# UNIVERSITY OF NAIROBI

## INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES
## MASTER OF ARTS IN INTERNATIONAL STUDIES

GAD OTIENO AWUONDA

## THE ROLE OF INTERNATIONAL LAW IN THE FOREIGN POLICY OF AFRICAN STATES: A CASE STUDY OF KENYA

A DISSERTATION SUBMITTED TO THE UNIVERSITY OF NAIROBI, INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE DEGREE OF MASTER OF ARTS IN INTERNATIONAL STUDIES

NOVEMBER, 2001

## TABLE OF CONTENTS

## ACKNOWLEDGEMENTS

It is my pleasant task to acknowledge the contribution of various people and institutions who have made the preparation of this paper possible. First and foremost I wish to acknowledge with immense gratitude the firm yet understanding guidance I received from my supervisor Dr. Makumi Mwagiru. I however regret that my humble abilities would not live to his expectations nor march his example. I wish to thank the Director of the Institute of Diplomacy and International Studies whose understanding and constant encouragement gave me the much needed push to see the final bit of the programme at the Institute.

To my classmates, the staff of the Institute I must say it was an unforgettable experience being part of the team.

My tribute goes to Sasakawa Foundation of Japan who through their programme, the Sasakawa Young Leaders' Forum generously contributed to this achievement by offering me full scholarship which enabled me to undertake the course in the first place. Without their scholarship administered by the University of Nairobi, Board of Postgraduate Studies, this enterprise would have taken a wholly different course.

Much thanks goes to the following persons, Nancy Wanjala, Board of Postgraduate Studies, my lecturers, friends and relatives for their invaluable support. I wish to extend gratitude to Jane Mugo whose most patient and diligent efforts saw this work word processed to its present state.

## DECLARATION

This dissertation is my original work and has not been submitted for a degree to any other University

.....  6th Nov. 2001

Gad Otieno Awuonda  Date

This dissertation has been submitted for examination with my approval as a University Supervisor.

.....  8 November 2001

Dr. Makumi Mwagiru  Date

# CHAPTER ONE

# INTERNATIONAL LAW AND FOREIGN POLICY

## INTRODUCTION

One debate that has preoccupied practitioners and scholars in international relations as well as international lawyers and scholars is whether international law plays any meaningful role in the conduct of international relations or whether there is need at all to afford it that central place in the conduct of international relations[1].

Writing in the aftermath of the second world war, Hans Morgenthau[2] led the assault against international law and organizations which he and the subsequent adherents to the realist school dismissed as inconsequential in international politics in which the teachings of Marchiavelli were applied by states and religiously adhered to in their dealings with each other. The realists discounted any pretensions to the dream of a *world government* or any form of binding international normative structure and argued for and endorsed power politics as the prime mover of events in international relations.

With the passage of time and the recession in memory of the anarchical period of the second world war, the advocates of the idealist school who espouse the position that international law, international organizations and moral considerations are relevant in international relations have taken the battle to the realists whose own guru, Morgenthau did *a volte face* just before his death and admitted that the world needed international law and organizations if only to avoid a nuclear catastrophy.

However there is still a strong group mainly of practitioners of international relations whose adherence to the realist school is not in doubt. Within the

academia there is, of recent, a plenthora of literature asserting the pervasive nature of international law and organizations in international relations.

International legal positivism having failed to live up to the assault by the realists has been since replaced by the now predominant school which sees international law as being part and parcel of the political process which comes in handy in situations of crisis and in which states are seen to participate in numerous functionally related international organizations. There is also the pluralist school whose adherents see human beings as the focus of international relations in that the conduct of international politics in influenced by human needs and by the means and processes by which they can be fulfilled. With these the case for international law has had tremendous support.

But then the historical reality is that contemporary international law was European international law, which became global in scope through the expansion of trading relations and the establishment of colonies. It thus came into existence prior to the emergence of third world states as sovereign international actors. This has led these third world states, African ones included, to question the basis on which the westerners purport to exact from the them compliance with the norms and principles of international law in its present state. This, together with the westerners' belief that there is no respect for the rule of law in most of the third world has led to the relegation of the practice of the these states to the background in any work on international law and international relations. This study shall endeavor to make a contribution towards filling that void.

