



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ONYANGO OTIENO, VISRAM, KOOME, OKWENGU & MARAGA JJ.A.)

CIVIL APPEAL NO. 113 OF 2011

BETWEEN

ATTORNEY GENERAL.....APPELLANT

AND

MOHAMUD MOHAMMED HASHI.....1ST RESPONDENT

MOHAMMED ALI AWDAHIR.....2ND RESPONDENT

MOHAMED DOGOL ALI CADE.....3RD RESPONDENT

ABDI WAHID MOHAMMED OSMAN.....4TH RESPONDENT

ABDULLAHI OMAR MOHAMMED.....5TH RESPONDENT

ABDIRAHAM MOHAMED CASER.....6TH RESPONDENT

KHADAR MOHAMMED JAMA.....7TH RESPONDENT

ABDIRIZAK HASSA ALI.....8TH RESPONDENT

MOHAMMED ISHMAEL.....9TH RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Mombasa (Ibrahim, J.) dated 9th November, 2010

in

H.C. MISCELLANEOUS APPL. NO. 434 OF 2009)

JUDGMENT OF ONYANGO OTIENO, JA

I have had the opportunity of reading in draft the judgments of Maraga JA and Koome JA. I do agree with the learned Judges and the arguments put forward by them. The various authorities including various international authorities cited by them are all on point.

The only issue before us is as to whether, the Kenyan courts have jurisdiction to try the respondents and for that matter, any other accused person for the offence or offences in respect of Piracy *Jure Gentium* committed outside the Kenyan Territorial Waters or to be more precise, committed in the High Seas.

I would in brief state that at the time the offence in respect of the case before us took place on 3rd March, 2009, **Section 69 (1)** as read with **Section 69 (3)** of the Penal Code was still in operation. By the time the trial started, that section was still in operation. Later it was repealed by **Merchant Shipping Act** which came into operation on 1st September, 2009. In my mind, that repeal had no effect on the case that was already in court before the repeal. This is because the provisions of **Section 23 (3)** of the **Interpretation and General Provisions Act Chapter 2** Laws of Kenya is clear. It states: -

“Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) affect a penalty forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

(e) affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealed written law had not been made.”

This being the case, the learned Judge did not in my considered view appreciate the law when he held that **Section 69 (1)** as read with **Section 69 (3)** of the Penal Code would not apply to the case as in his view **Section 23(3)** above did not apply. In my mind, I entertain no doubt that the section did apply.

Secondly, I do not see any contradiction between that section and **Section 5** of the Penal Code. **Section 5** was enacted in 1930 and is a provision that governs the territorial jurisdiction of the courts in respect of municipal laws. Later, it became necessary to provide for cases of piracy on the high seas or on the international waters and thus **Section 69 (a)** as read with **Section 69 (3)** was introduced in 1967 about 27 years later to take care of that situation which I observe, is the situation before us in this appeal. I do not see any conflict between the two provisions which were in existence in our Penal Code as on the date the offence was alleged to have taken place. **Section 5** provided for local jurisdiction while **Section 69 (1)** as read with **Section 69 (3)** donated as at that effective time jurisdiction to try piracy *Jure Gentium* on the High Seas. Thus the Kenyan courts have jurisdiction to try such cases. The heading of Chapter 8 of the Penal Code makes the difference clear. It is headed “**OFFENCES AFFECTING RELATIONS WITH FOREIGN STATES ANDEXTERNAL TRANQUILITY.**” Fight against piracy in High Seas is a way of ensuring external tranquility.

Thirdly, I do not think, the learned Judge of the High Court (as he then was), was right in making his decision based on the seminal materials that were canvassed at a seminar outside this country. These were, as is normal with seminars and conferences, proposals that were canvassed, but they remained no more than that. They never crystallized into any legal authorities that could be relied upon to make a judicial decision of the magnitude that was made by the learned Judge.

Fourthly, although the learned Judge was of a feeling that there were no authorities on the subject that would have helped him to come to a proper and fair decision on the matter that was before him, in my view, Kenya being a signatory to several relevant international conventions, and the world now being one authorities with several international conventions on the issue, I do feel he had all the material he needed for a proper judicial decision in the matter. As I note that my brothers and sisters have cited a number of them, I will not cite them here, but I do think, Azangalala J got it right in his decision in the case of **Hassan M. Ahmed v. Republic, Mombasa High Court Criminal Appeal Nos. 198 – 2007 of 2008.**

In concluding this brief judgment, I would say that as the world has now been reduced into a global body, with the economy of every State being intertwined with that of the other States throughout the world, it would be dangerous for any nation to refuse discouraging acts perpetrated on the High Seas such as piracy *juregentium* that would affect even nations within whose territorial waters such offences have not taken place. In my mind if Kenyan courts can feel emasculated when people charged with such offences are produced before them, then how would such heinous offences that would affect its economy as well though perpetrated in the High Seas be controlled? In any event what would be the use of the international conventions on such matters if signatories to them such as Kenya do not honour them in action?

