U.S. authorities or a threat to national security may require that the interrogation be conducted as quickly as possible.[206] Furthermore, the problem is magnified once one considers that the Supreme Court has yet to rule on whether *Miranda* applies to such interrogations.[207] However, despite the lack of guidance from the Supreme Court, courts

199. Moran v. Burbine, 475 U.S. 412, 421 (1986).

200. *See* Michigan v. Tucker, 417 U.S. 433, 447 (1974) ("[R]efusing to admit evidence gained [without administering a *Miranda* warning] . . . instill[s] in . . . investigating officers, or in their future counterparts, a greater degree of care toward the rights of [the] accused.").

201. *See* Schneider, *supra* note 185, at 460 (describing certain instances when the Supreme Court has recognized scenarios when the typical *Miranda* requirements may be loosened or eliminated altogether).

202. 467 U.S. 649 (1984).

203. *See id.* at 655.

204. *Id.* at 656 (observing that officers in a tenuous situation must not be prevented from asking questions for "their own safety, the safety of others, and perhaps as well . . . to obtain incriminating evidence from the suspect").

205. *See id.* at 656 (citing Miranda v. Arizona, 384 U.S. 436, 455–58 (1966)).

206. *See* Schneider, *supra* note 185, at 462 (discussing the difficulty in applying the *Miranda* requirements overseas, especially in instances of international terrorism investigations).

207. *See Hasan III*, 747 F. Supp. 2d 642, 657 (E.D. Va. 2010), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012); *see also* Schneider, *supra* note 185, at 461 ("The Supreme Court has never ruled on the question of Miranda's applicability to overseas interrogations conducted by US officials.").

generally rule that United States officials must administer *Miranda* rights to foreign detainees during a custodial interrogation.[208]

Accordingly, in *Dire* itself, the Fourth Circuit first examined whether the Miranda warnings administered by Special Agent Knox "adequately advised [the defendants] of their Fifth Amendment rights."[209] The defendants' argued to suppress statements made during questioning because Special Agent Knox failed to explicitly tell the defendants they had a *right* to a lawyer.[210] Instead, Knox informed the defendants "that if they wanted a lawyer, we would *give* them one."[211] After establishing that an interviewer need not administer any "precise formulation of the warnings"[212] the court determined that "Knox's warnings sufficiently advised the defendants of their right to counsel."[213]

The court acknowledged that the second issue, whether the defendants "knowingly and intelligently" waived their rights against self-incrimination, presented a much more difficult question.[214] The Fourth Circuit cited the "totality of the circumstances" criteria, noting that factors such as a "suspect's intelligence and education, age and *familiarity with the criminal justice system*" must be taken into account

208. *See generally In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177 (2d Cir. 2008) (holding that foreign detainees under interrogation by United States officials in a foreign country are entitled to some form of *Miranda* warnings); United States v. Heller, 625 F.2d 594, 599 (5th Cir. 1980) ("[I]f American officials participated in the foreign search or interrogation, or if the foreign authorities were acting as agents for their American counterparts, the exclusionary rule should be invoked."); Pfeifer v. U.S. Bureau of Prisons, 615 F.2d 873, 877 (9th Cir. 1980) ("Under the joint venture doctrine, evidence obtained through activities of foreign officials, in which federal agents substantially participated and which violated the accused's Fifth Amendment or *Miranda* rights, must be suppressed in a subsequent trial in the United States."). *But see* Military Commissions Act of 2009, 10 U.S.C. § 948b(d)(B) (Supp. 2010) (stating that *Miranda* rights do not apply to "alien unprivileged enemy belligerents [who violated] the law of war and other offenses triable by military commission"). However, uncoerced statements obtained from a foreign detainee by foreign officials before the detainee has been administered *Miranda* warnings are typically admissible. *See* United States v. Yousef, 327 F.3d 56, 145 (2d Cir. 2003).

209. *Dire*, 680 F.3d at 473.

210. *Id.* at 473–74.

211. *Id.* at 474.

212. *Id.* (quoting California v. Prysock, 453 U.S. 355, 359 (1981)) (internal quotation marks omitted).