**Statement of the Problem**

Adda Bozeman[3] posses the question as to whether the world can gradually develop an effective and universally acceptable body of laws given the grea economic, ideological, cultural, religious and racial divisions of our earth. The

which currently compose an overwhelming majority in the United Nations. Most discussions on the relevance and efficacy of international law in international relations take as their case studies the practice of the developed countries of the north.

This study purposes to shift attention to the practice of the African countries with regard to international law when it comes to the formulation and execution of their foreign policies. It seeks to find an answer to the question as to whether international law is actually given a place in the formulation and execution of the foreign policies of African states. This will be done by the use of three case studies which will be used to test the hypotheses. Kenya's practice will be the focus of this study.

Through these case studies it is purposed to illustrate whether in a given conflictual situation or conflict prone interaction with other states Kenya takes into account international law, and whether the outcome of the situations are informed by consideration of the relevant standards and norms of international law by Kenya.

With these illustrative cases the study will show that international law in spite of its quality of European origin, generally accepted and observed in the conduct of the foreign policies of African countries. An attempt will be made to bring to the fore the legal considerations taken into account in handling the issues involved in conflict or potentially conflictual situations, involving Kenya and its interlocutors.

***Justification of the Study***

Law is supposed to be the arbitor between the weak and the strong. In order

concern here is not with whether that kind of law will ever see the light of day but is whether given these divisions there is any semblance of respect for the existing norms which form the very basis of order and peace in the present international society.

After the independence of most of the third world states, western states simply took it as given that on becoming independent, third world states would embrace the existing body of international law[4]. The truth was that these western states used their influence over the post colonial elite to force unequal treaties upon third world states or acted in concert to formulate treaties whose terms these third world states were expected to endorse without question[5]. This has led some nationalist politicians and a number of third world scholars to assert that until international law becomes the product of the equal participation of all states, they do not see any chance that international law will be relevant to international relations.

Again some western scholars are of the view that, especially in Africa states regard law as merely one of the instruments for exercising authority and that they take international law as relevant only to the extent that it protects them from undue interference by the more powerful countries and as an instrument of bringing about social change, with more equitable conditions stimulating their development[6]. The belief is that third world states expect benefits from international law without making any input towards strengthening it by observing it. Before one could authoritatively advance the case for the position that international law and organizations are indeed indispensable and highly relevant in and are routinely taken into account in the conduct of international relations one must of necessity take into account the actual practice of the third world states

o have a modicum of respectability it is essential that a legal system be seen to ring the order to society and the confidence that societal and individual expectations shall be realized due to a working legal system which ensures that everyone performs their part and gets their just desserts.

In the international scene the third world countries mostly Afro-Asian ones are questioning some of the stipulations that compose traditional law[7]. These principles of classical international law are a creation of Western Europe wholly informed by their civilization and are therefore not conducive to the needs and interests of the "new" entrants to international relations. This has forced third world countries to question the basis of the demand by the west that they observe the norms of international law on the same footing as the western states. However, despite questioning of the basis of obligation, it is obvious that third world states have to a large measure interacted in the international scene by observing legal norms and carrying out their obligations under the principles of international law.

For reasons bordering on racist bias, African countries are portrayed or at least, viewed by the western writers in this area as exhibiting extreme lack of respect for international law, at least when compared to their western counterparts. This is not necessarily true. There is therefore need for a study to ascertain and put up a case for need to reconsider this view of western writers about Africa and its observance of international law. Moreover, African countries constitute one third of the states in the world, and it is important that their practice in the maintenance of law and order in international relations be taken seriously, they are no longer irrelevant in international relations.

Since the end of the Cold War and the consequent lessening of the nuclear

threat some of the most serious conflictual issues have shifted world attention towards third world countries and more so to Africa. Civil war, border disputes, human rights violations, economic woes among a host of problems that beset the continent of Africa need various approaches and the role of international law in tackling some of these is just one and quite important aspect of that approach.