Lastly I do agree with Mr. Kiage that the Judge had no jurisdiction to make the orders he made. As I have stated, I agree with Maraga JA and Koome JA whose decisions I have read in draft. As the other two learned Judges also agree, this appeal is allowed and the ruling of the learned Judge and orders made thereunder all set aside. Let the trial in the Chief Magistrates Court proceed. We make no order as to costs of the appeal.

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

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

JUDGMENT OF VISRAM, J.A.

I have read in draft the judgments of OnyangoOtieno, Maraga and Koome, JJA and I entirely agree with the same, including the orders proposed therein.

ALNASHIR VISRAM
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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF KOOME, J.A.:

1. This appeal challenges the judgment of Ibrahim, J [*as he then was*] in High Court Miscellaneous application No. 434/2009. In that case the nine [9] respondents were arraigned before the chief magistrate’s court on 11th March, 2009, in Criminal Case No. 840 of 2009. They were charged with the offence of piracy contrary to **Section 69 (1) as read with Section 9 (3) of the Penal Code.** The particulars of the offence were that:

“ On the 3rd day of March, 2009 upon the high seas of 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 carabire rifle attacked a machine sailing vessel namely MV COUPIER and at the time of such act put in fear the lives of the crewmen of the said vessel.”

2. All the respondents pleaded not guilty and by the time they made an application in the High Court in which they challenged the jurisdiction of the trial court, the prosecution had called 15 witnesses and closed their case. Subsequently, while the respondents were waiting for the determination of the application, each one of them was found to have a case to answer, they were put on their defence and we were informed during the hearing of this appeal, the matter is now pending for judgment by the trial magistrate. The respondents had sought before the high court for an order of prohibition, prohibiting the magistrate’s court from hearing, proceeding with, entertaining and/or otherwise allowing the prosecution of criminal case No. 840 of 2009 which commenced on 11th March, 2009.

3. The respondents complained that they were charged with the offence of piracy contrary to **Section 69 of the Penal Code** since 11th March, 2009, which allegedly took place in the Gulf of Aden beyond Kenya and its territorial waters: Kenyan courts have no jurisdiction under **Section 5 of the Penal Code** to try the respondents. Secondly, the respondents had indicated their desire to be represented by lawyers of their choice who were denied audience; thus they were denied to have counsel of their choice and a fair trial. After considering the matter, the learned judge concluded in his judgment that the Kenyan courts have no jurisdiction to deal with matters that took place outside of Kenya territorial waters. In particular, he held the alleged offence took place in the high seas which is outside the jurisdiction of the local courts.

4. An order of prohibition, prohibiting the learned chief magistrate from proceeding with criminal case No. 840 of 2009 was issued. The court gave further directions *suomotounder Article 29 of the Constitution* declaring the respondents as “vulnerable persons” or “wards” of court who needed protection. The Attorney General was ordered to advise the Ministry of Immigration, Ministry of Foreign Affairs, the Police and all the law enforcement agencies of the provisions of the Constitution. The same order was extended to secure the release and safe passage and delivery of the respondents to their respective countries of origin. In default, the court requested the UNHCR to take custody of the respondents and consider them as displaced persons who required their protection for relocation or repatriation to their county or countries of origin.

5. Being aggrieved by that decision, the Attorney General appealed against the whole decision. The appeal raises eighteen grounds which were all argued together in a bid to address the following broad issues; whether the local courts have jurisdiction to try piracy cases committed in the high seas; whether there is a “legislative” misnomer regarding the provisions of **Section 69 (1) of the Penal Code as read with Section 5**; whether the learned judge failed to appreciate the law of piracy *jure gentium* is a crime recognized under the International Law and also failed to give due regard to precedents which have been decided on the same issue; whether the repeal of S 69 of the Penal Code by the Merchant Shipping Act, 2009, had an effect on the prosecution of the criminal case which occurred in March 2009; and finally, whether the court exceeded its jurisdiction by issuing orders that were not prayed for.

