H. C. Miscellaneous Application No. 434 of 2009)

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JUDGMENT MARAGA, JA

Introduction

This is an appeal from the ruling and order of Ibrahim J (as he then was) delivered on 9th November, 2010 in Mombasa HC Misc. Application No. 434 of 2009 in which he held that Kenyan courts have no jurisdiction to try suspects of piracy charges allegedly
committed in the Indian Ocean beyond Kenya's territorial waters.

Facts of the Case

1. The facts of the case are that all the Respondents to this appeal stand charged before the Chief Magistrate's Court at Mombasa with the offence of piracy contrary to **Section 69(1)** as read with **Section 69(3)** of the **Penal Code**. The particulars of the charge allege that on 3rd day of March 2009, upon the high seas of the Indian Ocean, jointly being armed with offensive weapons namely three AK 47 rifles, one pistol make Tokalev, one RPG-7 portable Rocket Launcher, one SAR 80 rifle and one Carabine rifle, the Respondents attacked a machine sailing vessel namely MV COURIER thereby putting in fear the lives of the crew men on the said vessel.

2. They pleaded not guilty and challenged the court's jurisdiction to try them arguing that the offence having allegedly been committed in the Gulf of Aden, far off the Kenyan territorial waters, the Kenyan courts have no jurisdiction to try them. The trial court overruled that preliminary objection and proceeded with the trial.

3. After both the prosecution and the defence had closed cases but before judgment was delivered, the Respondents made a Judicial Review application to the High Court and sought an order of prohibition to prohibit their trial on the same ground of jurisdiction. The matter was heard by Ibrahim J (as he then was) who acceded to the Respondents' plea and held that the Kenyan courts have no jurisdiction to try them. He accordingly granted them the order of prohibition prohibiting their continued trial and directed the Kenya Government to repatriate them to their country. In event the Kenya Government failed to comply with that order, he directed United Nations High Commission for Refuges ("UNHCR") to take custody and care of the Respondents as wards or displaced persons who require the UNHCR's protection and assist them to relocate to their country. This appeal arises from that decision.

The Appellant's Case

4. Presenting the appeal, Mr. Kiage, Special Prosecuting Counsel assisted by the Assistant Director of Public Prosecutions, Mr. Ondari, and Principal State Counsel and Messrs Monda, Mwaniki, Muteti and Mule, submitted that piracy *jure gentium* is a crime under international criminal law, which is committed against all nations. Citing the Privy Council decision in **Re Piracy Jure Gentium Special Reference**[1] and a treatise on **International Law by Greig,**[2] he submitted that international law authorizes every nation to try international crimes notwithstanding that they may have been committed outside its territorial jurisdiction and irrespective of the nationalities of the accused persons.

5. Besides the universal jurisdiction granted by customary international law, counsel submitted that **Section 69** of the Kenyan **Penal Code** grants the Kenyan courts jurisdiction to try the offence of piracy committed in the high seas. He also cited the US decision in the case of United **States of**

[1] [1934] A.C. 586

[2] D.W. Greig, International Law, Butterworths, London, 1970

America v. Mohammed Modin Hassan & Others,[3] the Israel Supreme Court decision in **Attorney General of Israel vs. Eichman,**[4] the Permanent Court of International Justice decision in the case of the **S.S. Lotus, France v. Turkey**[5] as well as the Kenyan High Court (Justice Azangalala) in **Hassan M. Ahmed v. Republic**[6] in support of those submissions.

6. As the Respondents had not appealed against the trial court's decision dismissing their objection that it had no jurisdiction to try them, counsel submitted that they were deemed to have acquiesced to the trial court's jurisdiction and the learned Judge therefore erred in entertaining their judicial review application. He also faulted the Judge's subordination of Section 69 of the Kenyan Penal Code to Section 5 thereof as baseless. He argued that there is no conflict or gradation between the two sections. He said Section 5 which is in Chapter 3 of the Penal Code grants Kenyan courts jurisdiction to try territorial offences committed anywhere in

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[3] United States District Court for the Eastern District of Virginia, Criminal Appeal No. 2 of 2010

[4] Attorney General of Israel vs. Eichmann (1968), 36 ILR 5.

[5] S.S. 'Lotus' (France vs. Turkey), PCIJ, Series A, No. 10, 1927.

