RESOLVING THE MIGINGO ISLAND DISPUTE BETWEEN KENYA AND UGANDA UNDER INTERNATIONAL LAW: PROSPECTS AND CHALLENGES

By

GERHARD GITONGA MUCHEGE

(G62/81203/2015)

A PROJECT PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M) OF THE UNIVERSITY OF NAIROBI.

NAIROBI **DECEMBER, 2017**

DECLARATION

This Research Project is my original work and has not been presented or submitted for examination in any other university or institution. Where other works have been used, reference has been duly provided.

_____

GERHARD GITONGA MUCHEGE

DATED……..……..2017

This Research Project has been written and submitted for examination with my approval as the candidate's supervisor.

_____

PROF. F.D.P. SITUMA

DATED……..……..2017

UNIVERSITY OF NAIROBI

ACKNOWLEDGEMENTS

I acknowledge the efforts of my supervisor, Professor F.D.P. Situma for his tireless guidance and academic mentorship from which I have benefitted immensely. He showed belief in my work and pushed me to the limit for perfection.

I also thank my family for their support and understanding. This work would not be complete without their indulgence.

I cannot forget my friends, colleagues at work and my LL.M classmates for urging me on, even when my energy and motivation seemed to wane. I shall forever remain indebted.

DEDICATION

To my mother, who taught me the humility of looking up to the people others looked down upon

To my wife and partner Muthoni, who gave me a life of love

To my daughters Mwendwa and Kendi, who gave meaning and joy to my life

And to Stanley Mbae, a teacher at my local primary school, who taught my lips to pronounce the vowels “a, e, i, o, u”

LIST OF ABBREVIATIONS

ACJHR	African Court of Justice and Human Rights
AU	African Union
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EACJ	East African Court of Justice
ECOSOCC	Economic, Social and Cultural Council- of the African Union
ICJ	International Court of Justice
IEBC	Independent Electoral and Boundaries Commission
PCIJ	Permanent Court of International Justice
NATO	North Atlantic Treaty Organization
OAU	Organisation of African Unity
SADC	Southern African Development Community
UK	United Kingdom
UN	United Nations

LIST OF CONVENTIONS AND TREATIES

1. 1899 Hague Convention for the Pacific Settlement of International Disputes, 29 July 1899; 187 Parry's TS 410
2. 1907 Hague Convention for the Pacific Settlement of International Disputes, 18 October 1907; 93 LNTS 342
3. United Nations, *Charter of the United Nations*, 24 October 1945; 1 UNTS XVI
4. United Nations, *Statute of the International Court of Justice*, 18 April 1946; 1 UNTS XVI
5. The Treaty for the Establishment of East African Community, 30 November 1999; 2144 UNTS 255
6. Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008; 48 I.L.M.317
7. Constitutive Act of the African Union, 11 July 2000; 2158 UNTS 3
8. Treaty of Amity, Commerce and Navigation, 19 November, 1794, United States-Great Britain, 52 Parry's T.S. 243

LIST OF CASES

1. The Eastern Carelia Case, (1923) PCJI Ser.B No. 5
2. South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase) (1966) ICJ Rep. 6
3. North Sea Continental Shelf Cases(Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands), (1969) ICJ Rep. 3
4. Legality of Use of Force (Yugoslavia v. Belgium), (1999) ICJ Rep. 105
5. Nicaragua v. United States of America (1986) ICJ Rep. 1
6. Diplomatic and Consular Staff in Terhan (1980) ICJ Rep. 3
7. Argentina v. Chile (1977) 52 ILR 93
8. The Frontier Dispute Case (Burkina Faso/ Mali) (1986) ICJ Rep. 3
9. Fisheries Jurisdiction Case (United Kingdom v. Iceland) (1973) ICJ Rep. 3
10. Legal Status of Eastern Greenland (Norway v. Denmark) (1933) PCJI Ser.A/B, No. 53
11. Case Concerning Kasikili/Sedudu Island (Botswana/Namibia) (1999) ICJ Rep. 1045
12. Mavrommatis Palestine Concessions Case (Greece v. Great Britain) (1924) PCJI Ser. A, No. 2
13. Guinea/ Guinea-Bissau Maritime Delimitation Case(1985) 77 ILR 636

14. Eritrea v. Yemen(1999) 22 RIAA 335; 40 ILM 900

15. Island of Palmas Case (United States v. the Netherlands)(1928) 2 RIAA 829

16. Right of Passage over Indian Territory (Preliminary Objection), (1957) ICJ Rep. 146

17. Case of the Free Zones of Upper Savoy and the District of Gex(France v. Switzerland) (1932) PCJI Ser. A/B No. 46

18. Advisory Opinion of the Western Sahara Case (1975) ICJ Rep. 12

19. Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)(1963) ICJ Rep. 15

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The Kenya-Uganda boundary in Lake Victoria, within which the tiny Migingo Island is located, was established in 1926 by the Kenya Colony and Protectorate (Boundaries) Order in Council. According to the said Order in Council, the boundary should run from 1˚ south latitude, through Lake Victoria to the mouth of the Sio River. The full text of the relevant schedule provides thus:

> commencing in the waters of Lake Victoria on a parallel 1˚ south latitude, at the point due of the westernmost point of Pyramid Island; thence the boundary follows a straight line due north to that point; thence continuing by a straight line, still northerly to the most westerly point of Ilemba Island; thence by a straight line, still northerly, to the most westerly point of Kiringiti Island; thence by a straight line, still northerly, to the most westerly point of Mageta Island; thence by a straight line north-westerly to the most southerly point of Sumba Island; thence by the south-western and western shores of the island to its most northerly point; thence by a straight line north-easterly to the centre of the mouth of the Sio River.[1]

From the above description, the boundary line tangentially touches the western tip of Pyramid Island, and then runs in a straight line just west of due north to the western tip of Kenya's Ilemba Island. The line connecting these two points runs 510 metres west of Migingo, placing the island within the Kenyan territory**.**[2] Indeed, the 1926 Order in Council was an elaborate British mapping of the 933 kilometres of the Kenya-Uganda boundary, complete with coordinates, pillars and natural features. It is

[1] Kenya Colony and Protectorate (Boundaries) Order in Council 1926, Schedule I; See also Ian Brownlie and Ian R. Burns, *African Boundaries: A Legal and Diplomatic Encyclopaedia* (Hurst & Co. Publishers, London 1979), 944

[2] Peter Wafula Wekesa, *'Old Issues and New Challenges: The Migingo Island Controversy and the Kenya- Uganda Borderland'*, 4 Journal of Eastern African Studies; 331-340 (2010)

on the basis of this elaborate mapping that Kenya has been occupying and exercising sovereignty over the Migingo Island since 1926.

Kenya's exercise of territorial sovereignty over the island has remained unchallenged throughout these years backed mainly by the said boundary delineation and the stand of the Organisation of African Unity (OAU) and later, its successor, African Union (AU) on the African boundaries established during the colonial period.

The OAU adopted the legal finality of colonial boundaries in July 1964 at the Cairo Summit.[3] In so doing, the OAU relied on the legal principle of *uti possidetis juris* which bound African states to respect the boundaries existing on their attainment of independence. This position was also reaffirmed by the ICJ in the Frontier Dispute Case (*Burkina Faso / Mali*) [4] in which the Court found that the OAU Charter and the Cairo Resolution confirmed the principle of *uti possidetis juris*. It is instructive to note that this principle was equally adopted by the AU and the need to respect borders inherited on achievement of independence remains the undisputed rule of law.[5] It is also reiterated in the Preamble to the Declaration on the African Union Border Programme and the Modalities for the Pursuit and Acceleration of its Implementation**.**[6]

[3] Declaration of the African Union Border Programme and the Modalities for the Pursuit and Acceleration of its Implementation <http://www.peaceau.org/uploads/aubp-dec-e.pdf>(last accessed 17 May, 2016).

[4] **(**1986), ICJ Rep. 556; See also Dirdeiry M. Ahmed, *Boundaries and Secession in Africa and International Law: Challenging Uti Possidetis*, (Cambridge University Press, Cambridge, 2015), p. 79

[5] Constitutive Act of the African Union 11 July 2000; 2158 UNTS 3; United Nations High Commissioner for Refugees, *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHC: Volume 3 Regional Instruments* (UNHCR, Geneva 2007), p. 1112

[6] Declaration of the African Union Border Programme and the Modalities for the Pursuit and Acceleration of its Implementation <http://www.peaceau.org/uploads/aubp-dec-e.pdf>(last accessed 17 May, 2016)

Sovereignty over Migingo Island changed in 2004 when Ugandan authorities disputed the ownership of the island. Uganda went ahead and hoisted its flag, the clearest indication so far, that it was staking a claim over the ownership of the island. The Ugandan government also posted its security forces and marines to the island. As a result, Kenyan fishermen complained of harassment and intimidation by the Ugandan forces who accused them of illegal fishing in Ugandan waters. Towards the end of 2007, Kenya sent her police officers to the island, but they were later withdrawn in order to avoid escalating the hostilities between the two neighbouring countries.[7]

The Migingo Island territorial dispute became worse in early 2009 when Kenyans living on the island were required to buy special fishing permits from Ugandan authorities. This led to a diplomatic row between Kenya and Uganda. The situation was further aggravated by President Yoweri Museveni who, while addressing students at the University of Dar es Salaam, claimed that the island was Kenyan while the waters surrounding it were in Uganda. Museveni further stated that Luos (a Kenyan community that forms the majority of the island's inhabitants) would not be permitted to fish in Ugandan territory.[8]

On 2nd June, 2009, Kenya and Uganda appointed a Joint Technical Survey Team to undertake a physical demarcation of the Lake Victoria border using the Kenya Colony and Protectorate (Boundaries) Order in Council of 1926 and the Constitution of Uganda, as the basis of their work. The exercise came to a halt in early July, 2009 when the joint surveyors differed on technicalities, especially on the mode of erecting

[7] Jack Shaka, *'Migingo Island: Kenyan or Ugandan Territory?'*, 4 Journal of Conflictology; 1 (2013)
[8] Emmanuel Kisiangani, *'Dispute Over Migingo Escalates'* <http://www.issafrica.org/iss-today/dispute-over-migingo-escalates>(accessed 26 May, 2016).

new boundary pillars and the perimeters to help in determining the western most points as described in the 1926 Order in Council.

The Kenyan surveyors continued with the work, but their Ugandan counter parts pulled out. The Kenyan team later found that the island is 510 metres inside the Kenyan territory. This finding came out in March, 2016 when the Defence and Foreign Relations Committee of the National Assembly tabled a report after two years of enquiry.[9]

The territorial dispute between Kenya and Uganda over the Migingo Island is far from over. In March, 2016 it was reported that two Independent Electoral and Boundaries Commission (IEBC) clerks in Nyatike Constituency, on Migingo Island, were arrested by Ugandan authorities for alleged trespass. They were accused of going into a foreign land without authority.[10] This was the clearest indication that the island remains a potential point of dispute between the two states.

The Kenya-Uganda dispute over the Migingo Island only came to the fore in 2004. Put differently, Kenya has always occupied and exercised territorial sovereignty over the tiny island over the years. Some writers who have done some work about the dispute attribute it to the dwindling trans-boundary natural resources such as water

[9]Samuel Kisika, *'MPs Rule Out War to Recover Migingo' The Star* (Nairobi, 21 March 2016) <www.the-star.co.ke/news/2016/03/mps-rule-out-war-to-recover-migingo_c1316590> (accessed 20th May, 2016)

[10] Denish Ochieng, '*Uganda Authorities Arrest IEBC Clerks on Migingo Island' The Standard* (Nairobi, 10 March 2016) <http://www.standardmedia.co.ke/article/2000194366/ugandan-authorities-arrest-iebc-clerks-on-migingo-island> (accessed 20 May 2016)

and fish.[11] Beginning 2003, the exploitation of Lake Victoria resources has become increasingly contentious, with several incidents resulting in the harassment and arrest of fishermen accused of trespassing into the territorial waters of their neighbours.[12]

One of the plausible ways of de-escalating the dispute as a permanent solution continues to be pursued is by adopting interventionary strategies that ensure that access to resources, especially fisheries, is guaranteed to the citizens of the two States. This can be achieved if the two States were to go back to the agreement made at the African Union (AU) Summit meeting which took place in Lusaka, Zambia, on the 6th of March, 2009.[13]

At the said meeting, it was agreed that Uganda would withdraw its security forces and remove its flag from the island.[14] This meeting was held on the side-lines of a Tripartite Summit of EAC, SADC, and COMESA in Lusaka and was carried out within the framework of good neighbourliness to allow for diplomatic efforts to resolve the dispute. This was necessary because, although there was a subsequent agreement for the two states to deploy security personnel, Uganda always seems to have overwhelming numbers of security personnel who harass the Kenyan fishermen and beat up the Kenyan security officers.[15]

---

[11] Wafula Okumu, '*Resources and Border Disputes in Eastern Africa*', 4 Journal of the Eastern African Studies, 292(2010)
[12] Ibid
[13] Warui, D, *'The East African Community and Dispute Settlement: A Case of Migingo Island'* (MA Thesis, University of Nairobi 2013), p. 73
[14] Peter Wafula Wekesa, *'Old Issues and New Challenges: The Migingo Island Controversy and the Kenya- Uganda Borderland*', 4 Journal of Eastern African Studies, 331 (2010)
[15] Stanley Ongwae and Denish Ochieng, '*Ugandan Police Beat up Chief and Kenyan AP Officers on Migingo' The Standard* (Nairobi, 14 March 2016) <http://www.standardmedia.co.ke/article/2000194801/ugandan-police-beat-up-chief-and-kenyan-ap-officers-on-migingo> (accessed 20 May 2016)

1.2 Statement of the Problem

The Migingo Island territorial conflict between Kenya and Uganda has been brewing since 2004. Both States claim ownership of and sovereignty over the island as tension continues to build with no resolution in sight. Although there have been diplomatic efforts geared towards finding a common ground over the conflict, these diplomatic efforts have not yielded much in resolving the same. It remains a potential threat to international peace and security, especially within the East African region.

Some of the issues that the conflict brings to the fore are whether it is a "dispute" as defined under international law or whether Uganda can claim the island through the doctrine of prescription and acquiescence on the part of Kenya. Further the conflict raises the issue of who, between the two States has the right to exercise territorial sovereignty over the island? Put differently, who between Kenya and Uganda has the right to exercise thereon, to the exclusion of the other, functions of a State? These legal issues remain unanswered even as the two States engage in what seems to be half-hearted diplomatic efforts to resolve the conflict.

It is imperative that a peaceful and permanent settlement of the said conflict is reached under international law, regard being had to the provisions of Articles 2(3) and 33(1) of the United Nations Charter and Article 4(e) of the Constitutive Act of the African Union, all of which underscore the need for peaceful resolution of international disputes.

1.3 Research Hypotheses

The study proceeds on the hypothesis that the Migingo Island dispute remains unresolved because of Kenya's apparent inaction and acquiescence over Uganda's activities on and claim to the island. The study is further guided by the following 'minor' hypotheses, namely, that:

a) the conflict over Migingo Island is a legal dispute that raises international law issues;
b) there exists appropriate mechanisms and fora under international law for the pacific resolution of the Migingo Island dispute; and
c) there are prospects and challenges in resolving the Migingo Island dispute under international law.