6. The appellant was represented by a team of five advocates; Jacob Ondari, ADPP, V Monda, PSC, C Mwaniki, PSC and Ann Mutel, PSC who were ably led by Mr Patrick Kiage, Senior Prosecuting Counsel. In support of the grounds, counsel relied on several authorities, statutes and international law and submitted at length on the interpretation of the offence of piracy *juregentium* both by the municipal courts and under the international law. On the part of the respondents, they were all represented by MrWamwai, learned counsel who in opposing the appeal supported the judgment, he did not rely on any authorities but he submitted generally that the Kenyan courts lacked jurisdiction to try offences committed outside its jurisdiction.

7. I propose to make reference to those submissions, and the authorities cited as I analyze the issues raised herein. First of all, the issue of whether the prosecution of the respondents could have proceeded under the provisions of the penal code which was amended in the course of the trial. It is common ground that the offence was allegedly committed on 3rd March, 2009 and the respondents were arraigned before the chief magistrate’s court on 11th March, 2009 where they were charged with the offence of piracy contrary to the provisions of **Section 69 of the Penal Code**. The provisions of S 69 were subsequently repealed by the **Merchant Shipping Act, 2009**, which came into effect on 1st September, 2009, in particular, **Sections 369 and 371** that make very elaborate provisions on the crime of piracy in the high seas. Though the respondents were charged under **Section 69 (1) of the Penal Code** before it was repealed, this repeal did not affect the continued prosecution of the case against the respondents. By dint of Section 23 (3) of the Interpretation and General Priorities Act, a repeal of a law unless a contrary intention is expressly provided does not affect an ongoing prosecution. 8. On the municipal law, it is my considered opinion that the learned judge also misconstrued the territorial application of the law as provided for under **Section 5 of the Penal Code** which defines the geographical jurisdiction of the courts. That section should have been read together with **Section 6** which extended the jurisdiction of offences partly committed in Kenya and beyond to the Kenyan courts. Moreover the repealed **Section 69** falls within **Chapter VIII of the Penal Code** which deals with “offences affecting relations with foreign states and external tranquility” which provides in very clear terms and gives jurisdiction to Kenyan courts to deal with crimes of piracy *jure gentium* which are committed in the “territorial waters or upon the high seas”. Indeed **Section 69 (1)** provides:

“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”.

9. I find no justification in the learned judge’s attempt to rank the provisions of **Sections 5 and 69** of the penal code and the prioritization of section 5 was certainly taken out of context. The law clearly gives Kenyan court’s jurisdiction to deal with offences of piracy in the high seas as provided for under section 69 which falls under part VIII deals with extra territorial jurisdiction of Penal Code; While **Section 5** merely defines the territorial and geographical jurisdiction of the courts. There is no legislative misnomer and even if the judge found there was, that could easily have been resolved by falling back on the provisions of the United Nations Law of the Sea Convention [UNCLOS] of 1982, Kenya is signatory to this convention and by dint of **Article 2 (5) of the Constitution**, UNCLOS is part of our laws. Under UNCLOS the offence of piracy *jure gentium* is defined as:

“(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passenger of private ship or a private aircraft and directed:

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

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;

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

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

10. Although the learned trial judge made some reference to the Constitution of Kenya, 2010, he however did not consider the provisions of **Article 2 (5)** which provides for the sources of Kenyan laws and in particular:

“(a) the general rules of international law shall form part of the law of Kenya;

(b) any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

Kenya is signatory to UNCLOS and is a member of the United Nations.

11. There is sufficient material to show that piracy has been treated as a threat to World Peace and grave danger to humanity and thus any state is given jurisdiction to deal with it. In order to appreciate how the offence of piracy has been handled not only in Kenya but by the United Nations and by other courts in other jurisdictions, I will make reference to some outstanding resolutions by the United Nations and some authorities from other jurisdictions. For example in 2009, the UN Security Council, unanimously adopted resolution 1897 [2009] regarding the state of piracy off Somalia’s coast. That resolution authorized and invited all states and regional organizations to combat and eradicate the crime of piracy by:

“Noting with concern that the continuing limited capacity and domestic legislation to facilitate the custody and protection of suspected pirates after their capture has hindered more robust international action against the pirates off the coast of Somalia and in some cases, has led to pirates being released without facing justice, regardless of whether there is evidence to support prosecutions that, consistent with the provisions of the convention concerning the repression of piracy the 1988 convention of the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) provides for parties to create criminal offences, establish jurisdiction and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation and stressing the need for states to criminalize piracy under their domestic law and to favorably consider the prosecution in appropriate cases of suspected pirates considered with applicable international law. ...”