[6] Mombasa High Court Criminal Appeal Nos. 198-207 of 2008 (Consolidated)

the country while Section 69 is in Chapter 8 and deals with extra-territorial offences. Counsel also faulted the Judge for making orders that were not sought in the application and worse still against entities that were not party to the application.

The Respondents' Case

7. Opposing the appeal, Mr. Wamwayi, learned counsel for all the Respondents, submitted that the learned Judge was dealing with the concept of universal jurisdiction which is novel with a dearth of authorities in Kenya save for the High Court decision in **Hassan M. Ahamed** (supra). He therefore supported the decision of the learned Judge arguing that it is Section 5 and not Section 69 of the Penal Code, which grants Kenyan courts jurisdiction to try criminal cases. Section 69 only defines the offence of piracy but is silent on jurisdiction. Section 5 was enacted in 1930 when piracy was not an offence in Kenya while Section 69 was introduced by an amendment in 1967. Section 5 confers on Kenyan courts jurisdiction to try offences committed within Kenya's territorial jurisdiction. He argued that as the Penal Code is silent on which of the two sections supersedes the other, the

learned Judge cannot be faulted for finding that, on jurisdiction, Section 5 has primacy and ultimately finding that the Kenyan courts have no jurisdiction to try piracy offences committed outside its territorial jurisdiction. He therefore urged us to dismiss this appeal as unmeritorious.

The Appellant's Response

8. In response to those submissions, Mr. Kiage dismissed the contention that the concept of universal jurisdiction is novel in Kenya. He submitted that besides Justice Azangalala's decision in **Hassan M. Ahmed** (supra), there are numerous international authorities on the subject, which were referred to the judge but he ignored them and instead resorted to questionable seminal material. He said there is no conflict between Sections 5 and 69 of the Penal Code as the former does not address the subject matter of the offences the Kenyan courts can try. He urged us to allow the appeal.

Summary of Grounds of Appeal

9. I have considered these rival submissions. The Attorney General's 18 grounds of appeal raise three main issues,

namely, that the learned Judge erred and misdirected himself in failing to appreciate the law of piracy *jure gentium* as well as customary international law and the principle of universal jurisdiction that govern the offence of piracy *jure gentium*; that the learned Judge erred and misdirected himself on the import of Section 5 of the Penal Code in relation to Section 69 thereof thus holding that the trial court has no jurisdiction to try the Respondents; and that the learned judge exceeded his jurisdiction in making orders which were not sought in the application before him.

Piracy *Jure Gentium*

10. On the first ground, although the learned Judge was right in observing that, except for the case of **Hassan M. Ahmed v. Republic** (supra), there is a dearth of authorities in Kenya on the offence of piracy, there is a plethora of authorities and academic literature in international law which define the offence and confer jurisdiction on courts of all states to try it. The crime itself, with pirates being described as *hostis humani generis* "enemies of mankind"[7] has been in existence

[7] See Bahar, Michael. (2007), *Attaining Optimal Deterrence at Sea:* A Legal and Strategic Theory for Naval Anti-Piracy Operations, 40 VAND. J. Transnational L. 1 11. See also 18 Halsbury's Laws of England, 4th ed. (as revised in

for over 500 years.[8] In Kenya, Section 69 (1) of the Kenyan Penal Code, which was incorporated into the Penal Code by Act No. 24 of 1967, created the offence of piracy way back in 1967. It provides that:

> **"69. (1) Any person who in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of the offence of Piracy."**

What does the phrase "piracy jure gentium" in this provision mean?

11. The phrase "piracy jure gentium" is a Latin phrase which means piracy by the law of nations or piracy as known in international law. From this provision, it is clear therefore that the 1967 amendment to the Penal Code created in Kenya the offence of piracy as known and understood in international law. As the Penal Code does not define that phrase or enumerate the acts that constitute the offence, resort

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1977) Par. 1535 at p. 787.

[8] See Scharf, M.P. Appication of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States, Vol. 35:2 New England Law Review 363, 369.

has, in the circumstances, to be had to international law for the definition and exact understanding of the offence.

