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Case Brief: In re Mohamud Mohamed Hashi et al. (2009)

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PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
WAR CRIMES PROSECUTION

CASE BRIEF:
IN RE MOHAMUD MOHAMED HASHI
ET. AL. (2009)

Legal Memorandum

Prepared by the

Public International Law & Policy Group

June 2011

Final

CASE BRIEF: *IN RE MOHAMUD MOHAMED HASHI ET AL.* (2009)

Executive Summary

The purpose of this memorandum is to provide a case brief of the Kenya High Court's November 9, 2010, judgment in *In re Mohamed Mohamud Hashi et al.* Aside from the Introduction and the Conclusion, the memorandum proceeds in four parts: (1) the first section provides an overview of the facts and issues involved in the case; (2) the second section contextualizes the judgment in terms of international law, statutory authority, and judicial precedent; (3) the third section describes and analyzes the court's judgment; and (4) the fourth section evaluates the judgment's ramifications for ongoing and future piracy cases in Kenyan, foreign, and international courts.

On November 9, 2010, Kenya High Court Justice Mohammed Ibrahim issued a landmark judgment in *In re Mohamed Mohamud Hashi et al.*, holding that magistrate-level Kenyan courts lack jurisdiction to try acts of piracy committed outside of Kenya's territorial waters. In light of Kenya's judicial precedent in favor of magistrate-level jurisdiction over extraterritorial piracy offenses, Justice Ibrahim's ruling is widely regarded as a critical determinant of Kenya's willingness to prosecute piracy suspects. While the legal ramifications of the judgment may impede Kenya's piracy prosecutions in the short term, the ruling will likely have very limited ramifications for Kenya's future piracy prosecution efforts, particularly because the issue in *Hashi* is narrowly confined to the jurisdiction of Kenya's magistrate-level courts.

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CASE BRIEF: *IN RE MOHAMUD MOHAMED HASHI ET AL.* [2009]**Statement of Purpose**

The purpose of this memorandum is to provide a case brief of the Kenya High Court's November 9, 2010, judgment in *In re Mohamed Mohamud Hashi et al.*

Introduction

In light of escalating piracy attacks off the coast of Somalia, the international community has relied extensively on Kenya to prosecute non-Kenyan suspected pirates captured by other states. To this end, states and regional organizations, including the United States,¹ the United Kingdom,² Canada, China, Denmark,³ and the European Union,⁴ concluded a series of bilateral agreements with Kenya in 2008 and 2009. Under the terms of these prosecution agreements, Kenya agreed to discretionarily receive and prosecute suspected pirates in exchange for assistance with piracy investigations and prosecutions.⁵

Recently, however, Kenya has indicated an intention to discontinue large-scale prosecutions of non-national piracy suspects captured by other states. In April 2010, Kenyan Foreign Minister Moses Wetangula, a principal negotiator of the prosecution agreements, announced that Kenya would no longer accept piracy suspects from non-Kenyan naval forces, citing insufficient international assistance as grounds for termination of the agreements.⁶ Although Kenya has since resumed

¹ Jacquelyn S. Porth, *Legal Experts Take Action to Prosecute Pirates*, US POLICY, Feb. 27, 2009, available at <http://www.uspolicy.be/headline/legal-experts-take-action-prosecute-pirates>. The undisclosed memorandum of understanding was signed on January 16, 2009.

² The undisclosed memorandum of understanding was signed on December 11, 2008.

³ The memorandum of understanding was signed in August 2009.

⁴ *Exchange of Letters Between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy and Detained by the European Union-Led Naval Force (EUNAVFOR), and Seized Property in the Possession of EUNAVFOR, from EUNAVFOR to Kenya and for Their Treatment After Such Transfer*, Mar. 6, 2009, OFFICIAL JOURNAL OF THE EUROPEAN UNION at L 79/49–L 79/59, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:079:0049:0059:EN:PDF>.

⁵ See, for example, *Exchange of Letters Between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy and Detained by the European Union-Led Naval Force (EUNAVFOR), and Seized Property in the Possession of EUNAVFOR, from EUNAVFOR to Kenya and for Their Treatment After Such Transfer*, Mar. 6, 2009, OFFICIAL JOURNAL OF THE EUROPEAN UNION at L 79/49–L 79/59, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:079:0049:0059:EN:PDF>.

⁶ *Kenya Ends Trials of Somali Pirates in its Courts*, BBC, April 1, 2010, available at <http://news.bbc.co.uk/2/hi/africa/8599347.stm>.

its piracy prosecutions, largely in response to pledges of international support,⁷ the prosecution agreements remain tenuous.⁸

On November 9, 2010, in a legal blow to Kenya's piracy prosecutions, Kenya High Court Justice Mohammed Ibrahim issued a landmark judgment in *In re Mohamed Mohamud Hashi et al.*, holding that magistrate-level Kenyan courts lack jurisdiction to try acts of piracy committed outside of Kenya's territorial waters and ordering the immediate release of nine piracy suspects. Kenya's Attorney General appealed the judgment in the Kenya Court of Appeal,⁹ and on April 11, 2011, the Court of Appeal issued a stay of execution of Justice Ibrahim's orders pending hearing and determination of the appeal.¹⁰ The High Court's ruling is widely regarded as a critical determinant of Kenya's willingness to prosecute non-national suspected pirates captured by other states, and, as a result, the international community is anxiously awaiting the outcome of the appeal.

This memorandum analyzes the reasoning and implications of Justice Ibrahim's judgment in *In re Mohamed Mohamud Hashi et al.* Aside from the Introduction and the Conclusion, the memorandum proceeds in four parts: (1) the first section provides an overview of the facts and issues involved in the case; (2) the second section contextualizes the judgment in terms of international law, statutory authority, and judicial precedent; (3) the third section describes and analyzes the court's judgment; and (4) the fourth section evaluates the judgment's ramifications for ongoing and future piracy cases in Kenyan, foreign, and international courts.

⁷ Notably, on June 24, 2010, Kenya opened a special court to try suspected pirates arrested by foreign states patrolling the coast of Somalia and the Gulf of Aden. Based at Shimo La Tewa Prison in the Indian Ocean port city of Mombasa, the \$5 million piracy court is funded by the United Nations Office on Drugs and Crime, the European Union, Australia, and Canada.

⁸ In fact, Kenya formally ended its agreement with the European Union on September 30, 2010.

⁹ Eunice Machuhi, *Attorney General Files Appeal Against Ruling on Piracy Cases*, ALLAFRICA, April 11, 2011, available at <http://allafrica.com/stories/201104120114.html>.

¹⁰ Maureen Mudi, *Kenya: Suspected Pirates Remain in Custody*, NAIROBI STAR, April 12, 2011, available at <http://news1.ghananation.com/africa/134083-kenya-suspected-pirates-remain-in-custody.html>.