213. *Id.* at 473. The court stated that "[t]he relevant inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*." *See id.* at 473–74 (quoting Florida v. Powell, 130 S. Ct. 1195, 1204 (2010)) (internal quotation marks omitted).

214. *Id.* at 471 (quoting *Hasan III*, 747 F. Supp. 2d 642, 669 (E.D. Va. 2010), *aff'd sub nom. Dire*, 680 F.3d 446).

when determining effective waiver.[215] After confirming that neither the language barrier[216] nor the defendants' intelligence[217] prevented waiver, the Fourth Circuit directed its attention to the defendants' understanding "of the United States judicial system."[218] Here, the court oddly concluded that, since the defendants understood "the concept of an attorney," they knew enough about the judicial system to waive their rights.[219] Moreover, the court affirmed the district court ruling without even addressing the linchpin of the district court's "totality of the circumstances" rationale[220]—that defendants need only "comprehend" their waiver rights verbally, in a purely linguistic sense.[221]

The Fourth Circuit, however, was certainly not bound by precedent to rule as it did with respect to that facet of the district court decision. First, since the Supreme Court has not ruled on whether Fifth Amendment rights apply to individuals like the defendants in *Dire*, no precedent precluded the Fourth Circuit from examining the issue.[222] The opportunity to examine the Fifth Amendment issue became even more apparent after the government failed to challenge the application of *Miranda* to the defendants.[223] Moreover, the "public safety" exception to *Miranda* was not at issue.[224]

Despite these circumstances, the Fourth Circuit still refused to thoroughly review the district court's conclusion that a defendant need only comprehend his or her rights "merely as a linguistic matter."[225] The decision crudely undervalues an individual's

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215. *Id.* at 474 (emphasis added) (quoting Correll v. Thompson, 63 F.3d 1279, 1288 (4th Cir. 1995)) (internal quotation marks omitted).

216. The *Miranda* warnings "were recited to [the defendants], through Ismail, the interpreter, in their native language." *Id.* at 475 (alteration in original) (quoting *Hasan III*, 747 F. Supp. 2d at 670).

217. "[N]o evidence [exists] showing [the defendants] to be of below-average intelligence or to suffer from any mental disabilities." *See id.* at 474 (third alteration in original) (quoting *Hasan III*, 747 F. Supp. 2d at 671)

218. *See id.* at 475 (quoting *Hasan III*, 747 F. Supp. 2d at 671).

219. *See id.* (quoting *Hasan III*, 747 F. Supp. 2d at 671). The court held that "a criminal suspect [need not] know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *See id.* at 475 (quoting Colorado v. Spring, 479 U.S. 564, 574 (1987)).

220. *See id.* at 475.

221. *See Hasan III*, 747 F. Supp. 2d at 670–71.

222. *See* sources cited *supra* note 207 and accompanying text.

223. *See supra* note 192.

224. The United States officials conducted the interviews at issue in *Dire* approximately three days after capture, thus the "public safety" exception was not argued for at the appellate level. *See Dire*, 680 F.3d at 469–70.

225. *See Hasan III*, 747 F. Supp. 2d at 670–71.

subjective understanding of *Miranda* rights and effectively diminishes the meaning of the "totality of the circumstances" standard. Even though the Fourth Circuit stated that the defendants must have "a full awareness of both the nature of the right being abandoned and the consequences of [waiving that right,]"[226] the court accepted the district court's reliance on cases from other circuits—cases that gloss over the "defendant[s'] understanding of the U.S. criminal justice system" in determining the "totality of the circumstances."[227] After examining these cases, however, one must wonder whether a detainee can truly understand the consequences of waiving his or her *Miranda* rights without having knowledge of the United States judicial system.