12. Several books and academic literature define the offence of piracy. Archbold defines piracy in paragraphs 3051 to 3058 in the following terms:

> **"Everyone commits piracy by the law of nations who, without legal authority from any state and without any colour of right:-**
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> > **(a) Seizes or attempts to seize any ship on the high seas within the jurisdiction of the Lord High Admiral by violence or by putting those in possession of such ship in fear; or**
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> > **(b) Attacks such ships and takes and carries away any of the goods thereon by violence or by putting those in possession of such ship in fear; or**
> >
> > **(c) Attacks or attempts to attack such ship with intent to take and carry away any of the goods thereon by violence or by**

putting those in possession of such ship in fear; or

(d) Attacks such ship and offers violence to anyone on board thereon or attacks or attempts to attack such ship with intent to offer violence as aforesaid".[9]

13. Quoting the Digest of Criminal Law by Stephen, Archbold further states that:

> **"a person is guilty of piracy *jure gentium* who, being peaceably upon any such ship, seizes or attempts to seize her by violence or by putting those in possession of such ship in fear or takes and carries away or attempts to take and carry away any of the goods thereon by violence to those in possession of such ship or by putting them in fear".**[10]

14. Blackstone (1726-80) in his Commentaries on English Law, stated that:

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[9] Achbold, "Pleading, Evidence and Practice in Criminal Cases," (1962), Sweet and Maxwell, London.

[10] Stephen Dig. Crim. Law, 9th ed, 101.

"the offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there".[11]

15. Apart from these customary international law sources, there are conventions, notably the 1982 **United Nations Convention on the Law of Sea** (UNCLOS) and 1988 **Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation** (SUA) that codify the crime of piracy as well as other international crimes such as human trafficking, apartheid and torture. Articles 101-107 and 110 of UNCLOS, (which Kenya ratified on 2nd March 1989), define piracy *jure gentium* as:

(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:**

[11] Blackstone (1726-80), Commentaries on English Law Book IV., p. 71

(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; and

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

16. The SUA Convention defines the offence in similar terms.

17. Both UNCLOS and SUA define the term "high seas" to mean "all parts of the sea that are not included in territorial sea or internal waters of a State."[12]

18. From this literature, it is clear that piracy *jure gentium* is an assault on vessels sailing upon the high seas whether or not such an assault is accompanied by robbery or attempted robbery. In his book "International Law," Sir Robert Phillimore (1810-85) states:

[12] Article 1 of SUA and Article 86 of UNCLOS

> **"piracy is an assault upon vessels navigated on the seas committed *animo furandi* whether robbery or forcible depredation be effected or not and whether or not it be accompanied by murder or personal injury."**[13]

19. It is not correct, as Mr. Kiage submitted, that the learned judge did not appreciate the meaning of the offence of piracy jure gentium. He did. Where he erred, in my view, is in subordinating Section 69 of the Penal Code to Section 5 thereof; in his interpretation of **Sections 369** and **371** of the **Merchant Shipping Act of 2009**; on Kenyan courts' jurisdiction to try piratical offences committed on the high seas; and most importantly in his failure to appreciate the applicability of the doctrine of universal jurisdiction in reference to the case at hand.

20. As counsel for both parties correctly stated, the Penal Code with Section 5 thereof was enacted in 1930 and Section 69 which created the offence of piracy in Kenya was introduced by Act No. 24 of 1967. I agree with Mr. Kiage that there is no

[13] Sir Robert Phillimore (1810-85), International Law 3rd ed., Vol. 1, 1879.

conflict or gradation between the two sections. Section 5 is in Chapter 3 of the Penal Code and grants Kenyan courts jurisdiction to try municipal law offences committed anywhere in the country. Section 69 on the other hand is in Chapter 8 and is entitled **"OFFENCES AFFECTING RELATIONS WITH FOREIGN STATES AND EXTERNAL TRANQUILITY."** It does not deal with the issue of jurisdiction to try the offence of piracy. It deals with extra-territorial or international crimes. There is therefore no basis for the learned Judge's finding that Section 5 supersedes Section 69. If anything, in my view, on the established principle of statutory interpretation that in event of inconsistency in statutory provisions the "later in time" prevails, it is Section 69 which should supersede Section 5 but there is no warrant for that as there is no conflict between the two sections.