12. Apart from this somewhat recent resolution, the crime of piracy was regarded as a threat to World peace as early as 1926. The crime of piracy *juregentium* engaged the attention

of the League of Nations; the predecessor of the United Nations. A sub committee of experts presided over by a Japanese jurist, Mr Matsuda in a document C196, M70, 1927V gave what can be considered as a definition of Piracy on page 116:

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

Also see Sowilts Dictionary of English Law:

“piracy, the commission of those acts of robbery and violence upon the sea which if committed upon land would amount to felony. Pirates hold no commission or delegated authority from any sovereign state, empowering them to attack others. They can therefore be only regarded in the light of robbery. They are as Cicero has truly sated, the enemies of all. [Communes hostesomium]; and the law of Nations gives everyone the right to pursue and exterminate them of any previous declaration of war (Re: Piracy Jure Gentium [1934] AC 586) but is not allowed to kill them without trial, except in battle. Those who surrender or are taken prisoners must be brought before the proper magistrates, and dealt with according to law.”

13. The customary international law gives universal jurisdiction to all countries to deal with crimes committed outside the territorial jurisdiction. Offences that threaten world peace are also threats to humanity and the courts have ruled that such crimes are punishable in martial courts. In the case of **ATTORNEY GENERAL OF ISRAEL VS EICHMAN: TRIAL COURT DECISION 36 INTL. L. REP. 5 (ISRAEL, DIST CT JERUSALEM**, it was pointed out by a court in Israel as thus:

“The abhorrent crimes defined in this law are not crimes under Israel law alone. These crimes which struck out the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself [delictajurigentium]. Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international under the doctrine of universal jurisdiction, a state may “define and prescribe punishment for any offence “**recognized the community of nations**” as having universal concern”. Significantly, universal jurisdiction applies only to those crimes that the international community has universally condemned and also agreed, as procedural matters deserve to be made universally cognizable.”

14. It is clear from the judgment under review that, the learned judge failed to take into consideration the principles of international jurisdictions regarding the offence of piracy. Incidentally even for those who argue that international jurisdiction should bear boundaries so as not only to punish the wicked but also not to constrain the righteous; but more importantly to safeguard against legal principles being used as weapons to settle political scores (see **Kissinger Pitfalls of Universal Jurisdiction 80 Foreign Aff. 86 [2001]**). However according to statutes and well documented scholarly works, those arguments have no bearing and are inapplicable in cases of piracy *jure gentium* which has for centuries been considered a universal jurisdiction crime based also on international agreements that authorizes all nations to capture and punish a pirate.

15. This judgment also failed to recognize that Kenyan courts were beginning to develop jurisprudence in this area of law along the internationally recognized principles which were sadly set back by this judgment under review. For example, in the case of; **UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION, USA VS MOHAMED MADIN HASSAN & 4 OTHERS**, a court in the United States made reference to the application of UNCLOSS as part of customary international law and also made reference to a Kenyan decision as thus:

“Moreover, the courts of other countries have held UNCLOSS to be applicable as customary international law in concrete cases, as reflected in recent judicial decisions from Kenya, the country currently handling many modern piracy cases. Courts in Kenya have relied on the piracy provisions in UNCLOSS to interpret their own domestic criminal code proscribing general piracy.”

16. One of the authorities cited before the court in the US was also referred to the learned judge but it was not considered or distinguished was the case of; **HASSAN M AHMED VS R, CR Nos. 198 – 201**, delivered on 12th May, 2009, whose facts are similar to this case. The appellants who had been convicted with the offence of piracy appealed to the High Court. The appeal had challenged the jurisdiction of the principal magistrate to try an offence that was committed outside the Kenyan territorial jurisdiction. After reviewing the municipal law against piracy as provided in the penal code and also under the international conventions, Azangalala, J posited on page 11 of the judgment as thus:

“I would go further and hold that even if the 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 expectation of member states of the United Nations. That is the view expressed in the text book on International Law by Martin Dixon NA. The learned author writes on paragraph 5.2.3 page 76 as follows:

“Under international law, there are certain crimes which are regarded as so destructive of the international order that any state may exercise jurisdiction in respect of them. This is a jurisdiction which exists irrespective of where the act constituting the crime takes place and the nationality of the person committing it. ... It seems clear that piracy, war crimes and crimes against humanity, eg. genocide, are crimes susceptible to universal jurisdiction under customary international law.”