The Case

The Alleged Offence

Mohamud Mohamed Hashi alias Dhodi and eight other men¹¹ are charged with attacking the MV Courier, a German freighter, on March 3, 2009, while armed with five rifles, a pistol, and a portable rocket launcher. The suspects were arrested by the German navy with air assistance from the United States.¹² The alleged incident took place entirely in the Gulf of Aden in the Indian Ocean, outside of Kenya's territorial waters. None of the nine suspects were Kenyan nationals, and no Kenya goods, crew, or ship was involved in any way in the alleged incident.¹³ In sum, the incident involved the capture by another state of non-Kenyan suspects for alleged extraterritorial piracy offenses. The German navy brought the suspects to Mombasa, where they were placed in the custody of the Kenyan police.¹⁴

Procedural History

On March 11, 2009, the nine piracy suspects were arraigned and charged¹⁵ with the offence of piracy in violation of Section 69(1) of the Kenyan Penal Code. They pleaded not guilty. The trial commenced on April 27, 2009, in the Chief Magistrate's Court at Mombasa before Senior Resident Magistrate T. Mwangi. The prosecution called 15 witnesses, and, on August 24, 2009, the Magistrate evaluated the prosecution's evidence and turned the case over to the defense, setting a defense hearing for October 22, 2009. Prior to commencing their defense, however, the nine suspects on September 17, 2009, filed a judicial review application in the Kenya High Court. In their application, the suspects asserted that the Chief Magistrate's Court lacked jurisdiction under Section 5 of the Kenyan Penal Code to adjudicate the case, and sought leave to institute judicial review proceedings for an Order of Prohibition that would prohibit the Chief Magistrate at

¹¹ The eight others are Mohamed Ali aw-Dahir alias Orod Dheer, Mohamed Dogol Ali Cade, Abdiwahid Mohamed Osman, Abdullahi Omar Mohamed alias Indaguran, Abdirahman Mohamed Caser, Khadar Mohamed Jama, Abdirizik Hassna Ali alias Dawagoradi, and Mohamed Cirfer Ismail alias Mohamud Abdullahi Ismail.

¹² The German naval vessel was the FGS Rhineland, and the United States provided assistance via a helicopter assigned to the United States naval ship USS Monterey. In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 29.

¹³ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 5.

¹⁴ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 29.

¹⁵ The suspects were charged under Criminal Case Number 840 of 2009.

Mombasa or any other Magistrate's Court from adjudicating the case. The High Court ordered the proceedings stayed pending determination of the application.

Issue

In addition to their jurisdictional assertion, the suspects in their judicial review pleadings alleged that the trial was prejudicial to the applicants because they were subjected to discrimination, including the denial of bail, and were denied representation by counsel of their choice. At the hearing, the applicants' representative, Advocate Jared Magolo, conceded the applicants' claims concerning their legal representation and any constitutional issues raised by the application. The High Court's inquiry was thus confined to the judicial review question: whether the Chief Magistrate's Court had jurisdiction to try the charges against the applicants.

Legal Context

The following section discusses the legal grounds for granting or denying a Kenyan magistrate-level court adjudicative jurisdiction over non-national suspects captured by other states for extraterritorial piracy offenses.

Jurisdiction under International Law

The United Nations Convention on the Law of the Sea¹⁶ sets out the international legal framework applicable to combating piracy. In pertinent part, Article 100 of the Convention provides that “[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.” Piracy is defined under Article 101(a) as consisting in part of “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 . . . and directed (i) on the high seas, against another ship . . . or against persons or property on board . . . [or] (ii) against a ship, . . . persons or property in a place outside the jurisdiction of any State.”¹⁷

¹⁶ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 396, 21 I.L.M. 1261 (1982), available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

¹⁷ United Nations Convention on the Law of the Sea, art. 101(a), Dec. 10, 1982, 1833 U.N.T.S. 396, 21 I.L.M. 1261 (1982), available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

Does the “repression of piracy” under United Nations Convention on the Law of the Sea Article 100 include piracy prosecutions?

Considering Article 100 in isolation, if prosecution of piracy falls under “repression of piracy,” Article 100 may be construed as granting every state adjudicative jurisdiction over non-national piracy suspects captured by other states for extraterritorial offenses. If the “repression of piracy” under Article 100 does not include piracy prosecution, Article 100 may not be invoked as a legal basis for jurisdiction.

Even if Article 100 on its own grants jurisdiction, however, Article 100’s inclusion of the provision “to the fullest possible extent” allows for potential legal limitations on a state’s repression of piracy. Article 105 of the Convention may serve as such a constraint on a potential jurisdictional grant under Article 100.

Does United Nations Convention on the Law of the Sea Article 105 confer exclusive jurisdiction on capturing states?

Article 105 provides that “[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.” Article 105 thus confers exclusive jurisdiction on a capturing state that chooses to exercise jurisdiction.

Where the capturing state does not choose to exercise its jurisdiction, however, it is an open question whether jurisdiction is limited to the capturing state. The permissive language of Article 105 (which uses the word “may”) may signal that such jurisdiction is discretionary.¹⁸ Such a reading finds support in the “strong duty of cooperation”¹⁹ under Article 100 of the Convention, as well as in recent United Nations Security Council Resolutions calling for international cooperation in capturing and prosecuting pirates.²⁰

¹⁸ J. Ashley Roach, *Countering Piracy Off Somalia: International Law and International Institutions*, 104 AMERICAN JOURNAL INTERNATIONAL LAW 397, 403 (2010).

¹⁹ J. Ashley Roach, *Countering Piracy Off Somalia: International Law and International Institutions*, 104 AMERICAN JOURNAL INTERNATIONAL LAW 397, 403 (2010).

²⁰ Security Council Resolution 1918, for example, calls for increased efforts to prosecute Somali pirates. *Security Council, Unanimously Adopting Resolution 1918 (2010), Calls on All States to Criminalize Piracy Under National Laws*, UNITED NATIONS, April 27, 2010, available at <http://www.un.org/News/Press/docs/2010/sc9913.doc.htm>.

If Article 105 confers unconditional exclusive jurisdiction on capturing states, transfers of piracy suspects to Kenya for prosecution violate international law. If Article 105 confers exclusive jurisdiction on capturing states only if they choose to exercise it and the prosecution of piracy falls under “repression of piracy” under Article 100, the United Nations Convention on the Law of the Sea provides any state party with the international legal basis to exercise universal jurisdiction over piracy offenses.

Can Kenya rely on a jurisdictional grant from the United Nations Convention on the Law of the Sea?

Even if the United Nations Convention on the Law of the Sea provides a legal basis for jurisdiction, however, Kenya may not necessarily rely on it absent implementing domestic legislation. Kenya ratified the Convention on March 23, 1989, but only domesticated it with the passage of the Merchant Shipping Act 2008. It is an open question, therefore, whether Kenya may rely upon the Convention as an independent basis for jurisdiction.

In Kenya’s traditionally dualist legal system, rules of international law were binding as domestic law in Kenya only when the Kenyan Parliament had passed implementing legislation,²¹ and the High Court and Court of Appeal traditionally used customary international law norms and treaties that were ratified but not domesticated only to resolve ambiguities in domestic statutes.²² Moreover, under the dualist tradition, a jurisdictional grant under the United Nations Convention on the Law of the Sea even post-ratification would not override domestic law that unambiguously constrained such jurisdiction. In *R.M. v. Attorney-General*,²³ for instance, the Kenyan High Court held that absent statutory ambiguity, “the courts have no choice other than to enforce the local law irrespective of any conflict with international agreements.”²⁴ British precedent similarly supports a dualist

²¹ James Thuo Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law*, 31 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW REVIEW 363, 373 (2009).