By accepting the district court's "linguistic" rationale, the Fourth Circuit implicitly authorized a fallacy in the "totality of the circumstances" standard: How can a court truly weigh the "totality of the circumstances" if that court only analyzes whether a defendant understands *Miranda* rights "as a linguistic matter"?[228] The court's flawed logic opens the door for future courts to essentially disregard the "totality of the circumstances" standard as long as a U.S. interrogator can convey *Miranda* rights to the suspect in his or her primary language.[229] Furthermore, even if future courts truly apply "totality of the circumstances" factors, the Fourth Circuit's rationale that "the concept of an attorney" suffices as knowledge of "the United States judicial system" sets a dangerous precedent for foreign detainees in the future.[230] Essentially, under the court's ruling, as long as defendants know what an attorney is, they have the ability to waive Fifth Amendment rights—a low threshold to say the least.

The facts in *Dire* certainly allowed for a conclusion that the defendants did not "knowingly and intelligently" waive their rights

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226. *Dire*, 680 F.3d at 474 (citing Moran v. Burbine, 475 U.S. 412, 421 (1986)).

227. *See id.* at 472 (citing *Hasan III*, 747 F. Supp. 2d at 471 (citing United States v. Labrada-Bustamante, 428 F.3d 1252, 1259 (9th Cir. 2005) (holding that since familiarity with the "United States' form of justice is merely one factor to be considered" the U.S. official "was not required to explain to [the detainee] what the *Miranda* rights meant"))); United States v. Amano, 229 F.3d 801, 805 (9th Cir. 2000) (determining that the defendant validly waived his *Miranda* rights despite his "previous lack of contact with the criminal justice system in the United States, and his lack of contact with the Japanese consulate"); United States v. Rosario-Diaz, 202 F.3d 54, 69 (1st Cir. 2000) (finding a valid waiver of *Miranda* rights even though the defendant had "a very low I.Q" and "had no prior involvement with the criminal justice system"); United States v. Yunis, 859 F.2d 953, 964–65 (D.C. Cir. 1988) (noting that even though "[i]t is unclear what weight should be given to an alien's unfamiliarity with our legal culture in evaluating the validity of that alien's waiver" the defendant still sufficiently waived his *Miranda* rights despite his "unfamiliarity with American law").

228. *See Hasan III*, 747 F. Supp. 2d at 669–71.

229. *See Dire*, 680 F.3d at 474–75 (citing *Hasan III*, 747 F. Supp. 2d at 670).

230. *See id.* at 475 (quoting *Hasan III*, 747 F. Supp. 2d at 671).

under the "totality of the circumstances."[231] By affirming the district court holding, however, the court declined an opportunity to expand the Fifth Amendment rights of foreign detainees. In addition, the Fourth Circuit's implicit acceptance of the "linguistic" rationale directs future courts to largely disregard a foreign detainee's limited knowledge of the American judicial system—and seemingly also the potential for linguistic confusion—when determining effective waiver, arguably the most important factor in deciding whether a suspect has "full awareness of . . . the nature of [*Miranda*] right[s]."[232] The Fourth Circuit's decision significantly impedes any future argument a foreign detainee may make against "knowing and intelligent" waiver, a key limitation given the increasing interaction between the United States justice system and foreign detainees in many contexts.

CONCLUSION

United States v. Dire certainly displays the Fourth Circuit's ability to establish stimulating precedent. In its finest moment, *Dire*'s discussion of 18 U.S.C. § 1651 demonstrates the importance of preserving universal jurisdiction in a general piracy statute. Despite limited case law, the decision provides ample reasoning for future courts to reference when defining piracy under "the law of nations." At the same time, however, the Fourth Circuit also obscures the issue of whether foreign detainees are entitled to *Miranda* rights. Although the court does not preclude the possibility that foreign detainees possess Fifth Amendment rights, the *Dire* opinion does allow for future Fourth Circuit courts to largely ignore the "totality of the circumstances" standard. This disturbing precedent could have important consequences as the United States continues to pursue policies that result in the overseas detention of foreign nationals.

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231. The defendants did not speak English, had a limited understanding of the "American legal system," were victims of the "social and political conditions in . . . Somalia," and were illiterate. *See Dire*, 680 F.3d at 474.

232. *See id.* at 474 (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)); *see also Yunis*, 859 F.2d at 964 (stating that a defendant's "unfamiliarity with [the United States'] legal culture" and "an individual's foreign background seems especially pertinent to the knowing quality of waiver").