1.4 Research Questions

The study seeks to address the following questions:

a) How may the international law issues arising in the Migingo island conflict be addressed in resolving the same?
b) How may the available means and fora for the resolution of the Migingo Island conflict under international law be utilised?
(c) How may the prospects and challenges to the resolution of the Migingo Island conflict under international law be addressed?

1.5 Research Objectives

The overriding goal of this research is to analyse the Migingo island conflict in view of the prevailing normative and institutional frameworks of international law. In this regard, the specific objectives are to:

a) identify the international law issues raised by the dispute;

b) examine the available means and fora under international law for the resolution of the dispute; and

(c) identify the prospects and challenges in resolving the dispute under international law.

1.6 Theoretical Framework

Settling disputes lies at the heart of the legal enterprise. This study is concerned with the pacific resolution of the Migingo Island dispute between Kenya and Uganda under the ambit of international law. Due to their relevance to the hypotheses and research questions in this study, the following theories have been selected to guide the research: Legal Positivism, Consent Theory and Liberal Theory of international law.

Legal Positivism is particularly relevant to this study because the study seeks to find a solution to the dispute within the existing legal framework, by looking at the text of the relevant laws as they are, and not as they ought to be. The Liberal Theory is also apt because it emphasizes on the need for cooperation and peaceful international relations that lead to mutual gains among States. The theory ties well with the study hypothesis that there are appropriate mechanisms and fora for the pacific resolution of the Migingo Island dispute under international law.

1.6.1 Legal Positivism

This study is guided by the provisions of Articles 2(3) and 33(1) of the UN Charter[16] as well as Article 4(e) of the Constitutive Act of the African Union[17] which Articles emphasize the need for peaceful settlement of disputes. The study is further guided by

[16] Charter of the United Nations, 24 October 1945, 1 UNTS XIV
[17] Constitutive Act of the African Union, 11 July 2000; 2158 UNTS 3

the First Schedule of the Kenya Colony and Protectorate (Boundaries) Order in Council 1926, which delineates the boundary between Kenya and Uganda. Similarly, this study draws guidance from Article 4(b) of the Constitutive Act of the African Union whose clarion call is the need to respect the boundaries inherited by African States at independence.

These codified legal provisions are central to the resolution of this dispute. It is argued that these provisions form part of international law and their texts must be respected as they exist. This study is, therefore, based on the Positivist Legal Theory. The positivist theory is built around the belief that the question of what the law is must be kept separate from, the question of what the law should be. John Austin, one of the proponents of this theory, posited:

> The existence of law is one thing, its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation.[18]

Legal positivism is appropriate for this study because the study seeks to find a solution to the dispute between Kenya and Uganda over Migingo Island within the existing legal framework. The study aims at looking at the law as it is, rather than as it ought to be. It is further argued that there exists conventional criteria on how the boundary between Kenya and Uganda is to be determined, which criteria are embodied in legal instruments which should be invoked. These legal instruments should be applied as they are, devoid of moral consideration, political biases or economic conveniences, to arrive at a pacific settlement of the dispute.

[18] John Austin, *The Province of Jurisprudence Determined* (John Murray, London, 1832)

1.6.2 Consent Theory

This study is also based on the consent theory which is closely connected to legal positivism. Whereas legal positivism attaches primacy to codified international law, such as treaties and conventions, the consent theory sees the binding force of an international law rule in the consent of States, given expressly as in a treaty or by tacit agreement or acquiescence, as in the case of a customary law.[19]Most positivists' theorizing accepts this caveat and argues that the consent theory still works because most States have accepted it as the norm and that there are good reasons to respect the consent of States, anyway.[20]

This theory is particularly instructive to this study because it brings into focus the principle of *uti possidetis juris* which is captured under Article 4(b) of the Constitutive Act of the African Union. Both Kenya and Uganda are bound by the provisions of the Constitutive Act by dint of their membership of the African Union.

1.6.3 Liberal Theory of International Law

This study is further guided by the liberal theory which is a perspective on international politics that views the State as the unit of analysis, but also includes international law, international organizations, and non-governmental organizations, as important factors in world politics.

[19]Boleslaw A. Boczek, *International Law: A Dictionary* (Scarecrow Press, Maryland, 2005), p. 4
[20]Basak Cali, *International Law for International Relations* (Oxford University Press, Oxford, 2010), p. 76

Liberal theorists reject the realist presumption that international relations are a zero-sum game, but instead, view them as a system of interactions holding the potential for mutual gain. Furthermore, cooperative and peaceful international behaviours are, therefore, possible and desirable.[21] The three major pillars of liberal theory, namely, democratic peace, economic independence and international institutions, work together to reinforce and perpetuate stable peace.[22] In that context, the study argues that for the sake of peace, the Migingo dispute ought to be addressed in a more diplomatic manner by involving the international community and major international institutions.

1.7 Literature Review

The following literature was reviewed in framing the appropriate research design in response to the framed research problem:

Gino J. Naldi looks at international dispute settlement from the regional dimension.[23]He specifically examines some aspects of the Protocol to the Statute of the African Court of Justice and Human Rights as well as the Statute itself.[24] The author points out that the Protocol has provided for a merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union to form a single court.[25] He also notes that under Article 28(d) of the Statute of the African

[21] Patrick Thaddeus Jackson, 'Theories of International Relations: US Diplomacy, An Online Exploration of Diplomatic History and Foreign Affairs' <http://www.usdiplomacy.org/diplomacytoday/values/theories.php>(accessed 3 June, 2016).
[22] John Ikenberry, *'Liberalism in a Realist World: International Relations as an American Scholarly Tradition'*, 46 International Studies; 203-219 (2009)
[23] Gino J. Naldi, 'Aspects of the African Court of Justice and Human Rights' in Matthew Saul, Duncan French and Nigel D. White (eds) *International Law and Dispute Settlement: New Problems and Techniques* (Oxford and Portland Publishers, Oregon, 2012), p. 321
[24] Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008; 48 I.L.M 317
[25] Article 2, *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHC: Volume 3 Regional Instruments* (UNHCR, Geneva 2007), p. 1040,

Court of Justice and Human Rights, the Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights, the Protocol and any other relevant human rights instrument ratified by the States concerned.

From the Summary of the Court's jurisdiction, it is apparent that the Court does have jurisdiction over States by dint of Article 29(1) (a) which provides that State Parties to the present Protocol are entitled to submit cases to the Court on any issue or dispute provided for in Article 28. Gino J. Naldi's work is important to this study as it will help in evaluating the place of the African Court of Justice and Human Rights in settling the Migingo Island dispute.

Ian Brownlie evaluates the settlement of international disputes by use of peaceful means.[26] He examines judicial settlement of international disputes and notes that this is only one facet of the available mechanisms. He also acknowledges settlement by political means, including action by organs of international organizations, like the General Assembly and Security Council of the United Nations. Brownlie emphasizes Article 2(3), 2(4) and Article 33(1) of the United Nations Charter, which provide for peaceful settlement of international disputes. Brownlie's work will inform this study in terms of appreciating dispute settlement under international law, regard being had to the principles of sovereign equality and non-intervention.

[26] Ian Brownlie, *Principles of Public International Law*, 8th edn. (Oxford University Press, Oxford, 2012), p. 46

Martin Dixon discusses the legal import of Article 2(3) of the United Nations Charter and notes that while the obligation to settle disputes peacefully is addressed primarily to the members of the United Nations, there is no doubt that this principle is one of the central obligations of international law which all states must observe.[27]

Dixon cites the *Legality of the Use of Force case (Yugoslavia v. Belgium)* as the *locus classicus* for this proposition. In this case, after Yugoslavia refused to accept repeated demands by the United States and other members of the North Atlantic Treaty Organization (NATO) to withdraw Yugoslav military and paramilitary troops allegedly engaged in serious human rights abuses against the local Kosovar-Albania population in Kosovo, NATO commenced an air campaign against Yugoslavia on March 24, 1999. The bombings continued for several months. In response, Yugoslavia instituted proceedings before the International Court of Justice on April 29, 1999, against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United States and the United Kingdom, in their capacity as member states of NATO. Yugoslavia asserted that the said states had acted in breach of international law.[28] The Court, in its decision, emphasized the importance of resolving disputes peacefully and reiterated its mandate in the following terms:

> Nevertheless, the Court, as the principal judicial organ of the UN, whose primary *raison d'etre* remains the preservation of international peace and security is under a positive obligation to contribute to the maintenance of international peace and security and to provide a judicial framework for the resolution of a legal dispute, especially one which not only threatens international peace and security, but also involves enormous human suffering and continuing loss of life as well as the disintegration of normal society.[29]

---

[27]Martin Dixon, *Textbook on International Law*, 7th edn. (Oxford University Press, Oxford, 2013), p. 286

[28]*Legality of the Use of Force case (Yugoslavia v Belgium)* (1999) ICJ Rep. 124

[29]*Ibid*

Martin Dixon's work is relevant to this study because it emphasizes the legally acceptable means of dispute resolution under international law. The work also examines in great detail these mechanisms. It, therefore, helps in addressing the research questions that the study seeks to answer.

Oduntan Gbenga discusses boundary disputes in Africa.[30] According to him, African boundaries are largely superimposed and are, therefore, very susceptible to conflict. He points out that superimposed boundaries generate conflict by creating a disjunction between interactions of the socio-cultural system, on the one hand, and political system, on the other. He argues that it is not surprising that all sub-regions of Africa are nearly evenly afflicted with the scourge of boundary disputes. This work is important to this study because it helps in appreciating the context in which boundary disputes on the African continent arise. The book sheds more light on how African boundaries came into being and why they remain a potential point of conflict. Gbenga has also delved into the issue of the settlement of the said disputes under international law using peaceful means, such as negotiation.

Malcom N. Shaw has written on the subject of settlement of disputes by peaceful means under the general topic of international law.[31] The book is invaluable as it gives a critical analysis of the legal instruments which anchor peaceful settlement of international disputes, especially the United Nations Charter. He has covered a spectrum of the mechanisms available for peaceful settlement of international disputes.

[30]Oduntan Gbenga, *International Law and Boundary Disputes in Africa* (Routledge Publishers, London, 2015), p.5
[31]Malcom N. Shaw, *International Law*, 7th edn. (Cambridge University Press, Cambridge, 2014), p. 914

J. G. Merrils discusses international dispute settlement mechanisms as provided for under Article 33 of the Charter of the United Nations.[32] He has considered dispute settlement mechanisms, such as negotiation and conciliation, in detail. His work will help this study to give a considered view as to whether these mechanisms are appropriate in the instant case.

Wafula Okumu argues that there is a likelihood of inter-state disputes in Eastern Africa as natural wealth is discovered in the borderlands.[33] He states that since the eruption of war between Ethiopia and Eritrea over their common boundary in 1998, and the subsequent failure to demarcate it, there has been a growing concern that there could be more inter-state disputes in Eastern Africa because of natural wealth on the borderlands. He also cites the 2009 standoff between Kenya and Uganda over the ownership of Migingo Island in Lake Victoria. He attributes the standoff to competition over resources, and not really a question of boundaries. This article, though not written from a legal perspective, is important as it helps this study to appreciate the dynamics of international disputes and what may have triggered the Migingo Island dispute.

David Warui examines the general mandate of the East African Community in settlement of disputes among its member states.[34] He states that the Treaty for the

[32]Merrils, J. G, *International Dispute Settlement*, 4th edn. (Cambridge University Press, Cambridge, 2005), p. 1
[33]Wafula Okumu, *'Resources and Border Disputes in Eastern Africa'*, 4 Journal of Eastern African Studies; 279 (2010)
[34] David N Warui, 'The East African Community and Dispute Settlement (A Case of Migingo Island)' University of Nairobi (2013), (MA Thesis, University of Nairobi 2013) 107 <http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/52603>(accessed on 26 May, 2016).

Establishment of East African Community[35] emphasizes sovereign equality of its Partner States, co-existence and good neighbourliness, and peaceful settlement of disputes. He further notes that the EAC Rules of Procedure require a Partner State to raise an issue as a substantive agenda to the EAC Secretariat, for deliberation by the EAC Council of Ministers. Warui further notes that neither Kenya nor Uganda has formally lodged the Migingo Island dispute as a substantive agenda to the EAC Secretariat. His work will help this study in examining whether the dispute can be resolved at the East African Court of Justice (EACJ), which is the principal judicial organ established under the Treaty for the Establishment of the East African Treaty.[36]

Peter Wafula Wekesa examines the controversy between Kenya and Uganda over the ownership of Migingo Island in the shared waters of Lake Victoria.[37] He argues that the Migingo Island dispute brings to the fore unresolved issues around the emergence, nature, and transformation of African borders. He attributes the disputes associated with the African borders to the way the African countries were hurriedly partitioned by the European powers during colonization. This work is important to this study because it helps in appreciating the possible causes of the Migingo Island dispute.

The gap identified in the literature reviewed above is that most of the works do not cover the specific problem identified for research. Specifically, most of the authors whose work was reviewed have not identified the international law issues that the conflict raises, neither have they examined the appropriate mechanisms and fora for

[35] Treaty for the Establishment of East African Community, 30 November 1999; 2144 UNTS 255
[36] Article 9(1), Treaty for the Establishment of East African Community, 30 November 1999; 2144 UNTS 255
[37] Peter Wafula Wekesa, 'Old and New Challenges: The Migingo Island Controversy and the Kenya-Uganda Borderland', 4 Journal of Eastern African Studies; 331(2010)

its resolution under international law. Equally, most of the authors have not identified the potential challenges and prospects in resolving the Migingo Island conflict under international law.

1.8 Research Justification

As has already been demonstrated through the literature review, there is a gap in research on the options of and challenges to resolution of the Migingo Island dispute under international law. This research attempts to fill that gap. The findings of this research will benefit the State parties, lawyers, and scholars of international law interested in the Migingo Island dispute. It is hoped that the research will lead to viable findings and recommendations that would lead to a pacific resolution of the dispute.

1.9 Research Methodology

This study relied heavily on the doctrinal analysis of the law as it is, rather than as it ought to be. The study sought to find a solution to the conflict between Kenya and Uganda over the Migingo Island within the existing legal norms, regardless of their merits or demerits, political or economic considerations.

Further, this study was predominantly based on desk review and analysis of literature on international dispute settlement mechanisms. Primary sources of international law, such as the Charter of the United Nations and case law, were reviewed. There was also focus on secondary sources of international law and information on the dispute, such as books, journals, articles and theses on the subject. The bulk of the study was done through a library based research at the University of Nairobi, School of Law. Internet resources were also used to supplement the library resources, especially on Migingo Island dispute between Kenya and Uganda, because not much is published on the subject yet.