²² James Thuo Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law*, 31 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW REVIEW 363, 378 (2009).

²³ *R.M. v. Attorney-General* (2006), available at <http://www.chr.up.ac.za/index.php/browse-by-subject/337-kenya-rm-v-attorney-general-2006-ahrlr-256-kehc-2006.html>.

²⁴ *R.M. v. Attorney-General* (2006), paras. 44, 64, available at <http://www.chr.up.ac.za/index.php/browse-by-subject/337-kenya-rm-v-attorney-general-2006-ahrlr-256-kehc-2006.html>. Nevertheless, the court held that “in such cases the court should draw such inconsistencies to the attention of the appropriate authorities since the supremacy of the national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.” Moreover, since “[r]atification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such [a treaty] . . . if an issue comes before this court which would not be covered by local legislation but would be covered by international instruments, [the court] would take judicial notice of that treaty or convention in [the] resolution of the dispute.” *R.M. v. Attorney-*

approach. In *R. v. Keyn*, for instance, the court held that without domestic implementing legislation, the “assent of nations . . . would be powerless to confer [on British courts]. . . a jurisdiction over foreigners in foreign ships on a portion of the high seas.”²⁵ As the Kenyan legal system is descended from the British common law system, Kenyan courts would likely view the *Keyn* opinion as persuasive authority.

Piracy, however, may have “occasioned a decisive break with dualism.”²⁶ In Kenya’s first piracy trial, *Republic v. Hassan Mohamud Ahmed et. al.*,²⁷ the Kenya Magistrate’s Court expressly addressed the question of magistrate-level jurisdiction, finding in a November 1, 2006, judgment that Kenyan magistrate-level courts can assume jurisdiction over extraterritorial crimes committed by non-nationals. In *Ahmed*, the United States had handed over to Kenyan authorities ten Somali nationals captured by the guided-missile destroyer U.S.S. S. Winston Churchill. The suspects were charged in Mombasa’s Magistrate’s Court with hijacking the Indian-flagged vessel MSV Safina Al Bisarat on the high seas on January 20, 2006.²⁸ Following their sentencing by the Magistrate’s Court, the suspects appealed to the High Court,²⁹ asserting that Kenyan magistrate-level courts lacked jurisdiction over crimes committed by non-nationals on the high seas. On May 12, 2009, the High Court rejected the appeal and upheld the convictions and sentences.³⁰ Strikingly, the *Ahmed* High Court Justice invoked international law as an independent basis for jurisdiction, asserting that even if jurisdiction was unavailable under Kenya’s domestic law, it was available under the United Nations Convention on the Law of the Sea: “[E]ven if the Convention had not been ratified and domesticated, the . . . Magistrate was bound to apply international law and norms 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.”³¹ Notably, the *Ahmed* court’s application of international law did not require any ambiguity in Kenya’s domestic law.

General (2006), para. 22, available at <http://www.chr.up.ac.za/index.php/browse-by-subject/337-kenya-rm-v-attorney-general-2006-ahr-256-kehc-2006.html> (internal citation omitted).

²⁵ *R. v. Keyn*, 2 Exch. Div. 63, 203 (1876).

²⁶ James Thuo Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law*, 31 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW REVIEW 363, note 66 (2009).

²⁷ *Republic v. Hassan Mohamud Ahmed et. al.* (2006).

²⁸ *Press Release: Capture of Suspected Somali Pirates*, EMBASSY OF THE UNITED STATES, Feb. 2, 2006, available at http://nairobi.usembassy.gov/pr_20060202.html.

²⁹ *Hassan M. Ahmed et. al. v. Republic* (2008).

³⁰ *Hassan M. Ahmed et. al. v. Republic*, (2008). The judgment was issued on May 12, 2009 by Justice F. Azangalala.

³¹ *Hassan M. Ahmed et. al. v. Republic*, 10-11 (2008).

Jurisdiction under Domestic Law

Assuming that the United Nations Convention on the Law of the Sea provides Kenya with the international legal basis to exercise jurisdiction over extraterritorial piracy offenses, if Kenya may not rely on the United Nations Convention on the Law of the Sea as an independent basis for jurisdiction, it must rely on Kenya's domestic law.

Statutory Authority

Effective September 1, 2009, Kenya adopted the Merchant Shipping Act of 2008. The Merchant Shipping Act of 2008, under Section 454(1), repealed Section 69 of the Kenya Penal Code and Kenya's Merchant Shipping Act of 1967. Section 69(1) of the Kenya Penal Code provided that "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." The relatively broad language of Section 69, while it did not predicate a Kenyan court's jurisdiction on any territorial or nationality nexus with Kenya, also did not expressly establish the jurisdiction of Kenyan courts over non-national piracy suspects captured on the high seas by other states. The 2008 Act similarly does not address a Kenyan court's jurisdiction to adjudicate piracy offences where the suspects were captured by other states. Nonetheless, Section 370(4) of the 2008 Act provides a more explicit grant of jurisdiction, providing that the piracy provisions of the 2008 Act shall apply "whether the ship . . . is in Kenya or elsewhere," whether the offenses were "committed in Kenya or elsewhere," and "whatever the nationality of the person committing the act."

Pursuant to Kenya's Constitution, Section 77(4), *ex post facto* crimes are prohibited in Kenya.³² Consequently, piracy prosecutions under the 2008 Merchant Shipping Act may only be based on crimes committed after September 1, 2009, when the law took effect. Suspects charged with offenses committed prior to that date, including the nine suspects in the instant case, would be prosecutable for the crime of piracy *jure gentium*, if at all, only under Section 69 of the Kenyan Penal Code.

Even assuming that international and domestic laws establish the general jurisdiction of Kenyan courts over non-national piracy suspects captured on the

³² Section 77(4) of Kenya's Constitution provides: "No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for such a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."

high seas by other states, though, Kenya's domestic laws arguably qualify which Kenyan courts may adjudicate these cases.

Per the terms of the Kenyan Constitution, the Constitution is the supreme law of Kenya and any other law that is inconsistent with it is considered void.³³ Section 60(1) of the Constitution grants Kenya's High Court "unlimited original jurisdiction in civil and criminal matters" and "such other jurisdictions and powers as may be conferred on it...by any other law." Under the Kenya Judicature Act, Section 4(1),³⁴ "[t]he High Court shall be a court of admiralty, and shall exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya." The "other law" referenced in the constitutional grant of jurisdiction to the High Court may also include the law of nations and customary international law.³⁵

Section 4 of the Kenya Criminal Procedure Code, First Schedule, provides that the offense of piracy may be tried by a Subordinate Court of the First Class, presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate, or a Senior Resident Magistrate. Unlike the statutes vesting jurisdiction in the High Court, however, the statutes vesting jurisdiction in Kenya's magistrate-level courts do not explicitly address the jurisdiction of the magistrate-level courts over offenses committed on the high seas. Under the Kenya Judicature Act, Section 3(1)(b) and Schedule in Parts I and II, Kenyan magistrate-level courts have jurisdiction to invoke and apply selected laws of the British Parliament, including the Admiralty Offences (Colonial) Act 1849. Section 1 of the Admiralty Offences Act³⁶ provides for local court jurisdiction over piracy offenses committed on the high seas. The Magistrates' Courts Act, Section 3(2), however, provides that "[t]he Resident Magistrate's Court shall have jurisdiction throughout Kenya." Similarly, Section 5 of the Kenya Penal Code, which section confers jurisdiction on Kenya's magistrate-level courts to adjudicate on matters under the Kenya Penal

³³ KENYA CONST. sec. 3 (2008).