African states, if they are to stand a moral ground of seeking to reform the classical international law to fall in line with their perceived needs and interests ought first to show their willingness to observe international norms. Given their relatively weaker position in international relations, they cannot afford to engage in naked power politics but would need a stronger international legal order, albeit a just one, whose achievements can only be realized expeditiously if they, also show a willingness to play by the rules of international law.

**Literature Review**

Literature relevant to this study may be divided into three major categories. The first category consist of scholars who see no place for international law in international relations, or if they concede it has a place at all, assert that it is observed in matters where vital national interests are not involved.

The second category consists of those who refute the contentions of the first group. Much of the recent literature here sees the solution to the problem as lying in looking at the two disciplines, international law and international relations, as being mutually compatible and having complementary roles where one cannot survive without the other.

The third category of literature is that of scholars who examine of international law as it is relevant and effective in a world not necessarily of consonant national interests but of differing levels of economic development and historical experiences. This category of literature is of the most immediate

interest in this study for it focuses on the attitude of the third world, towards international law.

The works that contain refutation of the relevance of international law in international relations abound. A number of these concede that commercial and diplomatic dealings throughout the world take place in compliance with the widely recognized and codified rules of international law but see a different situation when it comes to matters of vital national interests or high politics.

Hans Morgenthau[9], a leading proponent of this view, drew a distinction between rules of international law applicable to routine international dealings which he found highly effective and those purporting to govern matters touching on the most important state interests like the use of force which he found essentially unlike domestic legal systems. In matters of sufficient importance, he noted that choices in this area of international relations are not between legality and illegality but between political wisdom and political folly. States act not in compliance with any code of conduct but in compliance with their perceived interests.

Before Morgenthau, Carr[10] set the ball rolling by discounting any meaningful place for international law in a world where realist power politics prevailed. Subsequent to these writings several scholars who adhere to the realist school of thought have written authoritatively to reject any notions of a world ruled by norms of international law and by the activities of international organisations.

In this genre is Schwarzenberger[11] whose view is that international law is subordinate to the principles of balance of power and power politics, and Brierly[12] who sees the present world order and insecurity as wholly unconducive to any claim by international law of relevance in matters of high politics.

Champions of the second category of literature noted above include Kaplan and Katzenbach[13] who see the sanctions imposed by international law as more real than is usually perceived and that states generally have no choice but to act within the bounds of international law.

To Tunkin[14] international law actually acts in limitation of, and in support for, foreign policy and diplomacy and this is what accounts for the order the international society generally enjoys.

Boyle[15] coins a functionalist approach to international law's role in international relations. He argues forcefully for the functionalist integrationist approach to international affairs. To him a future world government is feasible and in order to achieve it states ought to participate in a plethora of functionally related international organisations. Boyle sees international law as being largely taken into account in the conduct by nations of their foreign affairs. Werner Levi[16] sees international law as a subset of international politics and asserts that in order to have international law in the first place, states explicity or implicitly have had to consent to the emergence of the rules.

The seminal work of Harold Lasswell and Myres MacDougal[17] is credited for being the pioneering works aimed at rescuing international law from the realm of disembodied legal essences and relating it to the real world. These two scholars in prescribing a pluralist approach to the study of the role of international law in international relations have amply demonstrated that a political science indifferent to values and political purposes is an arid and ineffective discipline.

Mwagiru[18] has argued that looking at the main analytical frameworks of international law and international relations reveals that both disciplines make similar assumptions about the nature of the international system because there

exists between them a close paradigmatic affinity and therefore have a symbiotic relationship in which one would not stand alone without the other.

The closest antecedents of this work are Louis Henkins classic, How Nations Behave: Law and Foreign Policy[19] ; and Forsythe's, The Politics of International Law[20]. These two scholars have both concluded in their works that international law has a pervasive influence on the foreign policies of states since the law usually reflects a prior judgment that it rules enhance national interest. Because of this, states are seen to abide by most of the law most of the time, for by doing so, they advance their long-term national interests in orderly international relations.