21. With respect I am unable to fully appreciate the learned Judge's analysis of the offence of piracy in the light of the repeal of Section 69 of the Penal Code by **Section 454(1)** of the **Merchant Shipping Act**. If he implied, as I think he did, that the offence of "piracy *jure gentium*" ceased to exist in Kenya on 1st September 2009 when the Merchant Shipping

Act of 2009 came into operation, then he was clearly wrong. As stated above the phrase "jure gentium" is a Latin expression which means the "law of nations." The offence that Section 69 of the Penal Code created was therefore the offence of piracy as known in international law. Although that Latin phrase is not used in the Merchant Shipping Act of 2009, a reading of Sections 369 and 371 thereof makes it quite clear that the Act retains the offence of piracy *jure gentium* in Kenya. For ease of reference, I hereby set out the relevant portions of those two sections.

Section 369 states:

"(1) In this Part—

"piracy" means—

(a) any act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed—

(i) against another ship or aircraft, or against persons or property on board such ship or aircraft; or

(ii) against a ship, aircraft, persons or property <u>in a place outside the jurisdiction of any State</u>;

(b) any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or

(c) any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b).” [Emphasis supplied].

22. **Section 371** makes provision for sentence for the offence of piracy and armed robbery in territorial waters. It states:

“Any person who –

(a) commits any act of piracy;

(b) in territorial waters, commits any act of armed robbery against ships shall be liable, upon conviction, to imprisonment for life.”

23. These provisions make it clear that the offence of piracy that Section 369 created is committed in the high seas outside the territorial jurisdiction of any state which is basically the same as the one that was in the repealed Section 69 of the Penal Code. Ojwang J (as he then was) held the same view in **Republic Vs Abdirahman Isse Mohamud & 3 Others**[14] where he said that Sections 369 and 371 of the Merchant Shipping Act suggest that "piracy as an offence under the Kenyan law, is **piracy jure gentium,** i.e, by **international law,** and **in the high seas."** In **Hassan M. Ahmed v. Republic**[15] Azangalala J had, after deciding that the Kenyan Principal Magistrate's court had jurisdiction to try piracy offences committed in the high seas, observed that "even if the [UNCLOS] Convention had not been ratified and domesticated, the Learned Principal Magistrate was bound to apply international norms and Instruments since Kenya is a member of the civilized world and is not expected to act in contradiction to expectations of member states of the United Nations."

Any crime committed outside the jurisdiction of any state is

[14] Mombsa HC Misc. Application No. 72 of 2011.

[15] Hassan M. Ahmed v. Republic Mombasa High Court Criminal Appeal Nos. 198-207 of 2008 (Consolidated)

governed by international law. So the impression the learned Judge created that by repealing Section 69 of the Penal Code Parliament abolished the international crime of piracy in Kenya is clearly wrong.

24. Even if the repeal of Section 69 of the Penal Code abolished the international crime of piracy, that could not have availed the Respondents in this matter in view **Section 23(3)** of the **Interpretation and General Provisions Act.**[16] The relevant portions of the latter in essence provide that the repeal of a statutory provision does not affect any existing legal proceeding under it and that the same shall proceed "as if the repealing written law had not been made." The offence in this case having allegedly been committed on 3rd March 2009 while the Merchant Shipping Act, which repealed Section 69 of the Penal Code came into operation on 1st September 2009, the learned Judge therefore erred in holding that that Section 23(3) of the Interpretation and General Provisions Act does not apply to this case.

[16] Cap 2 of the Laws of Kenya

25. The second ground of appeal raises a major issue of international importance. It is whether or not Kenyan courts have jurisdiction to try piracy offences committed in the high seas beyond its territorial jurisdiction. In this case the offence charged is alleged to have been committed in the Gulf of Aden. The Gulf of Aden is a gulf located in the Arabian Sea between Yemen, on the south coast of the Arabian Peninsula, and Somalia in the Horn of Africa. In the northwest, it connects with the Red Sea through the Bab-el-Mandeb strait, which is about 20 miles wide. It shares its name with the port city of Aden in Yemen, which forms the northern shore of the gulf. That is admittedly beyond Kenya's territorial waters.

26. As I have stated, Mr. Kiage, learned counsel for the Appellant, argued that besides its Penal Code, Kenya, like any other nation in the world, is, under the concept of universal jurisdiction, authorized by international law to try international crimes including piracy irrespective of the locus quo and the nationalities of the perpetrators. Basing himself under the provisions of Section 5 of the Kenyan Penal Code, Mr. Wamwayi, learned counsel for the Respondents, on his part contended otherwise. He asserted that the Kenyan courts have no jurisdiction to try the Respondents for an offence

allegedly committed in the Gulf of Aden, far off the territorial jurisdiction of Kenya. Those rival submissions call for the examination of the concept of universal jurisdiction.