1.10 Assumption, Scope and Limitation of the Research

The study is based on the assumption that the two states embroiled in the dispute will be willing to pursue a pacific settlement of the dispute. The study is further based on the assumption that both states accept the provisions of the First Schedule to the Kenya Colony and Protectorate (Boundaries) Order in Council 1926, which delineates the boundary between Kenya and Uganda, as correct. However, the study does not extend to the question of transboundary or shared natural resources like water and fish surrounding the island in dispute. Future research can focus on this aspect of the dispute**.**

1.11 Chapter Breakdown

This study is comprised of five chapters structured as hereunder:

Chapter One: Introduction

1.1 Background to the Study

1.2 Statement of the Problem

1.3 Research Hypothesis

1.4 Research Questions

1.5 Research Objectives

1.6 Theoretical Framework

1.7 Literature Review

1.8 Research Justification

1.9 Research Methodology

1.10 Assumption, Scope and Limitation of the Research

Chapter Two: The Migingo Island Dispute in Perspective

2.1 Introduction

2.2 Genesis of the Dispute

2.3 Arising Legal Issues in International Law

2.3.1 Whether it is a "Dispute" as Defined in International Law

2.3.2 Who is entitled to Territorial Sovereingty over the Island?

2.3.3 Whether Uganda can Claim Migingo Island through the Doctrine of Prescription

2.3.4 Whether the Principle of *Uti Possidetis Juris* is Applicable

2.4 Conclusion

Chapter Three: Resolving the Migingo Island Dispute: Available Means and Fora in International Law

3.1 Introduction

3.2 Dispute Settlement in International Law

3.3 Obligation to Settle International Disputes by Peaceful Means

3.4 Diplomatic Means of Dispute Settlement

3.4.1 Negotiation

3.4.2 Mediation and Good Offices

3.4.3 Inquiry

3.4.4 Conciliation

3.5 Arbitration and Judicial Settlement

3.5.1. Arbitration

3.5.2 The International Court of Justice (ICJ)

3.5.3 African Court of Justice and Human Rights (ACJHR)

3.5.4 The East African Court of Justice (EAJC)

CHAPTER TWO

THE MIGINGO ISLAND DISPUTE IN PERSPECTIVE

2.1 Introduction

This chapter responds to the first part of the research questions and is meant to examine the dispute in the context of its genesis and the legal issues that it raises under international law. In order to respond to the research question identified, the chapter tests the hypothesis that the conflict over Migingo Island is a dispute under international law that raises legal issues for determination.

2.2 Genesis of the Dispute

The Kenya-Uganda dispute over Migingo Island only came to the fore in 2004. Put differently, Kenya has always occupied and exercised territorial sovereignty over the tiny island since 1926. A cursory look at some written works on the dispute would have one believe that the dispute only started in the last decade, perhaps fuelled by competition for fish and water resources by the nationals of the two States.[1]

However, the genesis of the said dispute is more than a rush for the fish resources. It is historical and political. Historically, Ugandan authorities have so far annexed eight islands on Lake Victoria, which were previously part of Kenya. In early 1970s Uganda's president Idi Amin Dada seized Sigulu Island, the largest and most important of the islands with a population of about 10,000 people, mainly of Banyala (Luyha) origin. Others were from the Suba region, particularly the twin islands of

[1] Wafula Okumu, 'Resources and Border Disputes in Eastern Africa', 4 Journal of the Eastern African Studies; 279, (2010).

Rusinga and Mfangano, and Luo residents, mainly from locations like Sakwa, Bondo, Uyoma and Yimbo.[2]

The Kenyan residents of Sigulu have since the early 1970s become naturalized Ugandan citizens, and have their representatives in Ugandan government as well as in other local authorities in Samia Bugwe and Bugiri districts of Eastern Uganda. The Kenyan Government then under the presidency of Mzee Jomo Kenyatta acquiesced in the entire annexation process as it did not lodge any diplomatic protest. The former Budalangi MP and long serving cabinet minister James Osogo was the lone voice that protested against the annexation of Sigulu Island by Ugandan authorities. Some of the other Islands that were annexed in a similar pattern were Lolwe, Wayami, and Remba.[3]

This annexation was by design. It is instructive to note that in 1976 president Idi Amin attempted to redraw the boundaries between Kenya and Uganda. Amin was claiming all Kenyan districts that were part of Uganda before the colonial re-demarcation of the territorial boundaries. According to Amin, these districts extended all the way to Naivasha. He claimed that these areas were very fertile and produced nearly all the wealth in Kenya. However, he backed down only when President Jomo Kenyatta threatened to block Uganda's imports through the port of Mombasa.[4]

[2] Joe Ombuor, 'How Much More Territory Will Kenya Cede to Uganda Before the State Intervenes?' *The Standard* (Nairobi, 27 December 2008) <www.Standardmedia.co.ke>(accessed 23rd October, 2017).
[3] ibid
[4] Bamuturaki Musinguzi, 'The Day Idi Amin Wanted to Annex Western Kenya' *The East African* (Nairobi, 10 September 2011 www.theeastafrican.co.ke/news (accessed 26th May, 2016).

President Amin later remarked that there was no intention of Uganda claiming an inch of any territory of her neighbours, whether Kenya, Sudan, Zaire (Congo DRC) etc. He stated that he was a firm believer in OAU (now AU) and that as its Chairman, he knew of the OAU July Resolution of 1964 which solemnly declared that all member States pledged themselves to respect the borders existing on their achievement of independence. Stressing that he was only informing his people of the pre-colonial boundaries without the intentions for war nor advocating any changes, Amin said that he had a written agreement signed by the then British Colonial Secretary of State Herbert Asquith, transferring some parts of Uganda to Sudan in 1914 and to Kenya in 1926.[5] The dispute between Kenya and Uganda regarding the ownership of Migingo Island must therefore, be seen in this historical and political light.

2.3 Arising Legal Issues in International Law

The Migingo Island dispute between Kenya and Uganda raises a number of legal issues in international law. The first legal question that begs answers is whether the dispute is indeed a "dispute" as defined in international law. The second legal issue is, between the two neighbouring States, who has the right to exercise territorial sovereignty over the island? Put differently, who between the two States has the right to exercise thereon, to the exclusion of the other, functions of a State? The third legal issue that falls for determination in light of this dispute is whether the principle of *uti possidetis juris* is applicable. Finally, can Uganda claim to have acquired the island through prescription and acquiescence on the part of Kenya**?**

[5] Ibid

2.3.1 Whether it is a "dispute" as defined in International Law

A dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another. The term 'dispute' was aptly defined by the Permanent Court of International Justice in the *Mavrommatis Case* [6] as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". Further, in the *Case Concerning the Northern Cameroons,*[7] one of the preliminary questions was whether there existed a dispute between the parties. The Court held that one of the tests to be applied was that the judgment of the court on the conflict had to have some practical consequences in the sense that it can affect existing legal rights or obligations, and thus remove uncertainty from their legal relations.[8] In the broadest sense, a dispute would exist where existing legal rights or obligations would be affected notwithstanding whether such a disagreement involves States, institutions, juristic persons (corporations) or private individuals.

Going by the Court's holding in the above two cases, it is apparent that the conflict between the two states over Migingo Island constitutes a dispute in the eyes of international law. The point of fact on which the two States are having a disagreement is whether the tiny island lies on the Kenyan or Ugandan side of the international boundary.

Further, the conflict has an impact on legal rights and obligations of the two States in international law. For example, if a determination were to be made that the island

[6] *Mavrommatis Palestine Concessions (Greece v UK)* (1924) PCIJ Series A No. 2
[7] *Cameroon v United Kingdom* (1963) ICJ Rep. 15, 33
[8] *Ibid*

belongs to Kenya, Uganda would have a legal obligation under international law to respect the territorial integrity of Kenya over the island. Any occupation or interference with the island by Uganda would be deemed to be a violation of Kenya's territorial integrity. The converse is also true.

The need to determine whether the conflict between Kenya and Uganda over the Migingo Island is a legal dispute in the eyes of international law is not merely academic. It is a material factor for consideration because if any of the States intends to use the International Court of Justice (ICJ) as a forum for its resolution, the existence of a legal dispute is a primary condition for the court to exercise its judicial function. Put differently, the Court must ascertain whether there exists a legal dispute over which it has jurisdiction *ratione materiae*. The Court's jurisdiction therefore lies in the determination of this legal issue.

2.3.2 Who is entitled to Territorial Sovereignty over the island?

One of the key legal issues arising in the circumstances of the dispute is the question of claim to territory. The territory of a state is an important attribute of Statehood. Under international law, territory is the portion of land subject to the sovereign authority of a State. Consequently, there exists a nexus between territory and sovereignty.[9] Max Huber, in the *Island of Palmas Case* stated that sovereignty, in relation to a portion of the surface of the globe, is the legal condition necessary for the inclusion of such portion in the territory of any particular State.[10]

[9] Antonio Cassese, *International Law,* 2nd edn, (Oxford University Press, Oxford, 2005), p. 83
[10] *Island of Palmas (United States v. the Netherlands)* (1928) 2 RIAA , 829

Territorial sovereignty implies that, subject to applicable customary or conventional rules of international law, a particular State has the sole legal authority to exercise jurisdiction in respect of objects and persons within its territory.[11] The concept of sovereignty lies at the heart of the existence of all States. It is a reflection of their exclusive, supreme and inalienable legal authority to exercise power within their area of governance. A sovereign State possesses legislative, executive and judicial powers and has authority over its subjects within its territory, to the exclusion of all other States. Sovereignty is the basis for the doctrines of responsibility, nationality and jurisdiction.[12]

A State has absolute and exclusive power of enforcement within its own territory over all matters arising therein, unless that power is curtailed by some rule of international law, either general or specific. No other State or international legal person may trespass into the 'domestic jurisdiction' of a territorial sovereign.[13] Additionally, the principle entails an obligation to respect the definition, delineation and territorial integrity of an existing State. A State exercises supreme authority within its territory. It exercises jurisdiction over persons and property to the exclusion of others.

Kenya has always exercised territorial sovereignty over Migingo Island since 1926. The island is a gazetted territory of Nyatike Constituency in Migori County. The geographical coordinates place the tiny island squarely within the Kenyan territory. For this reason alone, it cannot be overemphasized that Kenya has an exclusive,

[11] Wolff Heintachel von Heinegg, 'Legal Implications of Territorial Sovereignty in Cyberspace', 89 International Law Studies; 124 (2013)
[12] Erotokritou C. 'Sovereignty over Airspace: International Law, Current Challenges and Future Developments for Global Aviation', 4 Student Pulse; 2-4 (2012)
[13] Martin Dixon, *Textbook on International Law*, 7th edn, (Oxford University Press, Oxford, 2013), p. 150.

supreme and inalienable legal authority under international law to exercise power over the island. It must be noted that at the time the Ugandan authorities moved into the island in 2004 by deploying police officers and hoisting the Ugandan flag, the island was still under the sovereignty of the State of Kenya. The island was not *terra nullas* and could, therefore, not be the subject of occupation by Uganda.

Similarly, Kenya has not ceded the Migingo Island to Uganda. Uganda cannot claim to have acquired a derivative title over the island from Kenya under international law. It follows that the island is part of the Kenyan territory and the invasion and continued occupation by Ugandan security forces remains a violation of the territorial intergrity of Kenya.

2.3.3 Whether Uganda can Claim Migingo Island through the Doctrine of Prescription

Claimants to title of territory based initially on occupation may invoke the principle of prescription to consolidate a claim.[14] Prescription is the acquisition of title by a public, peaceful and continuous control of territory. Prescription involves a *de facto* exercise of sovereignty.[15] Prescription can validate an initially doubtful title, provided the display of State authority is public. It must be public, as a title acquired via prescription implies the acquiescence of any other interested claimant.[16] Protest from such a claimant or a dispossessed sovereign can bar the establishment of title by prescription.

[14] Wallace, R and Ortega, O. *International Law*, 7th edn, (Sweet and Maxwell, London, 2013), p. 108
[15] Ibid
[16] Ibid

As to the length of time before prescription will give good title, there is no accepted period and much will depend on the circumstances of each particular case, such as the geographical nature of the territory and the existence or absence of any competing claims.[17] The difficulty in establishing good title based on prescription is illustrated in the *Kasikili/Sedudu Island Case*[18] where Namibia was precluded from utilising prescription to establish title. In this case, on 17th May 1996, Botswana and Namibia jointly filed a submission to the ICJ requesting the Court's settlement of a boundary dispute around the Kasikili/Sedudu Island. Botswana argued that the island ought to be considered its territory unless it could be proven that the main channel passed through the south region of the island, and, therefore, fell within the sovereignty of Namibia. Namibia, on its part, claimed that the Chobe River passed through the south of the island and that it had occupied, used, and exercised sovereign jurisdiction over Kasikili Island, with the knowledge and acquiescence of Botswana, since at least 1890. As such, the Island was a territory governed by the sovereignty of Namibia. The Court held:

> After summarizing the arguments advanced by each of the Parties the Court observes that they agree between themselves that acquisitive prescription is recognized in international law and that they further agree on conditions under which title to territory may be acquired by prescription, but that their views differ on whether those conditions are satisfied in this case. Their disagreement relates primarily to the legal inferences which may be drawn from the presence on Kasikili/Sedudu Island of the Masubia of Eastern Caprivi, while Namibia bases its argument primarily on that presence, considered in the light of the concept of 'indirect rule' to claim that its predecessors exercised title-generating State authority over the island, Botswana sees this as simply a 'private' activity, without any relevance in the eyes of the law…. The Court continues by pointing out that for present purposes, it need not concern itself with the status of acquisitive prescription in international law or with the conditions for acquiring title to territory by prescription. The Court considers, for the reasons set out below, that the conditions cited by Namibia itself are not satisfied in this case and that

[17] Ibid
[18] *Botswana / Namibia)* (1999) ICJ Rep. 1045

> Namibia's argument on acquisitive prescription therefore cannot be accepted.[19]

Like occupation, prescription is based on effective control over territory. As in the case of occupation, effective control needs to be accompanied by 'the intention and will to act as sovereign'. The difference between prescription and occupation is that prescription is the acquisition of territory which belongs to another State whereas occupation is acquisition of *terra nullius*. Consequently, the effective control necessary to establish title by prescription must last for a longer period of time than the effective control which is necessary in cases of occupation; loss of title by the former sovereign is not readily presumed.[20]

When faced with competing claims, international tribunals often decide in favour of the State which can prove the greater degree of effective control over the disputed territory, without basing their judgment on any specific mode of acquisition. For instance, in the *Legal Status of Eastern Greenland Case*[21] Norway occupied and claimed as its own parts of Eastern Greenland, a territory previously claimed by Denmark. Denmark later sued Norway before the Permanent Court of Justice on the ground that Norway violated Danish sovereignty in Eastern Greenland. The PCIJ gave judgment in favour of Denmark because Denmark had exercised greater control than Norway over the Eastern Greenland, but the Court did not specify the mode by which Denmark had acquired sovereignty.

---

[19] Ibid., paras. 90-99.
[20] Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edn, (Routledge Publishers, London, 1997), p. 150
[21] *Denmark v Norway* (1993) PCIJ Ser. A/B, No. 53, p.71

In that regard, effective control denotes that the disputed territory will likely be given to the party which has ruled over the territory for a considerable period of time. The principle should have two elements, that is, willingness of implementation of control subjectively, and the act of implementation of control objectively. Thus, effective control should be continuous and peaceful.[22] The foregoing was reiterated by the tribunal in *Eritrea/Yemen Arbitration Award* where the dispute concerned a territorial sovereignty claim over the delimitation of maritime boundaries between Eritrea and Yemen. The Tribunal, in its decision stated:

> The modern international law of the acquisition (or attribution) of territory generally requires that there be an intentional display of power and authority over the territory, by the exercise of jurisdiction and State functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and size of its population, if any.[23]

Can Uganda claim the island through prescription and acquiescence on the part of Kenya? The underlying rule for prescriptive title is that of estoppel. If a state has slept on its rights, it cannot be allowed to revive them against a State that has been in long continued enjoyment of those rights. It is instructive to note that even though Kenya has not lodged an official protest with the United Nations, it has not remained quiet over the Ugandan activities on the island. For example, in 2009, Kenyan Prime Minister Raila Odinga asked Uganda to pull out of Migingo Island. This is what he had to say:

> Kenya has all the documents indicating that the island belongs to it. Even the Ugandan Constitution states clearly where the boundary was. So whatever

[22] Liu Zhengquan and Liang Meirong, 'Solution of Territory Dispute and Effective Control Principle: The Perspective of China and its Neighbouring Countries', 3 International Journal of Law and Social Sciences; 43 (2013)
[23] *Eritrea / Yemen)* (1998) XXII, RIAA 211

> argument Uganda is going to use, they are not going to get a single document to defend their case.[24]

Based on Kenya's continued protest over Uganda's occupation of the island, acquisition of the island by prescription is not applicable. Kenya cannot be said to have slept on its rights. It has made efforts to involve the Ugandan Government in settling the question of which, between the two States, should lay claim to the island. The resistance by the Kenyan Government to Uganda's occupation does not manifest any acquiescence on the part of the Kenyan Government. Based on the foregoing, Uganda cannot claim Migingo Island through prescription and acquiescence.