³⁴ *Judicature Act* sec. 4(1) (Kenya, 2007).

³⁵ James Thuo Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law*, 31 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW REVIEW 363, 371 (2009).

³⁶ Section 1 of the Admiralty Offense Act provides: "If any person within any colony shall be charged with the commission of any . . . piracy . . . committed upon the sea . . . or if any person charged with the commission of any such offence upon the sea . . . shall be brought for trial to any colony, then and in every such case all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in such colony shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorized, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial . . . as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed . . . upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the courts of criminal justice of such colony."

Code, provides that “[t]he jurisdiction of the Courts of Kenya for the purpose of this Code extends to every place within Kenya, including territorial waters.” Section 6 of the Kenya Penal Code³⁷ explicates Section 5, providing that Kenyan magistrate-level courts have jurisdiction where the offenses are committed partly within and partly beyond the territorial jurisdiction of the courts.

Judicial Precedent

Justice Ibrahim in his judgment explains that “[t]he question of jurisdiction to try cases by the Kenyan Courts has not been the subject of much judicial interpretation and very few cases are reported on the subject.”³⁸ Justice Ibrahim expounds that “[t]his scarcity in judicial interpretation is explained by the fact that until very recently the Kenyan Courts did not try piracy cases with the first reported case heard by courts in 2006.”³⁹ Nevertheless, despite potential statutory basis for the assertion that Kenyan magistrate-level courts lack jurisdiction over extraterritorial piracy offenses, judicial precedent in Kenya strongly supports the jurisdiction of magistrate-level courts over acts of piracy committed by non-national piracy suspects captured on the high seas by other states. The 2006 *Ahmed* case, discussed above, held that Kenyan magistrate-level courts can assume jurisdiction over extraterritorial crimes committed by non-nationals. On appeal in 2009, the High Court in *Ahmed* relied on Kenya Penal Code Section 69(1), emphasizing that the provision spoke of “any person” on the “high seas.” Since 2006, Kenya has held 119 piracy prosecutions and convicted 50 piracy suspects.⁴⁰ These prosecutions are typically held in magistrate-level courts. In September 2010, just several weeks before Justice Ibrahim’s ruling, Mombasa Senior Resident Magistrate Timothy Ole Tanchu⁴¹ sentenced seven Somali pirates to five years in prison.⁴² The pirates had been captured by the Spanish navy after attacking a Maltese-flagged merchant ship on the high seas in May 2009.⁴³

³⁷ Kenyan Penal Code Section 6 provides: “When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within jurisdiction.”

³⁸ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 13.

³⁹ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 13.

⁴⁰ United Nations Office on Drugs and Crime, *Counter-Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects*, Issue 6: June 2011, available at http://www.unodc.org/documents/easternafrika/piracy/UNODC_Brochure_final25.05.11.pdf.

⁴¹ *Republic of Kenya: The Judiciary: Profiles*, REPUBLIC OF KENYA: THE JUDICIARY, available at http://www.judiciary.go.ke/judiciary/index.php?option=com_content&view=article&id=527&Itemid=486.

⁴² *Somali Pirates Sentenced to Five Years in Kenya*, BBC, Sept. 24, 2010, available at <http://www.bbc.co.uk/news/world-africa-11407176>.

⁴³ *Somali Pirates Sentenced to Five Years in Kenya*, BBC, Sept. 24, 2010, available at <http://www.bbc.co.uk/news/world-africa-11407176>; *Spanish Navy Detains Suspected Pirates Off Somalia*, WORLD

The Judgment

Holding

Justice Ibrahim concluded that the Magistrate’s Court lacked jurisdiction to adjudicate the case. As a result, “[t]he whole process was . . . null and void, *ab initio*.”⁴⁴ Justice Ibrahim granted an Order of Prohibition prohibiting the Mombasa Chief Magistrate or any other Magistrate’s Court from “hearing, proceeding with, dealing with, entertaining and/or otherwise allowing the prosecution” of the case⁴⁵ and ordered the immediate release of the nine suspects,⁴⁶ directing the Kenyan government to ensure their safe return to their countries of origin.⁴⁷

Reasoning

Justice Ibrahim first examined the jurisdiction of Kenyan magistrate-level courts to try extraterritorial offenses.

The alleged offense was not committed within the territorial jurisdiction of Kenyan courts

Justice Ibrahim noted that the Merchant Shipping Act of 1967 and Penal Code Section 69(1), the laws under which the applicants were charged, defined Kenya’s territorial waters but did not provide an express definition of the “high

MILITARY FORUM, May 8, 2009, *available at* <http://www.armybase.us/2009/05/spanish-navy-detains-suspected-pirates-off-somalia/>.

⁴⁴ In re Mohamud Mohamed Hashi et al. (2009), *available at* <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 17.

⁴⁵ In re Mohamud Mohamed Hashi et al. (2009), *available at* <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 28.

⁴⁶ Invoking Article 29 of the Kenyan Constitution, which provides for the rights to freedom and security, including the right not to be deprived of freedom arbitrarily, detained without trial without just cause, or treated in a cruel, inhuman, or degrading manner, Justice Ibrahim noted that the suspects “were brought to Kenyan territory and jurisdiction against their will, and under coercion and compulsion” and “find themselves in a perilous, insecure and unenviable situation in a strange country.” As a result of the “peculiar, very unique, and exceptional circumstances in which the Appellants find themselves after the Order of Prohibition, they are extremely vulnerable and need protection and security.” As such, Justice Ibrahim held that the court was “obligated not to stop with the Order of Prohibition but also to give directions on the release, liberty and security of the Applicants.” He declared the suspects wards of the court. In re Mohamud Mohamed Hashi et al. (2009), *available at* <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, pp. 29-30.

⁴⁷ Justice Ibrahim ordered that the Attorney General advise the Ministry of Immigration, Ministry of Foreign Affairs, police, and all other law enforcement agencies of the provisions of Kenya’s constitution, and that the government and the Ministry of Immigration and Registration of Persons consult with the applicants to make arrangements for their return. Justice Ibrahim declared that this was “the obligation of the Kenyan Government under the Constitution and all International Conventions on Human Rights.” If the Kenyan government failed to comply with these orders, Justice Ibrahim called upon the United Nations High Commissioner for Refugees to take custody and care of the suspects as displaced persons. In re Mohamud Mohamed Hashi et al. (2009), *available at* <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 31.

seas.” Justice Ibrahim nevertheless determined that the high seas, by definition, cannot be a place within Kenya or within the territorial waters of Kenya, since they are deemed to be outside the jurisdiction of all states. The high seas as contemplated by Penal Code Section 69(1), therefore, exclude Kenya’s territorial waters.