The Concept of Universal Jurisdiction

27. Jurisdiction generally is defined as the competence of a state to exercise its governmental functions.[17] At the international level, jurisdiction refers to a state's sovereignty to competently exercise its judicial, legislative and administrative powers.[18] The exercise of every state's judicial function in relation to international law includes prosecuting international crimes.

The naturalist *civitas maxima* doctrine holds that "there is an international constitutional order and international crimes which offend" it should "be prosecuted by every member of the international community."[19] Because international crimes occur across borders or on open seas, no one state can establish the usual basis for jurisdiction by the nexus between its territory and the crime. As such, international law confers states with universal jurisdiction to prosecute international crimes "regardless of the

[17] John Dugard, Daniel L. Bethlehem, Max Du Plessis; International Law: A South African Perspective, 3rd ed. Kluwer, Netherlands, 2006.

[18] Brownlie, Principles of International Law, 5th Ed. (Oxford: Oxford University Press, 1999) at p. 301

[19] Ibid at p. 497

location of the offence and the nationalities of the offender or the victim."[20] The principle of universal jurisdiction holds that certain crimes are of such a serious nature that any state is entitled, or even required, to apprehend and prosecute alleged offenders regardless of the nationality of the offenders or victims, or the location where the offence took place.[21] It differs from other forms of international jurisdiction because it is not premised on notions of sovereignty or state consent.[22]

28. Based on the rationale that the international community should ensure there is no safe haven for those responsible for the most serious crimes, the concept of universal jurisdiction therefore allows all international states to bring the perpetrators to justice. This authority derives from the principle that every state has an interest in bringing to justice the perpetrators of international crimes.[23] All states are therefore obliged to act as guardians of international law and on behalf of the international community to prosecute international crimes regardless of the place of commission of the crime, or the nationality of the author or of the victim.

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20 Alexander *et al* supra.

21 See Inazumi, M., (2005), *Universal Jurisdiction in Modern International Law*: Expansion of National Jurisdiction for Prosecution of Serious Crimes under International Law, Pennsylvania Studies in Human Rights

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29. In Moore's Digest of International Law,[24] a pirate is defined as:

> **"one who, without legal authority from any State, attacks a ship with intention to appropriate what belongs to it. The pirate is a sea brigand. He has no right to any flag and is justiciable by all."**

30. In his commentaries William Blackstone describes piracy as "**an offence against the universal law of society such that, with respect to a pirate, every community hath a right by the rule of self defense to inflict punishment upon him"**[25]

31. The Privy Council succinctly enunciated this point in the case of **Re Piracy Jure Gentium** (supra) where it observed:

> **"With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of**

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them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its *terra firma* or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but "*hostis humani generis*" and as such he is justiciable by any state anywhere: Grotius (1583-1645) 'De Jure Belli ac Pacis,' Vol. 2, Cap. 20, --- 40."[26]

The History of the Universality Jurisdiction.

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32. Although the principle of universal jurisdiction dates back to the 16th century,[27] its actual application started with the establishment of the International Military Tribunal at Nuremberg.[28] The Charter of the Tribunal authorized the member states to prosecute war criminals for the crimes against peace, war crimes, and crimes against humanity. This was followed by the US Military Tribunal also set up at Nuremberg to try high-ranking German army officers for the reprisal killings of civilians in the territories of Greece, Yugoslavia, Albania, and Norway which were occupied by the US. It was while acting under this principle that the International Military Tribunal dismissed jurisdictional objections raised in the Hostages Trial[29], the Hadamar Trial[30] and others.

33. The Charters of these Tribunals codified international customary law war crimes, crimes against peace and crimes against humanity. Since World War II, the crimes in this category have increased to include piracy, human trafficking

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or slave trade, “apartheid”, crimes of aggression (although controversial as it has not been clearly defined[31]), genocide and other crimes against humanity.[32]

34. Besides customary international criminal law, the universality principle is also based on international treaty law. It is included in the 1949 Geneva Conventions, the 1984 Convention against Torture, and a string of international treaties on terrorism. Though not expressly provided, the Geneva Conventions provide that:-

> **“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such**

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High Contracting Party has made out a prima facie case."[33]

The other Conventions dealing with international maritime safety include Convention on the International Maritime Organization, 1948 (IMO); International Convention for the Safety of Life at Sea, 1974 (SOLAS); International Convention on Maritime Search and Rescue, 1979 (SAR); Declaration Condemning Acts of Violence Against Seafarers; United Nations Convention on the Law of the Sea (UNCLOS); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA); Protocol of 1988 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA). They oblige States Parties to search apprehend and prosecute or extradite the perpetrators of such crimes.