2.3.4 Whether the Principle of *Uti Possidetis Juris is* applicable

Uti possidetis juris is a principle of customary intenatinal law that serves to preserve the boundaries of colonies emerging as States. It is defined in Black's Law Dictionary as the doctrine that old administrative boundaries will become international boundaries when a political subdivision achieves independence.[25]

The ICJ analysed the principle of *uti possidetis juris* in the case concerning the *Frontier Dispute (Burkina Faso / Mali)*[26] where both parties submitted a claim before the Court on the question of the proper demarcation of boundary lines between the two States. The Court, in its decision, stated that:

> The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved… the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the

[24] 'PM Asks Uganda to Pull Out of Migingo Island' *Daily Nation* <www. nation.co.ke> (accessed on 20th October 2017)
[25] Bryan A. Garner (ed), *Black's Law Dictionary*, 9th edn, (Thomson West, London, 2004), p. 1583
[26] *Burkina Faso / Mali* (1986) ICJ Rep. 3

> continent of the gains achieved by much sacrifice… the essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States, judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination.[27]

The principle is antonymous to the principle of effectiveness, to the effect that an actual display of authority cannot in itself represent a better title to territory.[28] In accordance with the principle, when a State becomes independent from its colonial power, the State automatically inherits its colonial boundaries. Any efforts by another State to colonize, occupy, or otherwise violate the State's territory after it has gained independence are ineffective and of no legal consequence upon the State's territorial boundaries.[29] *Uti possidetis juris* thus creates a legal obligation and may prevent effective control from founding title.[30] Territory plays not only a definitional role, but a constitutive one historically as well. It is the link between a people, its identity as a State, and its international role.[31]

Based on the foregoing, Uganda cannot lay claim to the island through prescription, and the principle of *uti possidetis juris* ought to be invoked in this dispute so that the colonial delimitation of the boundaries can be ascertained and respected. In that regard, high reliance should be placed on the colonial maps defining the true boundaries and ownership of the island. The maps shall offer useful evidence which

---

[27] *Ibid,* See also Milena Sterio, *The Right to Self-Determination Under International Law: 'Selfistans', Secession, and the Rule of Great Powers* (Routledge Publishers, New York, 2013), p. 173
[28] Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Martinus Nijhoff Publishers, Leiden, 2006), p. 108
[29] Junwu Pan, *Towards a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Martinus Nijhoff Publishers, Leiden, 2009), p. 43
[30] Malcom Shaw, *Title to Territory in Africa: International Legal Issues* (Claredon Press, Oxford, 1986), p. 23
[31] Ibid., p. 3.

may be relied upon in settling the dispute. The ICJ in the *Frontier Dispute (Burkina Faso/Mali)* acknowledged the evidential value of maps by stating that:

> Maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so, the legal force does not arise solely from their intrinsic merits: it is because such maps fall in into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.[32]

The existing maps defining the boundaries and the extent to which the Migingo island falls within the two countries is of great evidential value in addressing the present dispute and hence reliance should be placed on the same. These colonial maps are available at the British National Archive and are adequate to decisively and amicably solve this dispute.

2.4 Conclusion

The Migingo Island dispute has various direct and indirect implications on the two States and the entire East African region. Economic benefits are to be derived from the various fishing activities undertaken by the inhabitants of the island. This can only be fully realised if the ownership of the island is settled. The legal issues discussed in this chapter will provide a useful guide in resolving the present dispute. In the next chapter, the study looks at the available means and fora for the settlement of the dispute under international law.

[32] *Burkina Faso / Republic of Mali* (1986) ICJ Rep. 582

CHAPTER THREE

RESOLVING THE MIGINGO ISLAND DISPUTE: AVAILABLE MEANS AND FORA IN INTERNATIONAL LAW

3.1 Introduction

One of the hypotheses in this study is that the Migingo Island dispute between Kenya and Uganda can be resolved peacefully under international law. To test this hypothesis, this chapter examines the various means and fora for settlement of disputes in international law. The evaluation of these pacific means of dispute resolution will, in turn, inform an analysis of the prospects and challenges of resolving the Migingo Island dispute in the next chapter.

3.2 Dispute Settlement in International Law

The hallmark of dispute settlement in international law is its consensual nature.[1] Disorder in relations between entities which have formal status on the international plane, primarily the nation-states and certain international organizations cannot be remedied unless all the parties involved consent, both to the implementation of the process of dispute resolution, as well as the specific mechanism to be engaged. The Permanent Court of International Justice in the *Eastern Carelia* case best captured this truism when it observed:

> It is well established in international law that no State can, without its consent, be compelled to submit its dispute with other States either to mediation or to arbitration, or to any other kind of pacific settlement. Such consent can be given once and for all in the form of an obligation

[1]Linda C. Reif, 'Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes,' 4 Fordham International Law Journal; 3 (1990)

> freely undertaken, but it can, on the contrary, also be given in a special case apart from any existing obligation.[2]

This remains true, whether the particular method selected is adjudicative or diplomatic in nature. Thus, although all disputes are theoretically capable of settlement in accordance with the rule of law, there is no international legal duty for states to settle their differences through third-party adjudication or to settle them at all. This state of affairs is the product of the decentralized nature of international law where all states are legally equal and where there is no superior entity with the authority to prescribe, adjudicate and enforce the law.[3]

3.3 Obligation to settle International Disputes by Peaceful Means

A basic principle of international law is that disputes must be settled by peaceful means. Indeed, the United Nations Charter, in Article 2(3), enjoins members States to settle their international disputes by peaceful means. These peaceful means are enumerated under Article 33(1) of the Charter as negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means.

Article 33(2) of the Charter also emphasizes that the Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means. In the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*)[4], the International Court of Justice accepted the importance of peaceful settlement of disputes and observed that the principle of

[2] *Status of Eastern Carelia Case (Advisory Opinion)* (1923), PCIJ Series B No. 5, p. 27
[3] Ibid
[4] *Nicaragua v United States of America* (Indemnity) (1986) ICJ Rep. 14

settlement of a dispute through peaceful means, as enshrined in Article 33 of the Charter has "the status of customary law".

In the international arena, the need for peaceful settlement of disputes has grown in the last century for a variety of reasons. First, the prohibition of the use of force has, at least formally, eliminated war as a means to solve conflicts. In addition, the ever growing and intensifying inter-dependence of States has increased the need for cooperation and coordination.[5]

The principle of pacific settlement of disputes is not an isolated concept in international law. Indeed, peaceful settlement of disputes is intimately supported, supplemented, and reinforced by nations in terms of friendly relations, good neighbourliness, good-will and cooperation.[6]

Chapter VII of the UN Charter permits recourse to other means of dispute resolution. For example, under Article 41, the Security Council may decide other measures, not involving the use of force that may be employed to give effect to its decisions. The Security Council may call upon the Members of the UN to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

[5] Lapidoth, R 'Some Reflections on Peaceful Means for the Settlement of Interstate Disputes' in Robin Sanchez Jeff Woled and Darle Tilly (eds) *Proceedings of the First Biennial Rosenberg International Forum on Water Policy, Water Resources Report No. 93* (University of California Centers for Water and Wildland Resources, 1998) 59,71 <http://ciwr.ucanr.edu/files/186748.pdf> (accessed 28th June, 2016)

[6] Alheritiere, D. 'Settlement of Public International Disputes on Shared Resources: Elements of a Comparative Study of International Instruments', 25 Natural Resources Journal; 701-711 (1985)

In the event that the measures contemplated under Article 41 fail, Article 42 of the UN Charter gives the Security Council powers to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such actions may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Pacific means of international dispute resolution as provided for under Article 33 of the UN Charter are classified as either diplomatic or adjudicative. Diplomatic means entail negotiation, inquiry, mediation, conciliation and good offices. Arbitration and judicial settlement form the adjudicative means as they follow the adjudicative procedures of international tribunals

3.4 Diplomatic Means of Dispute Settlement

Diplomatic means of dispute settlement allow parties the latitude to choose a mode of dispute resolution that does not entail the involvement of the court process, rules and procedures. The parties opt for such means owing to the flexibility of the whole process. Most of the inter-state disputes are, therefore, resolved by diplomatic channels.

3.4.1 Negotiation

The various methods of peaceful settlement of international disputes are not set out in any particular order of importance in Article 33(1) of the UN Charter. However, the first mentioned, negotiation, is the principal means of handling all international

disputes. In fact in practice, negotiation is by far the most popular means of dispute settlement and consists of discussions between the interested parties.

It is distinguished from other diplomatic means of dispute settlement in that there is no third party involved. Negotiations are normally conducted through 'normal diplomatic channels' (foreign ministers, ambassadors, etc.) Negotiation is used to try and prevent disputes arising in the first place, and will also often be used at the start of other dispute resolution procedures. In the *Free Zones of Upper Savoy Case* [7] the French Government invoked the principle of *rebus sic stantibus* (things thus standing) and stressed that the principle does not allow unilateral denunciation of a treaty claimed to be out of date. Switzerland argued, on the other hand, that there was a difference of opinion as regards this doctrine, and disputed the existence in international law of a right that could be enforced through the decisions of a competent tribunal to the termination of a treaty because of changed circumstances.[8] With regard to negotiation, the PCIJ pointed out that before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by diplomatic negotiations.[9]

The Manila Declaration on the Peaceful Settlement of International Disputes[10] highlights flexibility as one characteristic of direct negotiations as a means of peaceful

[7] *France v Switzerland* (1932), PCIJ Ser. A/B No. 46
[8]Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing, 2005), p. 178
[9] *France v Switzerland* (1932), PICJ Ser. A/B No. 46, 13
[10]The 1982 Manila Declaration the Peaceful Settlement of International Disputes, 15 April 1994; 1867 UNTS 3

settlement of disputes in several respects. Because, unlike the other means listed in Article 33 of the UN Charter, it involves only the State parties to the dispute. The State parties can monitor all the phases of the process, from its initiation to its conclusion and conduct it in the way they deem most appropriate.

In the *Fisheries Jurisdictions Case (United Kingdom v. Iceland),*[11] the Government of the UK and Iceland entered into an agreement in which the UK undertook to recognize an exclusive fishing zone of up to a limit of 12 miles and to withdraw its fishing vessels from that zone over a period of three years. In 1971, the Icelandic Government announced that the agreement on fisheries jurisdiction with the U.K would be terminated and that the limit of exclusive Icelandic fisheries jurisdiction would be extended to 50 miles. The question before the Court was whether the said agreement was still valid or whether it had since ceased to operate following Iceland's unilateral decision to extend the Icelandic fishing jurisdiction. The ICJ made the observation that:

> The obligation to negotiate thus flows from the very nature of the respective rights of parties. To direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the principles and provisions of the UN Charter concerning peaceful settlement of disputes. As the court stated in the North Sea Continental Shelf cases: 'the obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the UN Charter as one of the methods for the peaceful settlement of international disputes.[12]

The International Court of Justice in the above case made reference to the earlier case of the *North Sea Continental Shelf Case* in which the Court had similarly emphasized

[11] *United Kingdom v. Iceland* (1973), ICJ Rep. 3
[12] Ibid, p. 32

the need for negotiation.[13] The dispute related to the delimitation of the continental shelf between the Federal Republic of Germany and Denmark, on the one hand, and between the Federal Republic of Germany and the Netherlands, on the other hand. The parties asked the Court to state the principles and rules of international law applicable, and undertook thereafter to carry out the delimitations on that basis. The ICJ stated:

> The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation of a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreements. They are under an obligation to conduct themselves in a manner that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.[14]

The framework of the negotiating process can also be an international organization. In the *South West Africa Cases*[15] the contentions of the parties covered a number of issues, including whether South Africa had contravened the provision in the Mandate that it (the Mandate) can only be modified with the consent of the Council of the League of Nations, by attempting to modify the Mandate without the consent of the United Nations General Assembly, which, it was contended by the Applicants, had replaced the Council of the League for this and other purposes. The ICJ rendered the position thus:

> … diplomacy by conference or parliamentary diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation. In cases where the disputed questions are of common interest to a group of States on one side or the other in an organized

[13] (1969) ICJ Rep. 3
[14] *(Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands)* (1969), ICJ Rep. 3
[15] *(Ethiopia v South Africa, Liberia v South Africa)* (1961), ICJ Rep. 13

> body, parliamentary or conference diplomacy has often been found to be the most practical form of negotiation…[16]

States like negotiation because they remain in the driver's seat in a manner that they do not in third-party adjudication. Furthermore, negotiation can be quick if there is a will and it is certainly flexible.[17] But negotiation is not always a good method of settling international disputes. Neutral third parties seldom take part in negotiations, and this means that there is no impartial machinery for resolving disputed questions of fact. It also means that there is little to restrain a disputing State from putting forward extreme claims, especially where their bargaining power is very strong. What is more, States can also deny that a dispute exists and often place conditions before entering into negotiations.

Negotiation is plainly impossible if the parties to a dispute refuse to have any dealings with each other. Serious disputes lead the states concerned to sever diplomatic ties, a step that is especially common when force has been used. Prominent examples include the severance of relations between the United States and Iran, following the seizure of the embassy in Tehran in 1979[18] and the breaking of diplomatic relations between Britain and Argentina after the invasion of the Falkland Islands in 1982.

Negotiations will be ineffective if the parties' positions are far apart and there are no common interests to bridge the gap. In a territorial dispute for example, the party in

[16]Ibid; p. 346
[17] Palmer, G. 'Perspectives on International Dispute Settlement from a Participant', 43 Victoria University of Wellington Legal Research; 14 (2012)
[18] Merrils, J.G. *International Disputes Settlement*, 4th edn. (Cambridge University Press, Cambridge, 2005), p. 23

possession may see no need to negotiate at all. This, perhaps explains, why Uganda is not keen on having the Migingo Island dispute settled by way of negotiation or settled at all. In any dispute, if one party insists on its legal rights, while the other, recognising the weakness of its legal case, seeks settlement on some other basis, there is no room for agreement on matters of substance. Even a procedural agreement to refer the dispute to arbitration, for example may be difficult to negotiate without seeming to prejudice one side or the other.