Justice Ibrahim did not clearly assert whether the alleged offense in this case occurred on the high seas. Regardless, Justice Ibrahim found that it was undisputed here that the alleged offense was not committed within Kenya’s territorial waters. The prosecution asserted this fact in its presentation of evidence. Justice Ibrahim maintained that the defense could not dispute it without a formal rebuttal, and that, at any rate, the defense did not challenge it and in fact appeared to rely on it.⁴⁸

Kenya Penal Code Section 5 denies Kenyan magistrate-level courts jurisdiction to adjudicate extraterritorial offenses

Asserting that the jurisdiction of the courts of Kenya is premised on Section 5 of the Penal Code, Justice Ibrahim interpreted Section 5 as denying Kenyan magistrate-level courts jurisdiction to deal with any matters arising or which have taken place outside Kenya. Justice Ibrahim also noted that Section 6 of the Penal Code, which expands the scope of Section 5, had no application to this case, as the prosecution’s evidence did not allege partial commission of the offense in Kenya.

While Justice Ibrahim’s reasoning is not unsupported, the wording of Penal Code Section 5 may alternatively be read as conferring a jurisdictional floor encompassing Kenyan territory, rather than a jurisdictional ceiling precluding magistrate-level exercise of extraterritorial jurisdiction.

Kenya Penal Code Section 5 invalidates Penal Code Section 69’s extension of jurisdiction to the high seas

Justice Ibrahim concluded that Penal Code Section 69(1) was a “legislative misnomer.” For Justice Ibrahim, to the extent that Section 69(1) included the high seas, it is inconsistent with Section 5 of the Penal Code, and Parliament made a “clear error in purportedly extending the court’s jurisdiction to the High Seas in clear breach of the jurisdictional limits stipulated in Section 5.”⁴⁹ Holding that Section 5 is “the defining provision with regard to jurisdiction of the Kenyan

⁴⁸ In re Mohamud Mohamed Hashi et al. (2009), *available at* <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 16.

⁴⁹ In re Mohamud Mohamed Hashi et al. (2009), *available at* <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 17.

Courts in so far as the Code is concerned,” Justice Ibrahim resolved this “inconsistency” by asserting that Section 5 “is juridically paramount to and overrides Section 69(1) to the extent of this inconsistency.”

Justice Ibrahim did not identify whether his proposed resolution would entirely strike from Section 69 any mention of the high seas, or whether the resolution of the purported inconsistency would apply only in the case of magistrate-level jurisdiction. Under Justice Ibrahim’s interpretation, Penal Code Section 69(1) should not be inconsistent as it applies to the High Court, as Justice Ibrahim contends that the High Court has jurisdiction over extraterritorial piracy offenses.

Kenya Penal Code Section 2 does not save Section 69’s extension of jurisdiction to the high seas

Kenyan Penal Code Section 2(b) provides that “[e]xcept as hereinafter expressly provided nothing in this Code shall affect the liability of a person to be tried or punished under the law in force in Kenya relating to the jurisdiction of the courts of Kenya for an offence in respect of an act done beyond the ordinary jurisdiction of such courts.” The prosecution argued that under this provision, any jurisdictional limits in Penal Code Section 5 should not affect the liability of a suspect charged with committing an extraterritorial offense, which would be “an act done beyond the ordinary jurisdiction of such courts.” For Justice Ibrahim, however, the law referenced in Section 2 refers only to laws outside of the Kenyan Penal Code,⁵⁰ thus excluding Section 5. According to this reasoning, Section 5 would only not affect the liability of a suspect charged under a law outside of the Kenyan Penal Code “relating to the jurisdiction of the courts of Kenya for an offence in respect of an act done beyond the ordinary jurisdiction” of the court. Moreover, Penal Code Section 5, according to Justice Ibrahim’s decision, provides the decisive grant of ordinary jurisdiction to Kenyan magistrate-level courts. Under Section 2, then, Section 5 does not constitute a “law . . . relating to the jurisdiction of the courts of Kenya for an offense . . . done beyond the ordinary jurisdiction” of the court.

⁵⁰ In re Mohamud Mohamed Hashi et al. (2009), *available at* <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 18.

The title under which Kenya Penal Code Section 69 was enacted does not substantiate legislative intent to extend magistrate court jurisdiction to the high seas

The prosecution asserted that the Court should construe Penal Code Section 69 in the context of the title of Penal Code Chapter 8 under which it is enacted: “Offences Affecting Relations with Foreign States and External Tranquility.” According to the prosecution, this title demonstrates that it was the intention of Parliament to extend the jurisdiction of Kenya’s magistrate-level courts to the high seas, “with a view of curbing the criminal activities in the High Seas and thereby promoting co-operation and external tranquility and the security of nations.”⁵¹

Justice Ibrahim dismissed this line of reasoning, adopting a textualist approach. According to Justice Ibrahim’s decision, although this may have been the legislative intent, Parliament’s failure to state its intention expressly in the actual sections of the statute rendered the matter irrelevant. Absent an express exception to Section 5, providing that the jurisdictional limits did not preclude offences on the high seas, “[t]itles and marginal notes are only of reference and are interpretive tools but not the Law.”⁵² The chapter title “therefore is of no use on the question of jurisdiction.”⁵³

The Admiralty Offences Act 1849 does not confer extraterritorial jurisdiction on Kenyan magistrate-level courts

The prosecution argued that Section 1 of the Admiralty Offences (Colonial) Act 1849 confers jurisdiction on magistrate-level courts to try piracy offenses committed on the high seas. Justice Ibrahim questioned if the statute, “whose existence in England today is unknown if not doubtful, would be applicable in Kenya today; an independent and sovereign state which has its own Parliament and has passed anti-piracy law, however, inadequate.” Stating that the question of the applicability of the statute is “really academic,”⁵⁴ Justice Ibrahim asserted that even if the prosecution’s interpretation were correct, the prosecution would have to apply to amend the charge sheet for the question to be considered. Since the prosecution had not charged the suspects on the basis of this statute, Justice

⁵¹ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 19.

⁵² In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 13.

⁵³ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 19.

⁵⁴ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 20.

Ibrahim concluded that the Court had no jurisdiction to apply the statute or to assume its existence in the case.

Kenya Criminal Procedure Code Section 4, First Schedule, is invalidated by Kenya Judicature Act Section 4

According to Justice Ibrahim, Kenya Criminal Procedure Code Section 4, First Schedule, providing that magistrate-level courts may try suspects accused of the offense of piracy, contradicts Section 4 of the Kenya Judicature Act. Justice Ibrahim thus interpreted Judicature Act Section 4, providing that the High Court “shall exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters,” as vesting “exclusive” jurisdiction in the High Court. Justice Ibrahim reasoned that the mandatory provisions of the Judicature Act (which use the word “shall”) take priority over the permissive provisions of the Criminal Procedure Code (which use the word “may”). Additionally, Justice Ibrahim asserted that the objective of the Criminal Procedure Code is limited to making provisions for the procedure to be followed in criminal cases, and is not meant to be controlling over the determination of jurisdiction. While “there is a case for Parliament and the Chief Justice to look at these statutory anomalies,”⁵⁵ Justice Ibrahim contended that this reading was the “most reasonable way to give effect to the provisions of the two statu[t]es.”⁵⁶

By interpreting Section 4 of the Judicature Act as vesting exclusive jurisdiction in the High Court, it follows that magistrate-level courts have no jurisdiction over even territorial piracy offenses. This position, however, would contradict Penal Code Section 5, which Justice Ibrahim contended vests jurisdiction over territorial piracy offenses in Kenya’s magistrate-level courts.