17. This decision as rightly observed even by the US Federal Court in the case of **USA vs Hassan (supra)** represents the correct interpretation of the law. The offence of piracy *jure gentium* is an offence against international customary law; it is part of the laws of nations. The offence of piracy *jure gentium* is codified through treaties and also domesticated through the penal code and presently the **Merchant Shipping Act**.

My understanding of the offence of piracy *jure gentium* is a crime against customary international law which is recognized as *jus cogens*, a peremptory norm [Latin for compelling law]. *Jus cogens* are fundamental principles of international law which is accepted by the international community of states as a norm which no derogation is ever permitted. Examples include various international crimes such as slavery, torture genocide, war of aggression or crimes against humanity.

18. From the foregoing reasoning I think I have demonstrated that the respondents were properly arraigned before the chief magistrate and the charge of piracy *jure gentium* against **Section 69 of the Penal Code** gives jurisdiction to the Kenyan court to try offences committed in the high seas. The provisions of **Section 69** do not conflict with the provisions of **Section 5 of the Penal Code**. The issue of fair trial was not pursued in the high court, but the records show the respondents have been represented by counsel who must have been of their own choice.

In the upshot, I would allow the appeal, set aside the order of prohibition and the entire orders made on 9th November, 2010. I would order that the matter be returned to the trial magistrate to continue with the trial.

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

M. K. KOOME

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JUDGE OF APPEAL

JUDGMENT OF OKWENGU, JA.

I have read the judgment prepared by Maraga, JA. I agree with him fully and I have nothing useful to add.

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

H. M. OKWENGU

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JUDGE OF APPEAL

JUDGMENT MARAGA, JA

Introduction

1. 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

2. 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.

3. 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.

4. 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 Refugees ("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

5. 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.

6. 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 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.

7. 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 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

8. 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. Ahmed** (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

9. 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

10. 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

11. 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 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?

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

13. 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:-

- (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**
- (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]

14. 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]

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

“ 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]

16. 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:**
 - (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).**

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

18. 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]

19. 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:

“ 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]

20. 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.

21. 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 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.

22. 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 in a place outside the jurisdiction of any State;

(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].

23. **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.”

24. 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 Abdurahman 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 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.

25. 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.

26. 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.

27. 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

28. 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.

29. 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 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]

30. 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.

31. 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.”

32. 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]

33. 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 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.

34. 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.

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

36. 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 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.

37. 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 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.

38. 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.

39. 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.

40. 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.

41. 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.

42. 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.

(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.”

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 Senior 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.

[1] [1934] A.C. 586

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

[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)

[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 1977) Par. 1535 at p. 787.

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

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

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

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

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

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

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

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

[16] Cap 2 of the Laws of Kenya

[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

[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*

[22] See Kontorovich, E., (2004), *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 *Harvard International Law Journal*, 183, 184. At p. 190 he stated that “...before a Law of Nations in the Modern sense of the terms was in existence, a pirate was considered an outlaw, a *hostis humani generis*... Piracy is so called international crime; the pirate is considered the enemy of every state, and can be brought to justice anywhere.... For as long as sovereignty-based jurisdictional principles have existed at least since the early seventeenth century, any nation could try any pirates it caught regardless of the pirates nationality or where on the high seas they are apprehended...”

[23] International Criminal Court, *Making International Court Work: A Handbook for Implementing the Rome Statute*, Vol 13, No. 4(G), September 2001 at 17.

[24] (1906), Vol. 2, p. 953,

[25] William Blackstone (1765-1769), Vol. 4:397-402

[26] *Re Piracy Jure Gentium* (*supra*) at 589.

[27] 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.

[28] See Randall, C.K. (1988), *Universal Jurisdiction under International Law*, 66 Texas Law Review 785.

[29] The Hostages Trial (1949), 8 L.R.T.W.C. 34

[30] The Hadamar Trial (1947), 1 L.R.T.W.C. 46

[31] Alexander et al at p. 499

[32] International Criminal Court, *Making International Court Work: A Handbook for Implementing the Rome Statute*, Vol 13, No. 4(G), September 2001 at 17, at p. 18

[33] Article 49 of Geneva Convention I, Article 50 of Geneva Convention II, Article 129 of Geneva Convention III, and Article 146 of Geneva Convention IV.

[34] Mombasa HC Misc. Application No. 72 of 2011.