3.4.2 Mediation and Good Offices

Sometimes third states, or international organisations, or often even an eminent individual, may try to help the disputing states to reach an agreement. Such help can be of two forms, namely, good offices and mediation. A third party is said to offer its good offices when it tries to persuade disputing states to enter into negotiations. It passes messages back and forth and ends its role when negotiations start. It is trite observation to say that good offices stop where mediation begins. This is so because a mediatory party has a more active role to play. It participates in the negotiations, directs them and can suggest a solution, though the suggestions made are not binding upon the parties.[19]

However, in practice both good offices and mediation tend to merge with each other and many a time, it is not easy to draw a line between the two. For example, the role of the Government of Algeria in the settlement of the dispute between the United States and Iran in 1981, over the detention of American diplomatic and consular staff

[19] Ibid, p. 28

cannot be categorised simply as good offices or mediation. Nevertheless, it was effective in achieving a settlement involving, among other issues, the release of the detained hostages.[20]

In other instances, both methods are deployed concurrently. For example, in the dispute between Britain and Argentina over the invasion of the Falklands in 1982, first the United States in the person of Mr Alexander Haig offered to mediate, then the United Nations Secretary-General, Perez de Cuellar tendered his good offices.[21] Mediation cannot be forced on the parties to an international dispute, but only takes place if they consent. So, unless parties have taken the initiative and appointed a mediator already, their unwillingness to consider this form of assistance may prove a major stumbling block. By accepting mediation, a government acknowledges that its dispute is a legitimate matter of international concern.

Mediation is likely to be particularly relevant when a dispute has progressed to a stage which compels the parties to rethink their policies. A stalemate is clearly one such situation; another is when the parties come to recognise that the risks of continuing a dispute outweigh the costs of trying to end it. In the dispute between Iran and Iraq, for example, Iraq's determination to crush the Kurds presented Iran with a choice between increasing its support which could certainly have led to war with Iraq and withdrawing its support for the Kurds in return for Iraq's recognition of Iran's boundary claims. Since Iraq had concluded that the Kurds were currently a more

[20]S K Verma, *An Introduction to Public International Law* (Prentice-Hall of India Private Limited Publisher, New Delhi, 1998), p. 334
[21] Ibid

pressing issue than the disputed boundary, the two states were able to accept a fact-finding mission from the United Nations, a diplomatic initiative by Egypt and finally Algeria's mediation.[22]

However, mediation is not without its own limitations. It is likely to be ineffective in situations where any solution would require one party to abandon its main objective and receive little in return .This was the situation during the crisis that led to the Gulf War of 1991.[23] Following Iraq's invasion of Kuwait in August 1990 and the imposition of sanctions by the UN Security Council, the Secretary- General, France, the Soviet Union, and a number of others, made several attempts to bring about a peaceful solution. All were unsuccessful, essentially because a key demand was that Iraq should withdraw from Kuwait without any reward for its aggression.[24]

Mediation may also founder if a dispute has become an issue in the domestic politics of one or both parties. A government may have adopted a position from which it cannot retreat without attracting accusations of betrayal. Equally, the subject matter of a dispute may be so emotive that the very act of negotiating may be contentious. For example, the Migingo Island dispute between Kenya and Uganda has been an emotive issue and a subject of local politics, including heated debates in parliament.[25]

In conclusion, mediation can only be as effective as the parties wish it to be. This is governed largely by their immediate situation. Although this is a limitation on the

[22] Merrils, J.G. *International Disputes Settlement*, 4th edn, (Cambridge University Press, Cambridge, 2005), p. 23

[23] Ibid, p.34
[24] Ibid
[25] Kisika, S. "Mps Rule out War to Recover Migingo" The Star, (Nairobi, 21 March, 2016)www.the-star.co.ke/news/2016/03/mps-rule-out-war-to-recover-migingo c1316590 (accessed 20th May, 2016)

usefulness of mediation, it would be erroneous to think that a mediator is merely someone who lends authority to an agreement that is already virtually made. On the contrary, the mediator facilitates parties' dialogue, provides them with information and suggestions, identifies and explores the parties' aims and also canvasses a range of possible solutions. This is a vital role that moves the parties towards an agreement.

3.4.3 Inquiry

When a disagreement between states on some issue of fact, law or policy is serious enough to give rise to an international dispute, their views on the matter in question may be difficult or even impossible to reconcile. In such a case, either or both of the parties may refuse to discuss the matter on the ground that their position is 'not negotiable' Alternatively, negotiations may drag on for years until one side abandons its claim or loses patience and attempts to impose a solution by force.

It follows, therefore, that negotiation, even when assisted by good offices and mediation, cannot be regarded as effective means of resolving all international disputes. That is when inquiry as a pacific means of international dispute resolution comes into play.

'Inquiry' as a term of art is used in two distinct, but related, senses. In the broader sense, it refers to the process that is performed whenever a court or any other body endeavours to resolve a disputed issue of fact. In this broader sense, inquiry is a process which any tribunal on a fact finding mission would be required to perform. Since most international disputes raise issues of fact, although legal or political questions are also present, it follows that inquiry in this operational sense will often

be a major component of arbitration, conciliation, action by international organisations and other methods by third-party settlement.

However, this work is concerned with inquiry as a specific institutional arrangement which states may select in preference to arbitration or other means, because they desire to have some disputed issue independently investigated. In its institutional sense, inquiry refers to a particular type of international tribunal, known as the Commission of Inquiry, introduced by the 1889 Hague Convention.[26]

Inquiry entails submitting a dispute to a Commission of Inquiry in order for it to establish the factual basis of the dispute.[27] The primary function of a Commission of Inquiry is to establish the facts pertaining to the dispute by, for example, the hearing of witnesses or visiting the area where the alleged breach of international law is said to have occurred.[28]By elucidating the facts, the Commission of Inquiry hopes that once that difficulty has been overcome, the parties of their own accord will be able to settle the dispute.

International commissions of inquiry proved useful in several instances, mostly naval incidents. The best known was the Anglo-Russian Dispute concerning the Dogger Bank incident during the Russo-Japanese War.[29] A Commission of Inquiry in

[26] Merrils, J.G., *International Dispute Settlement*, 4th edn, (Cambridge University Press, Cambridge, 2005), p. 46
[27] Wallace, R and Ortega, O. *International Law*, 7thedn, (Sweet and Maxwell, London, 2013), p. 335
[28] Ibid
[29]The Dogger Bank incident (also known as the North Sea incident or the Russian Outrage) took place in 1904. Russia was at war with Japan and a number of Russian warships mistook British trawlers for Japanese Navy ships and fired on them. In the chaotic incident a number of Russian ships also fired at each other. The incident came close to sparking a war between Britain and Russia. See Marc Weller

accordance with the Hague Convention was established. The Commission spent two months hearing witnesses and preparing its report, which was delivered in 1905.[30] The Commission found that there had been no torpedo boats either among the trawlers or anywhere nearby and concluded that the Russian admiral had therefore no justification for opening fire. Following acceptance of the report by both parties, Russia made a payment to Britain by way of some 65,000 pounds and the incident was closed.[31]

The *Dogger Bank* incident gives a striking example of the value of the international inquiry commission as an instrument of dispute settlement. It may be argued that had the incident been investigated by two national inquiries, matters would have been exacerbated by two reports with a possibility of opposite conclusions.

However, an inquiry commission can only be used to settle an international dispute in situations in which certain special conditions are satisfied. The disputed issue should be largely of fact, rather than law or policy, no other procedure should have been employed and, most importantly, the parties should be willing to accept that their version of events may be shown to be wrong. Both the League of Nations and the United Nations adopted this kind of technique to their own organizational arrangements, the former exploiting it particularly well as a means of procrastination and persuasion.[32]

(ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015), p. 607

[30] Merrils, J.G., *International Dispute Settlement*, 4th edn, (Cambridge University Press, Cambridge, 2005), p. 47

[31] Ibid, p. 48

[32] Julius Stone, 'International Conflict Resolution' in David L. Sills (ed) *International Encyclopaedia of the Social Sciences*, (New York, 1968), p. 510

3.4.4 Conciliation

Conciliation is the process of settling a dispute by referring it to a commission of persons whose task is to elucidate the facts and to make a report containing proposals for a settlement, but which does not have any binding character of an arbitral award or judgment.[33] It is a kind of institutionalised negotiation. The task of the commission is to encourage and structure the parties' dialogue, while providing them with whatever assistance may be necessary to bring it to a successful conclusion.

Conciliation differs from, yet it is closely connected to, the other pacific means of dispute resolution in the sense that if mediation is essentially an extension of negotiation, conciliation puts third-party intervention on a formal legal footing and institutionalises it in a way comparable to, but not identical with, inquiry or arbitration. In most cases, conciliation is carried out by commissions comprising of several members and this is the usual arrangement under bilateral or multilateral treaties.

It is, however, open to states to refer a dispute to a single conciliator. This was the procedure adopted in 1977 when Kenya, Uganda and Tanzania asked the experienced Swiss diplomat, Dr Victor Umbricht to make proposals for the distribution of the assets of the former East African Community.[34] The dispute had arisen because the partner states, having integrated their economic activities, both before and after independence, had now decided to go their separate ways. It was therefore necessary

[33] Oppenheim, L. *International Law, 7th edn.*(Longman, London, 1952), p. 12
[34] Merrils, J.G., *International Dispute Settlemen*t, 4th edn, (Cambridge University Press, Cambridge, 2005), p. 71

for an agreement to be reached on the extent of the EAC's assets and liabilities and, more contentiously, on their allocation. As the three states were unable to resolve these matters by negotiation, they were encouraged by the World Bank to give Dr Umbricht a wide- ranging brief to investigate the whole issue and bring forward proposals for its resolution.[35]

The legal importance of conciliation is that it is a peaceful means subject to the rules of international law in settling international disputes. It does not force parties to accept its results or impose them on parties. The parties are free to accept or refuse its recommendations. Therefore, conciliation encourages them to adopt it with no fear of getting involved in an international legal obligation. That is because if they are not satisfied with its results, they have the right to refuse it and not comply with it.

Conciliation, like arbitration, could be institutional or ad hoc. Institutional conciliation is adopted and steered by a certain institution which, in turn, identifies the procedures of the conciliation process, keeps a list of conciliators from which conciliators are selected by the parties concerned, and determines the rules which guide and direct the steps of the conciliation process. Ad hoc conciliation is whereby the conciliation takes place without institutional supervision or does not follow the rules and procedures of any institution.

Ad hoc conciliation can be achieved in two ways, namely; parties can insert a conciliation clause into a treaty or contract. Thus, any future conciliation would address disputes arising out of that particular relationship. Alternatively, the parties

[35] Ibid

may consent to a discrete conciliation agreement which will address a specific dispute that arises.[36]

Conciliation is similar to mediation except for the fact that the third party can propose a solution. However, it is different from mediation in that the third party takes a more interventionist role in bringing the two parties together.[37]

3.5 Arbitration and Judicial Settlement

The means available for the settlement of international disputes are commonly divided into two groups. Those considered so far, namely negotiation, mediation and good offices, inquiry and conciliation, are termed diplomatic means, because the parties retain control of the dispute and may accept or reject a proposed settlement as they see fit. Arbitration and judicial settlement on the other hand, are employed when what is needed is a binding decision, usually on the basis of international law.

Judicial settlement involves the reference of disputes to an international tribunal for a legally binding decision on the basis of rule of law. It developed from arbitration, which accounts for the close similarity between the two. Judicial settlement is carried out through courts of general, as well as specialised jurisdiction at international and regional levels. Some of the courts, such as the International Court of Justice (ICJ), the African Court of Justice and Human Rights (ACJHR) and the East African Court

[36] Kassem, T. 'Conciliation Mechanism: An Amicable Mechanism to Settle Business Disputes, Advantages and Disadvantages', 2 International Journal of Multidisciplinary and Current Research; 2 (2014)

[37] Kariuki Muigua, 'Natural Resources and Conflict Management in East Africa' (Paper presented at the 1st Natural Resources and Conflict Management East African ADR Summit held at the Windsor Golf Hotel, Nairobi on 25th and 26th September, 2014) <http://www.uonbi.ac.ke/kariuki_muigua/files/natural_resources_and_conflict_management_in_east_africa-1st_east_african_adr_summit_final.pdf>(accessed 25 June 2016)

of Justice (EACJ) are herein examined with a view to finding out whether they are viable fora for the resolution of the Migingo Island dispute

3.5.1 Arbitration

The International Law Commission defines arbitration as a procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.[38] The parties to a dispute, by way of a treaty, agree to settle their disputes through arbitration and lay down the procedure and rules for the same. The treaty may be concluded prior to or after the dispute has arisen. There can be a general treaty of arbitration between the parties providing for all present and future disputes amongst them to be settled through arbitration; or a treaty may be concluded for reference to arbitration after the dispute has arisen. Equally, there can be an arbitration clause in a treaty which is not primarily an arbitration treaty, for example, a treaty of commerce, providing that differences related to matters within the purview of the treaty shall be determined by arbitration.

Arbitration is essentially a consensual procedure. In essence, it is a third-party decision, but the role of the disputing parties is all pervasive, which affects the whole procedure of arbitration. An essential element of arbitration, as opposed to good offices and mediation, is that it necessarily implies the duty of the parties to abide by the award that is made. Arbitration, in contrast to conciliation, leads to a binding settlement of a dispute on the basis of law. The arbitral body is composed of judges, normally appointed by the parties. This body may be established ad hoc by the parties or it may be a continuing body set-up to handle certain categories of disputes.

[38] (1952) 34 II YbILC, p. 202

Arbitration differs from judicial settlement in that, as a rule, the parties have the competence to appoint arbitrators, to determine the procedure and, to a certain extent, to indicate the applicable law.

3.5.2 The International Court of Justice (ICJ)

The International Court of Justice (ICJ) is by far the most important international organ available to the international community for judicial settlement of international disputes. The ICJ is the principal judicial organ of the United Nations (UN).[39] The relationship between the Court and the UN is emphasized in Article 93 of the Charter, which declares that all members of the UN are *ipso facto* parties to the Statute of the International Court of Justice. Other provisions of the Charter, that is, Articles 94-96, relating to the enforcement of the judgements of the Court and its advisory jurisdiction, conditions under which non-members of the UN may become parties to the Statute of the Court (Article 93(2)), give added emphasis to the association of the Court with the UN.

From its inception, the ICJ was envisaged as a fundamental forum for international dispute settlement and, potentially, among the strongest mechanisms for the effective enforcement of international law.[40] The Court's jurisdiction is two-fold, that is, contentious and advisory. But its jurisdiction is subject to the fundamental principle of international law that no state is to be compelled to submit its disputes with other States to any kind of pacific settlement. Therefore, the basis of jurisdiction of the Court is the consent of the litigating States, given either generally and in advance, or

[39] Article 92, UN Charter, 24 October 1945; 1 UNTS XVI
[40] Llamzon, P. *'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice'*, 18 European Journal of International Law; 815-852 (2008)

ad hoc upon the occurrence of a dispute. However, the principle of consent is less significant in the context of the Court's advisory jurisdiction.

Contentious jurisdiction may be classified under two categories, namely, conventional, under the principle of *forum prorogatum* and compulsory.[41] Under Article 36(1) of the Statute, the Court has jurisdiction over all cases which the parties refer to it and all matters specially provided for in the Charter of the UN or in treaties and conventions in force. Reference of a matter to the Court can be made by a special agreement known as a *compromis*, whereby two or more States agree to refer a particular and defined matter to the Court for a decision. The distinguishing feature of the special agreement is that jurisdiction is conferred and the Court seized of the case by the mere notification to the Court of the agreement.[42]

The more usual method of conferring jurisdiction is by inserting a compromissory clause in a bilateral or multilateral treaty in force. The treaty may be one specifically providing for the reference of a given dispute to the court. For example, in the *Asylum Case (Peru v Columbia)*[43] the jurisdiction of the Court was based on the so called Agreement of Lima and the parties agreed that 'proceedings before the recognised jurisdiction of the Court may be instituted on the application of either of the parties'.