Hassan M. Ahmed v. Republic lacks precedential effect

Justice Ibrahim dismissed the precedential value of *Ahmed*, in which the High Court had held that Kenyan magistrate-level courts had jurisdiction to adjudicate extraterritorial offenses. According to Justice Ibrahim, the Court in *Hassan* “did not consider the apparent contradiction between Section 4 of the Criminal Procedure Code and Section 4 of the Judicature Act.”⁵⁷

⁵⁵ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 21.

⁵⁶ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 21 (internal citation omitted).

⁵⁷ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 20 (internal citation omitted).

Justice Ibrahim then analyzed the effect of the repeal of Kenya Penal Code Section 69.

The repeal of Kenya Penal Code Section 69 requires acquittals in all cases commenced under Section 69 where judgment is pending or where convictions were issued following the repeal of Section 69

Justice Ibrahim asserted that upon repeal, Kenya Penal Code Section 69 ceased to exist, thereby denying courts the power to convict or sentence on the basis of Section 69.⁵⁸ Moreover, the Merchant Shipping Act of 2008 did not reenact Section 69, but introduced a new piracy offense. The piracy envisioned in Section 69 was *piracy jure gentium* and was not expressly defined. In contrast, Section 371 of the Merchant Shipping Act of 2008 expressly provides that “[a]ny person who (a) commits an act of piracy, (b) in territorial waters, commits an act of armed robbery against ships shall be liable upon conviction to imprisonment for life.” Piracy is defined in Merchant Shipping Act of 2008 Section 369(1)(a) as “any act of violence or detention, or any act of depredation, committed for private ends by the crew of the passenger of a private ship or a private aircraft, land directed.” Additionally, where Section 69 referred to the high seas, the Merchant Shipping Act of 2008 refers to offenses “against a ship, aircraft, or persons or property outside the jurisdiction of any state.” Although Justice Ibrahim noted that “[i]t is not possible to state by reading the provision whether ‘piracy’ defined in section 371 of the new Act is ‘piracy jure gentium’ as stipulated in the repealed Act,”⁵⁹ and that there was room for debate as to whether the location referred to in the new Act was equivalent to the high seas,⁶⁰ he concluded that the Merchant Shipping Act of 2008 created a piracy offense by statute, distinct from the offense of *piracy jure gentium* under Penal Code Section 69.⁶¹ As a result, convictions in pending piracy cases would require the substitution of charges and offenses.⁶²

⁵⁸ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 26.

⁵⁹ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 24.

⁶⁰ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 25.

⁶¹ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 24. The prosecution conceded this point, arguing that the Merchant Shipping Act of 2008 was “a Consolidating Act passing the offence of piracy by statute in conformity with the provisions of the United Nations Convention on the Law of the Sea,” but that the court already had jurisdiction over *piracy jure gentium*. In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 11.

⁶² In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 25.

However, the Kenyan constitutional prohibition of ex post facto crimes⁶³ precludes the rearrest and charging of piracy suspects under the Merchant Shipping Act of 2008 in pending cases or cases in which convictions were issued following the repeal of Section 69. Thus, “[t]he present quagmire and untidy situation of the Law is likely to lead [to] acquittals.”⁶⁴

Section 23(3)(e) of the Kenya Interpretation and General Provisions Act does not save Kenya Penal Code Section 69

Section 23(3)(e) of the Interpretation and General Provisions Act provides that “where a written law repeals in whole part written law, then, unless a contrary intention appears, the repeal shall not affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment . . . and any such investigation, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealed written law had not been made.” The prosecution argued that despite the repeal of Section 69, it was saved by Section 23(3)(e) and that the Magistrate’s Court thus had the jurisdiction to continue with the case.

Justice Ibrahim rejected this argument on the ground that Section 454(1) of the Merchant Shipping Act of 2008, which repealed Penal Code Section 69, did not include an express saving or transitional provision with regard to Penal Code Section 69.⁶⁵ According to Justice Ibrahim, Section 69 may have been saved by a sunset clause in the Criminal Procedure Code providing that the repeal of Section 69 would not affect the power of the court to convict and sentence suspects in pending piracy cases and cases relating to offenses committed prior to the commencement of the Merchant Shipping Act of 2008.⁶⁶ The failure to include such a provision was, to Justice Ibrahim, the “last and fatal omission on the part of the Legislature and the Attorney General,”⁶⁷ and “[w]ithout such a sunset clause to save the jurisdiction of the court to try the pending piracy cases, the accused persons are entitled to outright and unconditional acquittal.”⁶⁸ Justice Ibrahim

⁶³ The Kenyan Constitution in force at the time that Section 69 was repealed prohibited ex post facto offenses under Section 77(4). This provision was replicated in Article 50 of Kenya’s new Constitution dated August 27, 2010.

⁶⁴ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 26 (internal citation omitted).

⁶⁵ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 23.

⁶⁶ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 26.

⁶⁷ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 27.

⁶⁸ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 27 (internal citation omitted).

further explained that “Respondent is left ill-equipped to fall back to interpretive provisions in other statutes rather than the express and possessive take-over of the repealing statute.”⁶⁹ In so reasoning, Justice Ibrahim’s decision implied that Section 454(1) of the Merchant Shipping Act of 2008 manifested a “contrary intention” under Section 23(3)(e) of the Interpretation and General Provisions Act.

The application for judicial review should not be denied on the basis of delay

The prosecution argued that the application for prohibition should be denied on procedural grounds, as it had been filed after the prosecution closed its case. According to the prosecution, the suspects waived their right to object to a jurisdictional defect due to “inordinate and inexcusable delay” in making the application for judicial review.⁷⁰ The prosecution also argued that granting the order would cause substantial hardship or prejudice or be detrimental to good administration.⁷¹ Justice Ibrahim, in rejecting this argument, emphasized that lack of jurisdiction automatically requires a court to stop proceedings and renders any judgment void.⁷² Additionally, in a criminal case involving fundamental rights and freedoms, the notion of laches may not override statutory and constitutional provisions on life and liberty.⁷³ Moreover, Justice Ibrahim concluded that there was no delay in this case, as the suspects filed their application once the prosecution had closed its case and the facts were settled as to the location of the alleged incident.⁷⁴

Implications

In light of Kenya’s judicial precedent in favor of magistrate-level jurisdiction over extraterritorial piracy offenses, Justice Ibrahim’s ruling represents a dramatic reversal in case law. The ruling is *Hashi* is widely regarded as a critical determinant of Kenya’s willingness to prosecute piracy suspects. As such, the judgment signals to many the end of Kenya’s piracy prosecution agreements,

⁶⁹ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 23.

⁷⁰ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 10.

⁷¹ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 10.

⁷² In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, pp. 27-28.

⁷³ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 28.

⁷⁴ In re Mohamud Mohamed Hashi et al. (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 28.

necessitating the implementation of domestic or international prosecution alternatives.