In the same vein Theodore Schweisforth[21] asserts that as a system of norms with a separate existence, the function of international law is to canalize the options in a state's foreign policy, in other words to act as a restraint on foreign policy, and factor inducing order in inter-state relations. At the same time, according to Schweisforth a states foreign policy can use international law (as it is or as it becomes after successful reformist campaigns) as its tool to achieve those goals it aims for in international relations.

Most scholars who have written on the third world's relationship with international law like Anand[22], and Abi-Sasb[23] have concentrated on discussing these countries' demand for an overhaul of some of the tenets of international law so that it can reflect their demands and circumstances. This has left unexplored the actual compliance by these states of the uncontested principles of international law or even the contested ones.

## Theoretical Framework

Despite several centuries of debate and distinguished thought, there is still a lack of an established theory of international law. There still exists considerable disagreement as to the character of international law and its achievements and failure. To what extent international legal norms can be appreciated as an autonomous dimension in international life without being unduly hampered by the conditioning impact of the international environment has eluded agreement for centuries.

The analytical framework of this study will be one that endeavours to reconcile the extreme points in the intellectual exchange on the effectiveness or otherwise of international law in international relations. Thoughts about the efficacy of international law have coalesced around two main schools, which are examined in turn here.

Certainly the most lucid and influential exposition of the international law as a restraint system is to be found in the writing of Hans Kelsen[24] whose work is foreshadowed in the writings of John Austin. The Kelsenian[25] model of international law derives from the functions of law – especially criminal law – in a well ordered domestic society. Stress is put on the coercive claims of the norms comprising international law and on the sanctions available in the event of violations. Kelsen analogizes features of international society with the legal order in a domestic society and sees international law as if it was a hierarchical system and hence a system that qualifies in conventional terms as law. Kelsen also argues that various decentralized features of international society can be understood in the same way their centralized analogues in domestic society. Kelsen posits international legal order that is an autonomous reality, that has the normative properties needed for an orderly and just world.

The Kelsenian approach is faulted on various grounds[16]. One is that Kelsen and adherents of his school tend to accept normative claims at face value regardless of the prospect for their implementation. No attempt is made by Kelsen to qualify the rules of international law in the light of political realities, especially in light of military prerogatives by states, both in the sense of the capability to wage war and the discretion to bring that capability to bear through unilateral decision.

In another respect Kelsen's presentation of international law, despite its claims of being of the positivist school, is an ideal legal order; one which if actualized in the behaviour of states and in their formal acknowledgements promises an end to war and lawlessness.

Kelsen's approach also tends to restrict an international lawyer's job to the normative phenomena – to rules making – and the complex engineering process by which these rules get somewhat translated into patterns of behaviour is not examined.

The positivist approach to international law of Kelsen in as much as it may be fairly applicable to the situation of the weaker third world states due to the invulnerability to enforcement measures is not all-accurate. This is because it does not provide an acceptable incentive for the third world states to obey the normative dictates of international law if their more powerful western counterparts will not do so due to their ability to escape punishment.

On the extreme end of the opposite side of the intellectual divide stands the McDougalian approach to the study of international law. This approach otherwise known as the pluralist approach to international law is represented in the works of Harold Lasswell and Myres McDougal[17].

It conceives international law as being compromised by the process of authoritative decision transcending the boundaries of particular territorial communities. The focus of enquiry here is on the law choices available to the decision-maker called upon to appraise contested action . The legal system here is seen to be open due to the availability of plausible legal arguments to vindicate whatever cause of action is preferred for non-legal reasons and this shifts emphasis from rules or norms to policies and goals to be achieved. The McDougalian approach emphasizes the decision maker located in the national system as the prime actor in international law. It calls upon that actor to balance national interests against world community interests to the extent that the two perspectives collide. The fulfillment of the expectations of others about legal outcome ought to be a significant objective of the law. If these expectations are respected and the role of precedent is conserved, law remains subject to prediction and the potentialities for manipulation of legal doctrine are reduced.

The McDougal posits certain abstract and universalistic set of values – geared to the promotion of individual human dignity, the avoidance of war and disruption and the establishment of freedom and prosperity – as providing a framework for decisions about the requirements of international law.