[41]Verma, S.K., *An Introduction to Public International Law*(Prentice-Hall of India Private Limited Publisher, New Delhi, 1998), p. 344
[42] Article 40, Statute of the International Court of Justice, 18 April 1946; 1 UNTS XVI
[43] (1950), ICJ Rep. 266

The treaty may also be a general treaty of peaceful settlement of disputes. For example, in the *Nuclear Tests case (Australia v. France)*[44] Australia founded its application to the Court on the General Act of 1928. In all cases other than those instituted by notification of a special agreement, proceedings are commenced by the unilateral application of one of the parties to the Court pursuant to Article 35(2) and (3) of the Rules of the Court.

The principle of *forum prorogatum* (prorogated jurisdiction consented to by the conduct of the parties) is a special form of conventional jurisdiction conferred on the Court where the consent is based on the successive acts of the parties to the case.[45] Instead of a special agreement or a *compromis* referring the dispute to the Court, a unilateral reference of a dispute by one party is sufficient to confer jurisdiction upon the court if the other party or parties to the dispute tacitly consent to the reference, then or subsequently. Put in other words, it is enough if there is a voluntary submission to the jurisdiction. For example, in the *Corfu Channel Case (Preliminary Objection),*[46] in its letter of July 2, 1947, Albania agreed to appear before the Court in an action brought by the United Kingdom.

In prorogated jurisdiction of the Court, the respondent State usually refrains from contesting the Court's jurisdiction once the proceedings have been instituted. In considering whether jurisdiction has been conferred by the conduct of the respondent, the Court will have regard to the whole of its conduct. Assent by conduct can scarcely

[44] (1974), ICJ Rep. 253
[45] Verma, S.K, *An Introduction to Public International Law*(Prentice-Hall of India Private Limited Publisher, New Delhi, 1998), p. 345
[46] (1948), ICJ Rep. 15

be established if the respondent State consistently denies that the Court has jurisdiction. In the *Anglo-Iranian Oil Co. (Pleading),* [47] Iran's refusal to accept the United Kingdom invitation to appear before the Court led to the conclusion that it refused to confer jurisdiction based on the *forum prorogatum* principle.

Where the respondent state is not subject to the Court's jurisdiction at all, that is, it is not a member of the UN, some positive act is required in order to create jurisdiction. This may be done by pleading to the merits of the case, including filing a counterclaim.[48] The doctrine is implicit in Article 40(1) of the Statute of the Court and Rule 38(2) of the Rules of the Court.

The important source of the Court's compulsory jurisdiction is Article 36(2) of the Statute, commonly referred to as the optional clause, which provides:

> the states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning
>
> a) The interpretation of a treaty;
> b) Any question of international law;
> c) The existence of any fact which, if established would constitute a breach of an international obligation;
> d) The nature or extent of the reparation to be made for the breach of an international obligation.

The jurisdiction of the Court is accepted by a State making a unilateral declaration addressed to the Secretary-General of the United Nations.[49] This declaration will be operative against any other declarant State accepting the obligation of the Court under

[47] (1952), ICJ Rep. 17
[48] Verma, S.K., *An Introduction to Public International Law*, (Prentice-Hall of India Private Limited Publisher, New Delhi, 1998), p. 346
[49] Article 36(4), Charter of the United Nations, 24 October, 1945, 1 UNTS XVI

this clause, and, in this respect, it is always conditional. A State may withdraw its declaration if it contains a clause to this effect or if due notice has been given and all other declarant States do not object to it. Where a State has denounced its declaration in contravention of its terms, it can still be made respondent on the strength of the declaration. Put differently, if a matter has properly come before the Court under Article 36(2), the Court's jurisdiction is not divested by the unilateral acts of the respondent State in terminating its declaration.

In the *Right of Passage Over Indian Territory Case*,[50] India raised objection to the Court's jurisdiction, among others, on the wording of Portugal's declaration to terminate "by notifying the Secretary-General of the United Nations and with effect from the moment of such notification". The Court observed that such a notification would not have a retroactive effect.

Declarations made under the optional clause operate subject to the principle of reciprocity. Article 36(3) of the Statute provides that a State may make a declaration under paragraph 2 of Article 36 unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time. Similarly, with minor exceptions, all declarations that are filed with the Court contain reservations excluding certain kinds of disputes from compulsory jurisdiction of the Court. Such reservations may revolve around disputes related to matters within the domestic jurisdiction of the declaring State or disputes between the member States of the British Commonwealth.

[50] *Right of Passage Over Indian Territory Case (Portugal v India) (Preliminary Objections)* (1957) ICJ Rep. p. 125

Kenya filed a declaration on 19 April, 1965 pursuant to Article 36(2) of the Statute recognising as compulsory the jurisdiction of the Court and deposited it with the Secretary-General of the United Nations.[51] However, the same contained several reservations, including one on disputes with the government of any State which, on the date of the declaration was a member of the Commonwealth of Nations or became such a member subsequently.[52] Accordingly, without withdrawing her reservation first, Kenya cannot file her case against Uganda over Migingo Island at the Court as Uganda is a member of the Commonwealth of Nations.

The Court also has Advisory jurisdiction. Under Article 65(1) of the Statute, the Court is empowered to give advisory opinion on any legal question at the request of a body authorised by or in accordance with the Charter of the United Nations to make such a request. The General Assembly and the Security Council are authorised to make such requests.[53] Other organs of the UN and the specialised agencies, if authorised by the General Assembly may also seek advisory opinions of the Court on legal questions arising within the scope of their activities.[54]

Advisory jurisdiction of the Court is only confined to legal questions. The Court may refrain from giving an advisory on a purely academic question, but if the opinion sought may ultimately assist the concerned international organisation in discharging its functions, the questions are not to be deemed purely academic. In the *Advisory*

[51] Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court < https/treaties.un.org>(accessed 12th June 2017).
[52] Ibid.
[53]Article 96(1), Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[54] Article 96(2); Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

Opinion of the Western Sahara Case,[55] Spain stated that the questions submitted to the Court were academic and devoid of purpose or practical effect, seeing that the United Nations had already settled the method to be followed for the decolonization of Western Sahara. The Court, nonetheless, went ahead to answer questions which had been submitted for opinion, noting that the advisory opinion would furnish the Assembly with the elements of a legal character relevant to further discussion of the problem.

The absence of consent of a State or States does not prevent the Court from giving an advisory opinion on a legal question, the solution of which may clarify a fact in a dispute between States *inter se* or between a State and an international institution, without affecting the substance of the dispute. That is not to say that the Court does not regard the consensual basis of its advisory opinion seriously. In the *Western Sahara Case* [56], the Court had this to say:

> Consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion.[57]

An advisory opinion lacks the binding force of a judgment in a contentious case. However, they have been usually accepted and acted upon by the requesting body and States concerned. Advisory opinions have a strong persuasive value.

The decision of the Court is only binding between the parties and in respect of that particular case.[58] On the binding nature of the decision of the Court on the parties involved, the obligation to abide by the Court's decision furthermore stems from

[55] (1975) ICJ Rep. 12
[56] *Western Sahara (Advisory Opinion)* (1975), ICJ Rep. 12
[57] Ibid, p.47

Article 94 (1) of the UN Charter which states that each Member of the UN undertakes to comply with the decision of the ICJ in any case to which it is a party.

On the question of enforcement of the Court's decision, if any party to a case fails to perform the obligations on it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.[59]

3.5.3 African Court of Justice and Human Rights

The African Court of Justice and Human Rights (ACJHR) is an international and regional Court within the African continent. It was founded in 2004 by a merger of the African Court on Human and Peoples Rights and the Court of Justice of the African Union.[60] It is the principal judicial organ of the African Union.[61] According to Article 3 of the Statute, the Court is composed of sixteen judges who are nationals of State parties. Each geographical region of the continent is, where possible represented by three judges except the western region which is to be represented by four judges. However, the Statute prohibits the Court from having more than one judge from a single member State.

The judges of the Court are elected for a period of six years and may be re-elected only once. However, the term of office of eight judges, four from each section, elected

[60] Article 2, Statute of the African Court of Justice and Human Rights, 1 July 2008; 48 I.L.M 317
[61] Ibid.

during the first election ends after four years.[62] Under Article 16 of the Statute, the Court has two sections: a General Affairs section composed of eight judges, and a Human Rights section composed of a similar number of judges. When the Court is sitting, a quorum of nine judges is required for deliberations of the full Court while a quorum of six judges is required for deliberations of the General Affairs section or the Human and People's Rights section, respectively.[63]

Under Article 28 of the Statute, the Court's jurisdiction is wide and it relates to all cases and all legal disputes submitted to the Court in accordance with its Statute. Notably, the Court has jurisdiction to deal with any issue relating to any question of international law.[64] Article 33 of the Statute provides the process by which the Court becomes seized of a case. A State wishing to submit a case before the Court must submit a written application to the Registrar of the Court stating the subject of the dispute, the applicable law and the basis of jurisdiction.

In addition, the Court may give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOCC), the Financial Institutions, or any other organ of the African Union as may be authorised by the Assembly.[65] The applicable law is to be found under Article 31 of the Statute and it includes the Constitutive Act of the African Union, international treaties, whether general or particular as ratified by the contesting States and the general

[62] Ibid.
[63] Ibid
[64] Article 28(d) of the Statute of the ACJHR, 1 July 2008; 48 I.L.M 317
[65] Article 53 of the Statute of the ACJHR, 1 July 2008; 48 I.L.M 317

principles of law recognized universally or by African States. However, nothing stops the court from deciding a case *ex aequo et bono* if the parties thereto so agree.

3.5.4 The East African Court of Justice

The East African Court of Justice (EACJ) is established under 9(1)(e) of the Treaty Establishing the East African Community (EAC).[66] Its major mandate is to ensure adherence to law in the interpretation and the application of and compliance with the Treaty.[67] The composition of the Court is limited to fifteen judges of whom not more than ten shall be appointed to the First Instance Division and not more than five shall be appointed to the Appellate Division. The judges are appointed by the Summit from among persons recommended by the partner States who are of proven integrity, impartiality and independence and who fulfil the conditions required in their countries for the holding of such high judicial office, or are jurists of recognised competence.[68]

Article 27 of the Treaty clothes the Court with the jurisdiction. It states that the Court shall initially have jurisdiction over the interpretation and application of the EAC Treaty. Article 27(2) of the Treaty further provides for extended jurisdiction in this language:

> The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a Protocol to operationalize the extended jurisdiction.

Efforts to operationalize this extended jurisdiction begun many years ago, culminating in the Draft Protocol by the Council of Ministers in 2005. However, the Protocol has

[66] The Treaty for the Establishment of East African Community, 30 November 1999; 2144 UNTS 255
[67] Ibid, Article 23
[68] Ibid, Article 24

not been approved. In 2015, the Summit gave the Court jurisdiction over international crimes, including terrorism.[69] However, the East African Court of Justice (EACJ) currently lacks extended jurisdiction that would enable it to hear and determine the Migingo Island dispute between Kenya and Uganda.

3.6 Conclusion

The aim of this chapter was to examine the available means and fora for resolution of the Migingo Island dispute under international law in line with one of the research questions as to whether there exists such fora. In responding to the research question identified, the findings have validated one of the hypotheses that there exists appropriate means and fora under international law for the resolution of the dispute.

Further, the chapter has demonstrated that inter-state dispute resolution is consistent with the view that public international law comprises a set of rules and practices governing inter-state relationships in accordance with the theory of legal positivism. At the same time, legal resolution of disputes takes place between States conceived as having equal status under international law which consent to such modes of dispute resolution.[70] The chapter has demonstrated the availability of various mechanisms and fora, such as negotiation, inquiry (fact-finding), good offices, conciliation, mediation, arbitration, and judicial settlement.

[69] C Mathuki, 'EACJ to Handle Criminal Cases', *The East African* (Nairobi, 7 December 2013) <www.theeastfrican.co.ke> (accessed on 1 March, 2017)

[70] Robert O. Keohane, Andrew Moravcsik, and Anne Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' <http://www.priceton.edu/~slaughter/Articles/IOdispute.pdf>(accessed 1st June, 2016)

None of these means of international disputes settlement is compulsory.[71] States are, thus, at liberty to adopt any of the above discussed means of dispute resolution that may suit the circumstances of their case. The next chapter discusses the prospects and challenges of resolving the Migingo Island dispute under international law in view of the means and fora identified in this chapter.

[71]Patibandla Chandrasekhara Rao, *Law of the Sea: Settlement of Disputes* (Oxford University Press, Oxford, 2015), p. 2

CHAPTER FOUR

PROSPECTS AND CHALLENGES IN RESOLVING THE MIGINGO ISLAND DISPUTE

4.1 Introduction

This chapter addresses the prospects and challenges of resolving the Migingo Island dispute under international law. In so doing, the chapter tests the hypothesis that there are real prospects as well as potential challenges to the resolution of the dispute through the means and fora identified in the previous chapter.

International law obligates States to settle their disputes by the various peaceful means enumerated under Article 33(1) of the UN Charter. However, there is often a considerable gap between what is possible in theory and what States are prepared to do in practice. Moreover, even when a particular method of settlement is available and utilised, there is no guarantee that it will be effective in a given case. This is largely because international disputes must also be seen in the context of politics in which they thrive and not purely from a legal perspective. For example, the Migingo Island dispute must be viewed against the boundary politics of the two neighbouring States.

Uganda has always viewed the whole of western Kenya as part of its territory. For instance, in 1976, Ugandan President Idi Amin attempted to redraw the boundaries of the two countries.[1] President Amin laid claim to all Kenyan districts that were part of the Uganda Protectorate before the colonial re-demarcation of the territorial

[1] Musinguzi, Bamuturaki 'The Day Idi Amin Wanted to Annex Western Kenya' *The East African* (Nairobi, 10 September 2011) <***www.theeastafrican.co.ke***>(accessed on 20th October, 2017)

boundaries stretching all the way to Naivasha, arguing that he had a duty as the supreme commander of the Uganda's Armed Forces to liberate his country's territories.[2]

The reluctance of States to submit disputes to third-party settlement on the basis of international law may be for many reasons and not due to any difficulty in predicting the results. In fact, when the law clearly supports one of the parties to the dispute as may be the Kenyan case with the Migingo Island, there is less likelihood that the dispute will be settled in accordance with that law. This is because in such a situation, one of the parties is seeking a change in the existing law or the status quo and not willing to accept the existing law as the basis for the resolution of the dispute.

Similarly, no single method may be an antidote in every situation, so that whereas negotiation may have been demonstrated to have effectively worked in West Africa, it does not necessarily follow that it will work in a dispute involving East African States.