The consternation over the ruling may be unwarranted. Logistically, the legal confusion surrounding the judgment may impede piracy prosecutions in Kenya, but this effect is likely to be limited to the short term. A more serious consequence of the ruling is its assertion that the repeal of Kenya Penal Code Section 69 requires acquittals in all cases commenced under Section 69 where judgment is pending or where convictions were issued following the repeal of Section 69. Although any potential acquittals will set back international piracy prosecution efforts, the ruling will have very limited ramifications for Kenya's overall future piracy prosecution efforts. From a legal standpoint, even if the Kenya Court of Appeal affirms the High Court's decision, cases may still be brought in Kenya's High Court. Justice Ibrahim's ruling may indeed prompt Kenyan policymakers to reconsider prosecuting non-national piracy suspects captured by other states, but recent events suggest that Kenya has not abandoned its piracy prosecution efforts. While the ruling may spur states to pursue domestic piracy prosecutions, such a result is likely inevitable due to a variety of other factors. As such, the most potent legacy of the ruling will likely be a cautionary tale to states involved in drafting or redrafting domestic piracy legislation.

Short-term effects

Given the number of piracy suspects detained and convicted in Kenya, Justice Ibrahim's ruling certainly has the potential to derail Kenya's impressive piracy conviction rate. There are currently 136 piracy suspects detained in Kenya,⁷⁵ of which Kenya is currently trying 69.⁷⁶ Following Justice Ibrahim's ruling, legal experts predicted that as many as 60 of the 136 suspected pirates detained in Kenya could benefit from the ruling.⁷⁷ Experts estimated that more than half of the 69 suspects held in Kenya awaiting trial were charged under the old penal code and would likely now appeal, and that those convicted under the old penal code – as many as 21 – would appeal their convictions in light of the “legal

⁷⁵ United Nations Security Council, *Annex to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council: Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, para. 42, U.N. Doc. S/2011/30 (Jan. 25, 2011).

⁷⁶ United Nations Office on Drugs and Crime, *UNODC and Piracy*, available at <http://www.unodc.org/easternafrika/en/piracy/index.html>.

⁷⁷ Mike Pflanz, *Legal Loophole Could See Half of All Somali Piracy Suspects Walk Free*, THE TELEGRAPH, Nov. 10, 2010, available at <http://www.telegraph.co.uk/news/worldnews/piracy/8123394/Legal-loophole-could-see-half-of-all-Somali-piracy-suspects-walk-free.html>.

confusion.”⁷⁸ Pending appeal, Justice Ibrahim’s ruling has already “caused confusion in the judicial system and halted most piracy cases at the courts.”⁷⁹

If affirmed on appeal, the judgment will also create complications for Kenya’s special piracy court based at Shimo La Tewa Prison in the Indian Ocean port city of Mombasa. The \$5 million piracy court, which is funded by the United Nations Office on Drugs and Crime, the European Union, Australia, and Canada, opened on June 24, 2010, for the sole purpose of trying suspected pirates arrested by foreign states patrolling the coast of Somalia and the Gulf of Aden. Since the piracy court currently operates as a magistrate-level court, a judgment finding against the jurisdiction of magistrate-level courts to try extraterritorial piracy offenses would effectively render the piracy court obsolete.

Long-term legal ramifications

The legal paralysis generated by the judgment, while inconvenient, is likely to be a short-term effect, as the issue in *Hashi* is narrowly confined to the jurisdiction of Kenya’s magistrate-level courts. In fact, Justice Ibrahim, quoting in dicta the writings of Dr. Paul M. Wambua, asserts that Section 60 of Kenya’s Constitution, the Merchant Shipping Act of 1967, and Section 4 of the Judicature Act together vest universal jurisdiction in the High Court of Kenya to try piracy cases as a Court of Admiralty.⁸⁰ As discussed above, Section 4 of the Judicature Act vests jurisdiction in the Kenya High Court to adjudicate both territorial and extraterritorial piracy offenses. The judgment thus serves only to reaffirm the jurisdiction of the Kenya High Court to adjudicate extraterritorial piracy offenses. Because the High Court is constitutionally vested with original jurisdiction, future piracy cases may be brought directly in the High Court. The piracy court, then, could continue to function if upgraded to the status of a High Court.

Perhaps even more important, though, is a landmark decision by Mombasa High Court Justice Jackton Ojwang in June 2011, holding that a magistrate-level court had jurisdiction to try suspects charged with committing acts of piracy on the high seas. Four piracy suspects, charged by Magistrate Timothy Tanchu under the Merchant Shipping Act 2009 with attacking a ship on the high seas on September

⁷⁸ Mike Pflanz, *Legal Loophole Could See Half of All Somali Piracy Suspects Walk Free*, THE TELEGRAPH, Nov. 10, 2010, available at <http://www.telegraph.co.uk/news/worldnews/piracy/8123394/Legal-loophole-could-see-half-of-all-Somali-piracy-suspects-walk-free.html>.

⁷⁹ Maureen Mudi, *Kenya: Suspected Pirates Remain in Custody*, NAIROBI STAR, April 12, 2011, available at <http://news1.ghananation.com/africa/134083-kenya-suspected-pirates-remain-in-custody.html>.

⁸⁰ In re *Mohamud Mohamed Hashi et al.* (2009), available at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hash-et-all.pdf>, p. 21.

20, 2010, objected in the High Court to their trial at the magistrate's court. Representing the suspects was Jared Magolo, who, coincidentally, represented the nine suspects in *Hashi*. Magolo asserted, as did Justice Ibrahim in his ruling, that the High Court has exclusive jurisdiction to try piracy cases and that the Criminal Procedure Code has a limited purpose that does not apply to the determination of the jurisdiction of magistrates' courts in piracy cases. Justice Ojwang dismissed the suspects' application and directed that trial proceedings be conducted and concluded as matter of priority. Further, Justice Ojwang directed that the Chief Magistrate should, through the office of the Principal Judge, forward the ruling to all magistrates.⁸¹

Political will

Politically, too, Kenya seems willing to continue its piracy prosecution efforts even in the aftermath of Justice Ibrahim's ruling. On June 19, 2011, for example, a Danish warship, HDMS Esbern Snare of the NATO counterpiracy force, handed over 24 suspected pirates to Kenya to face trial. Although Kenya was initially unwilling to take the pirates, the Esbern Snare was able to strike a deal for their acceptance.

Domestic piracy prosecutions in other states

As demonstrated, then, the *Hashi* ruling is unlikely to have long-term implications for Kenya's piracy prosecutions. Should legal confusion or logistical gridlock hinder piracy prosecutions in Kenya, other states and international organizations are likely to fill the gap. Even so, if piracy prosecutions are moved outside of Kenya, this would most likely be attributable to factors beyond the *Hashi* ruling.