35. The universally applicable legal framework dealing with piracy as reflected in UNCLOS has also been endorsed by Security Council Resolutions 1816, 1838, 1846, 1851, 1897 and 1918 the most recent being UNSCR 1918 in April of

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2010 in all of which Kenya participated and adopted. Developed under the authorization of Chapter VII of the UN Charter, these resolutions sanction states to use “all necessary means” to repress piracy.

36. As the United States Security Council observed in the above mentioned resolutions, the offence of piracy on the coast of Somalia, which we are dealing with in this appeal, is of great concern to the international community as it has affected the economic activities and thus the economic well being of many countries including Kenya. All States, not necessarily those affected by it, have therefore a right to exercise universal jurisdiction to punish the offence.

37. Besides its obligation under the universal jurisdiction in international law and the fact that the offence of piracy on the coast of Somalia has had an adverse effect on its economic welfare, Kenya had also codified the offence of piracy as an international crime in Section 69 of the Penal Code which has now been repealed and replaced by Section 369 as read with Section 371 of the Merchant Shipping Act of 2009.

38. For the piracy offences committed after the 27th August 2010 when the current Constitution was promulgated, Article 2(5) and (6) which have respectively incorporated the general rules of international law and the treaties Kenya has and continues to ratify into Kenyan law, Kenyan courts, have added constitutional authority to prosecute piracy and other international crimes.

39. For these reasons, I find and hold that Kenyan courts have jurisdiction to try the offence of piracy irrespective of the place of its commission or the nationalities of its perpetrators or victims. It follows therefore that the learned judge erred in holding otherwise.

40. Issues also arose as to which court in Kenya has jurisdiction to try the offence of piracy, the High Court or the Subordinate Courts. In their submissions before the High Court, counsel for the Respondents herein who were the Applicants in that court, while asserting that Kenyan courts have no jurisdiction to try the offence, contended that if they were overruled on that point, then it is the High Court which has jurisdiction to try the offence. Counsel's point in that submission was that as the Respondents had not been charged

in the High Court and Section 69 of the Penal Code had been repealed, the charge against the Respondents should have been dismissed and the Respondents set free. A similar argument was placed before Ojwang J (as he then was) in the said case of **Republic vs. Abdirahman Isse Mohamud & 3 Others.** [34] The learned Judge, quite correctly in my view dismissed that argument and held that under **Section 5** of the **Criminal Procedure Code** ("CPC") read together with the First Schedule to the CPC, it is the Subordinate Court of the First Class presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate or a Senior Resident Magistrate which has jurisdiction to try the offence. Section 5 of the CPC states:

> **"(1) Any offence under any law other than the Penal Code shall, when a court is mentioned in that behalf in that law, be tried by that court.**
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> **(2) When no court is mentioned, it may, subject to this Code, be tried by the High Court, or by a subordinate court by which the offence is shown in the fifth column of the First Schedule to this Code to be triable."**

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The First Schedule to the CPC provides:

> **"Subordinate Court of the First Class presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate, or a Senoir Resident Magistrate."**

43. It is clear from these provisions and the cited authorities that the Kenyan subordinate courts presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate or a Senior Resident Magistrate, which have jurisdiction to try the offence.

44. The above analysis in effect disposes of the last ground that the learned judge had also no jurisdiction to order the repatriation of the Respondents and/or to direct the UNHCR to take custody of the Respondents as displaced persons. Besides the fact that there was no basis for that direction, I agree with counsel for the Appellant that the learned Judge had no jurisdiction to make orders against a person who was not party to the case before him and who

had not been given an opportunity to be heard on the matter.

45. In the upshot, I allow this appeal, set aside the learned Judge's order of 9th November 2010 and direct the trial court that is the Chief Magistrate's Court at Mombasa to immediately resume the trial of the Respondents.

DATED and delivered at Nairobi this 18th day of October, 2012

D. MARAGA

JUDGE OF APPEAL