4.2 The Prospects and Challenges in Resolving the Migingo Island Dispute by Judicial Means

Courts exist before a dispute arises and they are charged with making decisions based on justice and the rule of law. The particular interests of the States are less important than the legality of the court's decision. Compared to other dispute resolution mechanisms, judicial settlement has a number of advantages. For example, it is impartial, impersonal, orderly, legally binding, with the effect of making a final

[2] Ibid

disposition of the dispute. Judicial settlement may also reduce tensions by 'depoliticizing' an issue which is the subject matter of the dispute. On the international plane, the International Court of Justice is easily the most important international body for settlement of international disputes. Of course, there are other regional courts, but for purposes of this study we shall only explore the prospects and challenges of resolving the Migingo Island dispute at the International Court of Justice, the African Court of Justice and Human Rights and the East African Court of Justice.

4.2.1 The International Court of Justice (ICJ)

Both Kenya and Uganda are members of the United Nations and are, therefore, *ipso facto* parties to the Statute of the International Court of Justice (ICJ).[3] Indeed, Kenya and Uganda have filed their respective declarations under Article 36(2) of the ICJ Statute submitting to the compulsory jurisdiction of the Court. It follows that *prima facie*, the Court has jurisdiction to determine the Migingo Island dispute between the two States pursuant to Article 36 (1) of the Statute of the International Court of Justice, which clothes the court with jurisdiction over all cases which the parties refer to it and all maters specially provided for in the Charter of the United Nations or in treaties and conventions in force. This in itself constitutes a great prospect for the resolution of the dispute by the International Court of Justice.

One of the inherent challenges of the Court's jurisdiction over the Migingo Island is that on 19th April, 1965, Kenya filed several reservations in respect of its declaration recognising as compulsory, the jurisdiction of the Court. One of the said reservations

[3] Article 93(1), Statute of the International Court of Justice, 18 April 1946; 1 UNTS XV1

was that it shall not take for resolution by the Court, a dispute between itself and a government of any State which, on the date of declaration was a member of the Commonwealth of Nations or became such a member subsequently.[4] Uganda is a member of the Commonwealth of Nations. It follows that so long as Kenya's reservation stands, she cannot refer the Migingo Island dispute with Uganda to the International Court of Justice.

Unlike Kenya, Uganda's declaration recognising as compulsory the jurisdiction of the International Court of Justice, in conformity with Article 36(2) of the Court's Statute does not have any reservations. [5] Uganda recognises the Court's jurisdiction as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, and on condition of reciprocity. [6] Under the reciprocity principle, a State accepts the Court's jurisdiction as against another State in so far as that State has also accepted the Court's jurisdiction.

Further, notwithstanding the fact that Uganda has not filed any reservations limiting the Court's jurisdiction, it may nonetheless rely on Kenya's reservation not to take for resolution by the court, a dispute between itself and a member of the Commonwealth as a basis for exempting itself (Uganda) from the Court's jurisdiction. The ICJ addressed itself to this proposition in the *Interhandel Case* [7] in which it stated that reciprocity:

[4] Registered under No. 7697; 531 UNTS 113
[5] Registered under No.6946; 531 UNTS 113
[6] Ibid.
[7] (1959) ICJ Rep. 6

> …..in the case of declarations accepting the compulsory jurisdiction of the Court enables a party to invoke a reservation to that acceptance which it has not expressed in its own declaration but which the other party has expressed in its declaration. [8]

This principle was successfully invoked in the *Aegean Sea Continental Shelf Case* [9] in which Turkey was allowed to rely upon a Greece reservation to exclude the Court's jurisdiction.

The challenge of the Court's jurisdiction is not insurmountable. At the time of filing the said declaration, Kenya reserved the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, to add to, amend, or withdraw the same.[10] Kenya can, therefore, overcome the jurisdictional challenge by amending or withdrawing the reservation altogether to allow it to unilaterally apply to the International Court of Justice and invoke the Court's jurisdiction over the Migingo Island dispute.

Once Kenya makes a unilateral reference of the dispute to the Court, the Court becomes seized of the same. Uganda may subsequently submit to the Court's jurisdiction voluntarily. Case law supports this option. In the *Corfu Channel Case,* [11] Albania agreed to appear before the court in an action brought by the United Kingdom in its letter of July 2, 1947. However, even if Uganda were to deliberately refuse to appear before the Court or otherwise take part in the proceedings of the Court over the Migingo Island dispute, Kenya would still call upon the Court to decide in favour of its claim pursuant to Article 53 of the ICJ Statute.

[8] Ibid, note 4
[9] (Greece v. Turkey) (1978) ICJ Rep. 3
[10] Ibid.
[11] United Kingdom v. Albania(1948), ICJ Rep. 15

4.2.2. The African Court of Justice and Human Rights (ACJHR)

The African Court of Justice and Human Rights (ACJHR) is the main judicial organ of the African Union.[12] The foremost jurisdiction of the Court is over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and People's Rights, the Protocol and any other relevant human rights instruments ratified by the States concerned.[13] However, under Article 28 (d) of the Statute, the court has jurisdiction over all cases and all legal disputes submitted to it in accordance with the Statute which relate to any question of international law. In light of the said Article, the African Court of Justice and Human Rights has jurisdiction over the Migingo Island dispute between Kenya and Uganda. This is because the dispute raises international law issues of territorial sovereignty and the application of the principle of *uti possidetis juris*, among others

Further, State Parties to the Protocol on the Statute of the African Court of Justice and Human Rights are eligible to submit cases to the court for determination.[14] Kenya is a State Party to the said Protocol and may institute proceedings in respect of the Migingo Island dispute pursuant to Article 33 of the Statute which provides as follows:

> Cases brought before the court by virtue of Article 29 of the present Statute shall be submitted by written application addressed to the Registrar. The subject of the dispute, the applicable law and the basis of jurisdiction shall be indicated.

[12] Article 2(I), Statute of the African Court of Justice and Human Rights, 1 July 2008; 48 I.L.M 317
[13] Ibid, Article 28
[14] Ibid, Article 29

This is the procedure to be adopted before the General Affairs section of the Court. It is submitted that there are good prospects of resolving the Migingo Island dispute at the African Court of Justice and Human Rights in accordance with the Constitutive Act of the African Union, and other applicable law pursuant to Article 31 of the Statute.

One of the challenges to the resolution of the Migingo dispute in this forum is that unlike the ICJ which has experience in handling border disputes, the ACJHR lacks such experience. Another challenge of resolving the dispute at the Court is that States are generally reluctant to submit willingly to judicial process because there is no guarantee that the outcome would be in their favour. It is debatable as to whether this forum offers the best prospects of resolving the dispute. It, therefore, remains to be seen whether the parties in this dispute would be willing to submit to the court and also abide by its decision.

4.2.3. The East African Court of Justice (EACJ)

The East African Court of Justice (EACJ) is a treaty based judicial body of the East African Community tasked to ensure adherence to law in interpretation and application of and compliance with the East African Community Treaty. Currently, the EACJ lacks jurisdiction to hear and determine the Migingo Island dispute. The extended jurisdiction of the Court which is envisaged under Article 27(2) of the treaty has not been operationalized through a Protocol.[15] The Court's jurisdiction remains limited to interpretation and application of the EAC Treaty. Indeed, no State party has

[15] Article 27(2), Treaty for the Establishment of East African Community, 30 November 1994; 2144 UNTS 255

instituted proceedings against a fellow State party yet. The EACJ therefore offers no prospects for the settlement of the Migingo Island dispute as currently established.

4.2.3 Arbitration

Can the Migingo Island dispute be settled through arbitration? Arbitration was defined by the International Law Commission as 'a procedure for the settlement of disputes between States by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.[16] From this definition it is clear that arbitration is very much akin to the court process. It is, therefore, probable that what dissuades a party from submitting to the court could very well dissuade them from submitting to the arbitration process. For example, States attach high value to flexibility that can only be retained in a diplomatic means of dispute resolution.

Already, since the emergence of the dispute in 2004, the top leadership of both Kenya and Uganda has not done much in resolving the same. It is doubtful that the two States would submit to the arbitration process which entails appointing an arbitrator, determining how the proceedings would be conducted and raising the questions for determination. This is largely because they probably do not consider the Migingo Island dispute to be worth such efforts. It is therefore contended that arbitration may not present a very good prospect for the resolution of the Migingo Island dispute.

4.3 Diplomatic Means

One of the surest ways of ensuring that international disputes are settled by peaceful means in such a manner that international peace and security, and justice, are not endangered is by employing diplomatic means of dispute resolution. Indeed,

[16] *(1953) 11 ILC; p. 202*

negotiation, inquiry, mediation and good offices, as well as conciliation, have been employed variously to avert use of force whenever and wherever international disputes arise.

The Charter of the United Nations gives every member State and the Secretary-General, the right to invoke collective mediation of the United Nations by bringing to the attention of the Security Council or the General Assembly any dispute, or any situation which might lead to international conflict or give rise to a dispute.[17] An illustration of tendering good offices by the Security Council was seen in the Dispute between Holland and Indonesia. The Security Council, by its resolution of August 25, 1947 resolved to tender good offices to the parties. A Good Offices Committee of the Council consisting of Belgium, Australia and the USA, was appointed and it helped the parties in settling the dispute.[18]

Is the Migingo Island dispute between Kenya and Uganda amenable to settlement under any of these diplomatic means? Negotiation is the principal diplomatic means of handling all international disputes. Negotiations between States are usually conducted through 'normal diplomatic channels,' that is, by the respective foreign offices or by diplomatic representatives. They may also be carried out by 'competent authorities' of each party, that is, by representatives of the particular ministry or department responsible for the matter in question. Already, since the dispute arose, several bilateral meetings have been held at the Heads of State, ministerial and senior official levels from March 2009 to 2013 towards peaceful settlement.[19]

---

[17] Articles 34 and 35, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

[18] Verma, S.K., An Introduction to Public International Law(Prentice-Hall of India Private Limited Publisher, New Delhi 1998), p. 333

[19] Dennis Onyango, 'Kenya Uganda in Talks Over Migingo Island Dispute' *The Standard* (Nairobi, 21 November 2013) <www.standardmedia.coke>(accessed on 26 May 2016)

There was the Kampala bilateral ministerial meeting held in Uganda on 13th March, 2009. The meeting agreed on the primary reference documents to be used to ascertain the boundaries, the withdrawal of security forces from the island, a joint boundary survey, stoppage of harassment of fishermen and the enforcement of Lake Victoria Fisheries Organization (LVFO) fishing regulations.[20] This ministerial meeting had been preceded by the Heads of State meeting held on the side-lines of the Lusaka AU Summit on 6th March, 2009, during which meeting it was agreed that Uganda would withdraw its flag and security forces from the island.[21]

A second bilateral ministerial meeting was held on 11th May, 2009. This was a follow up of the Kampala, Lusaka, and Arusha meetings; the latter two meetings were held on the margins of Southern African Development Community (SADC) and EAC Summit meetings, respectively, held between the two Heads of State.[22] The bilateral ministerial meeting was used to launch the survey of the Kenya-Uganda border in Lake Victoria, which never materialised after the Ugandan technical team withdrew its work on 2nd June 2009, saying that they needed to consult further.[23]

To date, all these attempts at negotiation have not yielded much and the Migingo island dispute remains unresolved. This is not very hard to explain. For a negotiated settlement to be possible, the parties must believe that the benefits of an agreement outweigh the losses. If their interests are diametrically opposed, an arrangement which would require one side to yield all or most of its position is unlikely to be

[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.

acceptable. This explains the position between Kenya and Uganda over Migingo Island. Uganda is not keen on the resolution of the dispute. It would rather not disturb the status quo of its occupancy of the Migingo Island because it stands to lose if the dispute is resolved and the island's ownership reverted to Kenya.

The colonial maps, as well as the 1926 Order in Council, show that Migingo Island lies within the Kenyan territory. This position is known by Uganda, hence the reason why they are not agreeable to negotiations that may lead to the establishment of the truth through the surveying of boundaries. Accordingly, negotiation has its own share of challenges and offers little prospects in resolving the Migingo Island dispute

Is mediation a viable option? When the parties to an international dispute are unable to resolve it by negotiation, the intervention of a third party is a possible means of breaking the impasse and producing an acceptable solution. This third party intervention may be by way of good offices, conciliation or mediation. Of the three third party interventions, mediation appears to carry better prospects in resolving the Migingo Island dispute.

Firstly, mediation is likely to be particularly relevant when the dispute has dragged on for long and the parties are compelled to rethink their policies. A stalemate is clearly one such situation and even though there is no admission by either government, there is a stalemate over the Migingo Island dispute. It is imperative for the two governments to acknowledge that mediation provides an avenue for the resolution of the dispute since attempts at negotiation have so far not worked. Further, mediation

has the advantage of allowing the two States to retain control of the dispute even if negotiations are deadlocked.

Would it be possible to find a willing mediator? Mediation may be performed by international organisations, by states or by individuals. For example, in the dispute between Britain and Argentina over the invasion of the Falklands Islands in 1982, first the United States, in the person of Alexander Haig, offered to mediate then the United Nations Secretary-General Perez de Cuellar tendered his good offices.[24]

Third party States will often step forward and offer mediation services either for influence or for their own interests. For example, in 1980 Algeria pursued a combined good offices and mediation role in the diplomatic hostages' dispute between the United States and Iran**.**[25] The dispute, after some very complex negotiations over Iranian assets in the United States, was eventually settled. The settlement not only enhanced Algeria's reputation in the eyes of the Americans, but more importantly, resolved a crisis which could have led to war between a super-power and a Muslim State.[26]

In the Migingo Island dispute, Great Britain would for example, be an ideal mediator owing in part to the historical ties it has with the two former colonies. It is was during the colonisation of the two States by Britain that the 1926 British Order-In Council delimited the boundary in Lake Victoria, which boundary is the subject of the dispute.

[24] Merrils, J. G, *International Dispute Settlement, 4th* edn. (Cambridge University Press, Cambridge, 2005), p. 30
[25] Ibid
[26] Ibid., p. 31.

Britain would, therefore, not only be an acceptable mediator, but would also lend authority to the mediation process.

However, it must be noted that mediation can only be as effective as the parties wish it to be. Mediation may founder if the issue in dispute is politicised because a government may have taken a position from which it cannot retreat without attracting accusations of betrayal.[27] The Migingo Island dispute has become a hot political issue in Kenya. For example, on 9th March, 2009, it was reported that former President Moi had stated that the island belongs to Kenya.[28] This was followed up by the then ODM Chief Whip, Jakoyo Midiwo, who accused the government of lacking commitment to solve the Migingo Island dispute.[29] However, with a committed mediator and willing parties, mediation offers the best chance of resolving the Migingo Island Dispute.

The biggest challenge to the settlement of the dispute through mediation is the parties' willingness to submit to the mediation process. This is because mediation cannot be forced on the parties to an international dispute, but can only take place if they consent. This can be overcome by having a would-be mediator who is acceptable to both parties, is committed to their cause and, one who is perceived to be strictly neutral.

4.4 Conclusion

This chapter was dedicated to the discussion of the prospects and challenges to the resolution of the Migingo Island dispute in international law. The discussion has

[27] Ibid.
[28] Allan Kisia, 'Migingo Island is Ours, Says Moi as MP Faults State' *The Standard* <https://www.standardmedia.co.ke> (accessed 3rd March, 2017)
[29] Ibid.

demonstrated that while there are prospects of resolving the dispute through a number of pacific means, there are corresponding challenges that must be addressed. These challenges are however surmountable and should not stand in the way of a peaceful resolution of the dispute. The next chapter shall highlight the findings of the study and make recommendations that would offer better prospects of resolving the Migingo Island dispute between Kenya and Uganda while mitigating against the existing challenges.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5. 1 Introduction

This study was informed by the challenge that the Migingo Island dispute, if not resolved amicably, has the potential to endanger international peace and security, especially within the East African region. As a result, the study set out to answer research questions on the the international law issues involved in the Migingo island dispute; the available means and fora for resolution of the dispute under international law; and the prospects of and challenges to the resolution of the dispute under international law.