Historically, a variety of complications have deterred states from prosecuting pirates domestically. These include the difficulties of transporting piracy suspects, witnesses, and evidence over long distances, fears that pirates may seek asylum in the host country, lack of suitable prisons for convicted pirates, lack of clarity about pirates' prisoner of war status, the difficulty of proving cases arising from the field of active military operations in civilian court, claims of abuse

⁸¹ Maureen Mudi, *Kenya: Landmark Ruling for Courts to Try Pirates*, NAIROBI STAR, June 1, 2011, available at <http://www.nairobistar.com/national/national/26500-landmark-ruling-for-courts-to-try-pirates>.

by piracy suspects, and questions regarding the legality of targeted killings of suspected wrongdoers.⁸²

With the escalation of the piracy crisis, however, many states have recognized the grave security threat and commercial costs posed by piracy. As a result, indications of Kenya's withdrawal from its prosecution agreements have spurred piracy indictments in other states. In April 2010, Germany requested extradition from Dutch authorities of ten suspected pirates captured by the Danish navy in the Gulf of Aden while attempting to board a German cargo vessel.⁸³ On May 18, 2010, Abduwali Abdukhadir Muse pleaded guilty in United States federal court to hijacking, kidnapping, and hostage taking committed during an attack on the United States-flagged vessel *Maersk Alabama* on April 8, 2009.⁸⁴ On June 17, 2010, concluding the first trial of pirates in Europe in modern times, a Dutch court sentenced five Somali men to five years in prison for attacking a Dutch Antilles-flagged cargo ship in the Gulf of Aden in January 2009.⁸⁵ On November 24, 2010, an American jury convicted five Somali men of piracy, representing the first United States piracy conviction in over 190 years.⁸⁶ These cases have established domestic legal foundations for future domestic piracy prosecutions, making it likely that states will continue to initiate piracy trials regardless of the outcome in *Hashi*. Moreover, domestic or international piracy prosecutions seem to be inevitable given congestion in Kenyan courts and other challenges plaguing Kenya's judicial system.⁸⁷

Lessons for states drafting domestic piracy legislation

The long-term significance of the *Hashi* case is likely to be as a cautionary tale for states involved in drafting or redrafting domestic piracy legislation. United Nations Security Council Resolution 1918 (2010) calls on all states to criminalize piracy under their domestic laws. Additionally, The Code of Conduct Concerning

⁸² Eugene Kontorovich, *A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists*, 98 CALIFORNIA LAW REVIEW 243, 245 (2010).

⁸³ *Somali Pirates Get 5 Years in Prison*, CNN, June 17, 2010, available at <http://edition.cnn.com/2010/CRIME/06/17/pirates.convicted/>.

⁸⁴ *Press Release: Somali pirate pleads guilty in Manhattan federal court to maritime hijackings, kidnappings, and hostage takings*, UNITED STATES ATTORNEY SOUTHERN DISTRICT OF NEW YORK, May 18, 2010, available at <http://www.ncis.navy.mil/PubNewsRoom/hlites/News%20Articles/NCIS%20assists%20in%20conviction%20of%20Somali%20pirates.pdf>.

⁸⁵ *Somali Pirates Get 5 Years in Prison*, CNN, June 17, 2010, available at <http://edition.cnn.com/2010/CRIME/06/17/pirates.convicted/>.

⁸⁶ *Five Somalis Sentenced to Life Plus 80 Years in Prison for Piracy Against USS Nicholas*, FBI, Mar. 14, 2011, available at <http://norfolk.fbi.gov/dojpressrel/pressrel11/nf031411.htm>.

⁸⁷ James Thuo Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law*, 31 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW REVIEW 363, 365 (2009).

the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, adopted in Djibouti on January 29, 2009, and signed by 17 of 21 states in the region, encourages parties to reform their piracy legislation. Many states, including Belgium, France, Japan, Maldives, Seychelles, Spain, and the United Republic of Tanzania, have begun the process of legislative reform to criminalize piracy as defined by the United Nations Convention on the Law of the Sea.⁸⁸

Hashi powerfully demonstrates the dangers of statutory inconsistencies and ambiguities as they relate to jurisdiction over piracy prosecutions. Such legislative errors may frustrate prosecution efforts by generating loopholes that ultimately facilitate the acquittals of piracy suspects, thereby undermining the rule of law. Moreover, they unnecessarily burden a state's judicial system. States wishing to execute efficient piracy prosecutions may consider conducting comprehensive reviews of domestic legislation, with an aim toward eliminating duplication, resolving discrepancies, and clarifying jurisdictional provisions. States may also consider enlisting international assistance in review and redrafting efforts. The United Nations Office on Drugs and Crime, for example, has performed assessments of the laws of Kenya, Seychelles, Tanzania, Mauritius, Yemen, and Somaliland, focusing on piracy-related provisions, and is assisting with redrafting initiatives to enable more effective piracy prosecutions.⁸⁹

Conclusion

Kenya High Court Justice Ibrahim's November 9, 2010, judgment in *In re Mohamed Mohamud Hashi et al.*, departed dramatically from judicial precedent by holding that magistrate-level Kenyan courts lack jurisdiction to try acts of piracy committed outside of Kenya's territorial waters. The ruling, while likely to set back piracy prosecution efforts in the short term, will likely have very limited ramifications for Kenya's future piracy prosecution efforts, particularly because the issue in *Hashi* is narrowly confined to the jurisdiction of Kenya's magistrate-level courts. The ruling may, however, encourage states to conduct reviews of their domestic legislation to facilitate more effective piracy prosecutions.

⁸⁸ United Nations Security Council, *Annex to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council: Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, para. 47, U.N. Doc. S/2011/30 (Jan. 25, 2011).

⁸⁹ United Nations Office on Drugs and Crime, *Counter Piracy Programme*, p. 10, Nov. 2009, available at http://www.unodc.org/documents/easternafrika//piracy/Counter_Piracy_Programme.pdf.

About the Public International Law & Policy Group

The Public International Law & Policy Group, a 2005 Nobel Peace Prize nominee, is a non-profit organization, which operates as a global pro bono law firm providing free legal assistance to states and governments involved in peace negotiations, drafting post-conflict constitutions, and prosecuting war criminals. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

PILPG's four primary practice areas are:

- **Peacebuilding**
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To provide pro bono legal advice and policy formulation expertise, PILPG draws on the volunteer services of over sixty former legal advisors and former Foreign Service officers from the US Department of State and other foreign ministries. PILPG also draws on pro bono assistance from major international law firms including Baker & McKenzie; Covington & Burling; Curtis, Mallet-Prevost, Colt and Mosle; DLA Piper; Sullivan & Cromwell; Steptoe & Johnson; Milbank, Tweed, Hadley & McCloy; WilmerHale; Vinson & Elkins; and graduate international affairs and law students at American University and Case Western Reserve Schools of Law. Annually, PILPG is able to provide over \$10 million worth of pro bono international legal services.

Frequently, PILPG sends members in-country to facilitate the provision of legal assistance and its members often serve on the delegations of its clients during peace negotiations. To facilitate this assistance, PILPG is based in Washington, D.C. and has points of contact in New York City, Boston, Seattle, Cleveland, London, Paris, Rome, The Hague, Stockholm, Belfast, Krakow, Budapest, Zurich, Tbilisi, Kabul, and Nairobi.

PILPG was founded in London in 1995 and moved to Washington, D.C. in 1996, where it operated under the auspices of the Carnegie Endowment for International Peace for two years. PILPG currently maintains an association with American University in Washington, D.C., and Case Western Reserve University in Cleveland, Ohio. In July 1999, the United Nations granted official Non-Governmental Organizations status to PILPG.

In January 2005, a half dozen of PILPG's pro bono clients nominated PILPG for the Nobel Peace Prize for "significantly contributing to the promotion of peace throughout the globe by providing crucial pro bono legal assistance to states and non-state entities involved in peace negotiations and in bringing war criminals to justice."