The main hypothesis of the study was that the conflict over Migingo Island is a legal dispute that raises international law issues. The other two hypotheses related to the appropriate mechanisms and fora as well as prospects and challenges under international law for the pacific resolution of the Migingo Island dispute.

5.2 Conclusion

The study has established that the conflict between Kenya and Uganda over the Migingo Island is indeed a legal dispute under international law. The conflict satisfies one of the tests set out by the ICJ in *the Case Concerning the Northern Cameroons (Cameroon v United Kingdom)*[1], in which the Court held that the judgment of the Court on the conflict had to have some practical consequences in the sense that it can affect existing legal rights or obligations and, thus, remove uncertainty from their

[1] (1963) ICJ Rep. 15

legal relations. The Migingo island dispute has practical consequences on the rights of the states involved in the sense that it affects existing legal rights and obligations.

The study found that the point of conflict is whether the Island lies on the Kenyan or Ugandan side of the international boundary. The study further found that a determination of this fact would impact on the legal rights and obligations of the two states under international law. For example, if a determination were to be made that the island belongs to Kenya, Uganda would have a legal obligation to respect the territorial integrity of Kenya over the island. In other words, any continued occupation or interference with the island by Uganda would be deemed to be a violation of the territorial integrity of Kenya.

The study further found that Kenya has always exercised territorial sovereignty over the Island since 1926. The geographical co-ordinates, as described by the First Schedule to the Kenya Colony and Protectorate (Boundaries) Order in Council, place Migingo Island on the Kenyan side of the international boundary with Uganda. Even before Uganda raised her claim over the island in 2004, the island was not *terra nullas*, and could therefore, not be the subject of occupation by Uganda. Similarly, Kenya has never ceded the Migingo Island to Uganda. Uganda cannot claim to have acquired a derivative title over the Island from Kenya under international law.

On the question whether Uganda can claim Migingo Island through the doctrine of prescription under international law, the study found that the doctrine of prescription is based on effective control over territory. When faced with competing claims over territory, international tribunals often decide in favour of the state which can prove a

greater degree of effective control over the disputed territory, without basing their judgment on any specific mode of acquisition. The *Legal Status of Eastern Greenland Case* (Norway v. Denmark) [2] was cited for this proposition. In the said case, Norway occupied and claimed as its own parts of the Eastern Greenland territory, a territory previously claimed by Denmark. Denmark later sued Norway before the Permanent Court of International Justice on the ground that Norway violated Danish sovereignty in Eastern Greenland. The PCIJ gave judgment in favour of Denmark because Denmark had greater control over the Eastern Greenland. This study finds that Kenya has had greater control over the Migingo Island, which is backed by the evidence of long uninterrupted occupation since 1926. Indeed, the island is in Nyatike Constituency of Migori County.

The study further found that even though Kenya has not lodged an official protest with the United Nations, it has not remained quiet over the Ugandan activities on the Island. Uganda cannot, therefore, claim the island by way of prescription and acquiescence on the part of Kenya.

The study further found that the principle of *uti possidetis juris*, which emphasizes the need for respecting colonial boundaries established upon independence of States is applicable. The dispute between the two states over the island should, therefore, be determined on the basis of the said principle. On the question of whether there are available means of resolving the dispute without resorting to force, the study found that all the pacific means of dispute resolution provided under Article 33(I) of the UN Charter are available, albeit with challenges. The study found that one of the

[2] (1933) PCJI Ser.A/B, No.53

foremost challenges of dispute settlement in international law is that parties must consent both to the implementation of the process of dispute resolution, as well as the specific means to be engaged. The study relied on the *Eastern Carelia Case*[3] for this proposition. This challenge remains true, whether the mechanism sought to be employed is diplomatic or adjudicative.

The study further found that the most appropriate diplomatic means of settling the Migingo Island dispute is mediation because the stalemate between Kenya and Uganda requires a third party who could bring the parties together to find a common ground. The study cited, as an example, the dispute between Great Britain and Argentina over the Falkland Islands in 1982.[4] First, the United States, in the person of Secretary of State, Alexander Haig, offered to mediate then, the United Nations Secretary-General Perez de Cueller tendered his good offices.[5] In the instant dispute, the study found that Great Britain would be an ideal mediator owing, in part, to the historical ties it has with her two former colonies.

It was during the colonial era of the two states by Britain that the 1926 Kenya Colony and Protectorate (Boundaries) Order in Council delimited the boundary in Lake Victoria, which boundary is the subject of the dispute. Britain would not only be an acceptable mediator, but would also lend authority to the mediation process. However, the challenge to this prospect is the parties' willingness to submit to the mediation process.

[3] (1923) PCJI Ser. B, No. 5, p. 27
[4] Merrils, J.G., *International Dispute Settlement*, 4th edn. (Cambridge University Press, Cambridge, 2005), p. 30
[5] Ibid.

An in-depth analysis of the judicial settlement of the dispute was carried out. The study established that the East African Court of Justice lacks jurisdiction to determine the dispute because the extended jurisdiction which is contemplated by Article 27(2) of the Treaty establishing the East African Community has not been operationalized by way of a protocol.

Further, it was established that, by the wording of Article 28 of the Protocol on the Statute of the African Court of Justice which establishes the jurisdiction of the African Court of Justice and Human Rights, the Court has jurisdiction to entertain the Migingo Island dispute. Although there are no documented cases that the Court has handled between states, nothing stops Kenya from moving the Court as provided for under Article 33 of the said Statute. Equally, it was established that, *prima facie,* the International Court of Justice has jurisdiction over the Migingo Island dispute. This is so because Kenya filed a declaration on 19th April, 1965 submitting to the compulsory jurisdiction of the court and deposited the declaration with the Secretary- General of the United Nations.

However, the outstanding challenge to the Court's jurisdiction is that Kenya also filed a reservation that it shall not submit to the Court any dispute between itself and a government of any state which, on the date of the declaration was a member of the Commonwealth of Nations or became such a member subsequently. It is emphasized that the International Court of Justice represents a great prospect for the resolution of the dispute, considering the wealth of experience the Court has accumulated over the years settling such disputes. The jurisdiction challenge can be overcome by Kenya filing a notification of the intention to withdraw the reservation with the United

Nations Secretary- General. This would allow Kenya to invoke the Court's compulsory jurisdiction under Article 36(1) of the ICJ Statute by way of a unilateral application.

It suffices to conclude that although there are challenges in resolving the Migingo Island dispute between Kenya and Uganda under international law, there are equally great prospects of resolving the same by pacific means as provided under Article 33(1) of the UN Charter.

5.3 Recommendations

Having found that the Migingo Island dispute is amenable to pacific settlement under international law, this study makes the following recommendations:

(i) As members of the United Nations, both Kenya and Uganda have a legal obligation to settle their International dispute over the Migingo Island by peaceful means. Both states should consent to the implementation of the process of its resolution, as well as the specific mechanism to be engaged.

(ii) Kenya, which, by all means is the aggrieved party in this dispute, should file a notification of her intention to withdraw the reservation which bars her from taking Uganda or any member of the Commonwealth of Nations to the International Court of Justice with the UN Secretary-General. This will restore the Court's jurisdiction to deal with the dispute under Article 36(1) of the ICJ Statute.

(iii) In line with their international law obligation to settle disputes peacefully, both Kenya and Uganda should make a formal request to the Great Britain to consider acting as a mediator between the two states over the dispute, since mediation offers better prospects for its resolution. Great Britain shares a unique history with both States, having colonised them. Most importantly, it has expressed its willingness to mediate over the Migingo Island dispute

(iv) Kenya should invoke the jurisdiction of the African Court of Justice and Human Rights (ACJHR) under Article 28(d) of the Statute of the Court by submitting a written application to the Registrar, indicating the subject of the dispute, the applicable law and the basis of the court's jurisdiction for the determination of the dispute

(v) Kenya should formally request Great Britain to furnish it with the colonial maps which are available at the British National Archives. The maps show the boundary delimitations between Kenya and Uganda. These maps would be of great evidential value before any international tribunal that the Migingo Island lies within the Kenyan borders. The maps would also aid any mediation process.

BIBLIOGRAPHY

Text Books

1. Austin J, (W. E. Rumble (ed.)) *The Province of Jurisprudence Determined* (Cambridge University Press, Cambridge, 1995).

2. Basak C, *International Law for International Relations* (Oxford University Press, Oxford, 2010).

3. Boczek B, *International Law: A Dictionary* (The Scarecrow Press Inc., Maryland, 2005).

4. Brownlie I and Burns I, *African Boundaries: A Legal and Diplomatic Encyclopaedia*, (Hurst & Co. Publishers, London, 1979).

5. Brownlie I, *Principles of Public International Law*, 8th edn. (Oxford University Press, Oxford, 2012).

6. Dixon M, McCorquodale R and Williams S, *Cases and Materials on International Law*, 5th edn (Oxford University Press, Oxford, 2011).

7. Dixon M, *Textbook on International Law*, 7th edn. (Oxford University Press, Oxford, 2013).

8. Fitzmaurice M and Elias O, *Contemporary Issues in the Law of Treaties*, (Eleven International Publishing, Utrecht, 2005)

9. Garner B, (ed), *Black's Law Dictionary*, 9th edn. (Thomson West, New York, 2004).

10. Gbenga O, *International Law and Boundary Disputes in Africa*, (Routledge Publishers, London, 2015).

11. Hillier T, *Sourcebook on Public International Law* (Cavendish Publishing Limited, London, 1998).

12. Malanczuk M, *Akehurst's Modern Introduction to International Law*, 7th edn. (Routledge Publishers, London, 1997).

13. Merrils J. G, *International Dispute Settlement*, 4th edn. (Cambridge University Press, Cambridge, 2005).

14. Milano E, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Martinus Nijhoff Publishers, Leiden, 2006).

15. Duncan French et al. (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Oxford and Portland Publishers, Oregon, 2012).

16. Pan J, *Towards a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Martinus Nijhoff Publishers, Leiden, 2009).

17. Rao P, *Law of the Sea: Settlement of Disputes*, (Oxford University Press, Oxford, 2015).

18. Shaw M, *International law*, 7th edn. (Cambridge University Press, Cambridge, 2014).

19. Shaw M, *Title to Territory in Africa: International Legal Issues* (Claredon Press, Oxford, 1986).

20. Sterio M, *The Right to Self-Determination under International Law: 'Selfistans', Secession, and the Rule of Great Powers* (Routledge Publishers, New York, 2013).

21. Wallace R and Ortega O, *International Law*, 7th edn. (Sweet and Maxwell, London, 2013).

22. Weller M (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015).

23. Verma, S. K, *An Introduction to Public International Law* (Prentice-Hall of India Private Limited Publisher, New Delhi, 1998)

Journal Articles

1. Alheritiere D, *'Settlement of Public International Disputes on Shared Resources: Elements of a Comparative Study of International Instruments'*, 25 Natural Resources Journal; 701-712 (1985)

2. Erotokritou C, *'Sovereignty over Airspace: International Law, Current Challenges and Future Developments for Global Aviation'*, 4 Student Pulse; 2-4 (2012)

3. Heinegg W, '*Legal Implications of Territorial Sovereignty in Cyberspace'*, 89 International Law Studies; 124 (2013)

4. Ikenberry J, *'Liberalism in a Realist World: International Relations as an American Scholarly Tradition'*, 46 International Studies; 203-219 (2009)

5. Kassem T, *'Conciliation Mechanism: An Amicable Mechanism to Settle Business Disputes, Advantages and Disadvantages'*, 2 International Journal of Multidisciplinary and Current Research; 2 (2014)

6. Kornprobst M, *'The Management of Border Disputes in African Regional Sub-Systems: Comparing West Africa and the Horn of Africa', 40* The Journal of Modern African Studies; 369-393 (2002)

7. Llamzon A, *'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice'*, 18 European Journal of International Law; 815-852 (2008)

8. Okumu W, *'Resources and Border Disputes in Eastern Africa'*, 4 Journal of Eastern African Studies; 279-297 (2010)

9. Palmer G, *'Perspectives on International Dispute Settlement from a Participant', 43* Victoria University of Wellington Legal Research; 14 (2012)

10. Posner E and Yoo J, *'Judicial Independence in International Tribunals', 93* California Law Review, 8 (2005)

11. Reif L, '*Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes'*, 4 Fordham International Law Journal; 3 (1990)

12. Shaka J, '*Migingo Island: Kenyan or Ugandan Territory?*', 4 Journal of Conflictology; 1 (2013)

13. Wekesa P, *'Old Issues and New Challenges: The Migingo Island Controversy and the Kenya-Uganda Borderland'*, 4 Journal of East African Studies; 331-340 (2010)

14. Zhengquan L and Meirong L, *'Solution of Territory Dispute and Effective Control Principle: The Perspective of China and its Neighbouring Countries'*, 3 International Journal of Law and Social Sciences; 43 (2013)

Electronic Sources

1. Kisia A, et al, *'Migingo Island is ours, says Moi as Mp Faults State'*, available at <https://www.standardmedia.co.ke> (accessed 3rd March, 2017).

2. Kisiangani E, *'Dispute Over Migingo Escalates'* available at <http://www.issafrica.org/iss-today/dispute-over-migingo-escalates> (accessed 26th May, 2016).

3. Kisika, S, *'Mps Rule Out War to Recover Migingo'*, available at <http://www.the-star.co.ke/news/2016/03/21/mps-rule-out-war-to-recover-migingo_c1316590> (accessed 15th December, 2016).

4. Mathuki C, 'EACJ to Handle Criminal Cases, '*The East African,* December, 2013 available at <http://www.theeastfrican.co.ke> (accessed 1st March, 2017).

5. Ochieng D, *'Uganda Authorities Arrest IEBC Clerks on Migingo Island*' available at <http://www.standardmedia.co.ke/article/2000194366/ugandan-authorities-arrest-iebc-clerks-on-migingo-island> (accessed 20th May, 2016).

6. Ongwae S and Ochieng D, *'Ugandan Police Beat up Chief and Kenyan AP Officers on Migingo'* available at <http://www.standardmedia.co.ke/article/2000194801/ugandan-police-beat-up-chief-and-kenyan-ap-officers-on-migingo> (accessed 20th May, 2016).

7. International Court of Justice, 'History' available at <http://www.icj-cji.org/court/index.php?p1=1&p2=1> (assessed 29 June 2016).

8. Keohane R, Moravcsik A, and Slaughter A, *'Legalized Dispute Resolution: Interstate and Transnational'* available at <http://www.priceton.edu/~slaughter/Articles/IOdispute.pdf> (accessed 1st June, 2016).

9. Lapidoth R, *'Some Reflections on Peaceful Means for the Settlement of Inter-State Disputes'* Georgetown University Law Centre, available at http://ciwr.ucanr.edu/files/186748.pdf> (accessed 28th June, 2016).

10. Jackson P, *'Theories of International Relations: US Diplomacy, An Online Exploration of Diplomatic History and Foreign Affairs'* available at <http://www.usdiplomacy.org/diplomacytoday/values/theories.php> (accessed 3rd June, 2016).