The McDougalian approach has the weakness of appearing to and actually employing international law in the service of providing rhetoric for an international morality play, which has a bias towards the western values[18]. So, as opposed to the Kelsenian image of international law into some kind of a Cold War ideology where western values and policies take precedence over those of the other social and political systems.

The McDougalian approach gives rise to ***ex parte*** manipulation of legal rules and their interpretation by the powerful, anarchistic, or desperate states. The

open system that McDougal espouses also impairs the organized international community with impartial yardsticks by which to measure its response to crisis and conflict, and thereby to legitimize its own role in resolving international disputes and to make possible a clear decision achieved after minimum debate.

When it comes to third world countries with radically different value systems and needs from those of the western states it is clear that any attempt to sell these states the value package in the McDougalian conception is bound to earn international law hostility from these countries.

It appears therefore that an acceptable analytical framework for international law must be one that is a complex synthesis of these extreme positions over the place of international in the formulation and implementation of the foreign policy of Kenya and by extension those of other African States.

It is clear that foreign policy formulators and those who implement foreign policy are won to pursue those policies, which are aimed to bring maximum advantage to the country they serve. These policies at least in a number of countries and instances usually fall well within the bounds of international law.

Recent literature has come to coalesce around the theory that posits that international law, objectively interpreted and complied with serves the national interests of the complying state and of the international society in general.

To this school of thought, advanced by the likes of Henkin, Forsythe, Boyle *et al*, it is not realistic to dismiss international law as if it were a mere sandcastle destined to be overwhelmed by the wave of national interest.

While international law is nowhere close to municipal law, it exerts considerable influence on the political life of most countries. Exceptions may abound and while international law may not always be decisive and controlling, it

nevertheless exerts an influence on the making of the foreign policies of most countries.

According to Henkin[29], international law has a pervasive influence on foreign policy, since the law usually reflects a prior judgement that the rules enhance national interests. In one way or the other states abide by the norms of international law most of the time and by doing so they advance their long term national interests in orderly international relations. The consent of states to a norm of international law is based on a perception that the norm is consistent with national interests as understood at the time the rule is created. This means that international law is not a set of rules divorced from politics.

The observance of international law by a state in the conduct of its foreign affairs is crucial in the success of its long and short-term policy objectives. Considerations of self-advantage by states when it can be achieved by use of legal means usually tempers considerations of expediency military and other easier but risky alternatives.

Dismissing the extremists in this debate, the positivist leaning scholars and practitioners the realists of the power politics school, Merrills asserts that:

> Beliefs about international law tend to extremes. The naïve idealist, rarer perhaps today than at some periods in the recent past, dreams of a world without conflict. In stark contrast is the cynic who, observing what he takes to be spectacular violations on every hand, international law is pious fraud, at most a rhetorical disguise for foreign policies based upon expediency[30].

It is clear that the school that to explains best and advances the efficacy of international life is the one which advocates for a hybrid approach to the study of international law and relations the operation of one necessarily entails the operation of the other. It is this set of assumptions that will inform this study.

*Hypotheses*

a) African countries in the main observe the norms of international law in the conduct of their international relations.

b) Owing to their weaker position in world politics African countries are less inclined to go against the rules of international law, they view an effective world legal order to be in their interests.

c) That any resistance and disrespect for certain rules of international law by African countries is due to the feeling that such rules are manifestly unjust and the refine should be changed to reflect the interests of all states

*Objectives*

a) to evaluate the role and place of international law in the foreign policy of Kenya;

b) to give a general overview of the role and status of international law in African international relations;

c) to examine the view that international law is largely and inherently absent in the process of foreign policy formulation and execution in Africa;

d) to contribute towards increased sensitivity to the need to give a stronger position to international law by African countries in their interaction with each other and with the other players in international affairs.

*Methodology*

This study will rely on various sources. First use will be made of the main textbooks on this area study so as to explicate the views and findings already made by scholars in this area. Secondly, for the case studies, use will be made of press reports, which will be useful in illustrating Kenya's position during various instances of international exchanges as well as exposing the relevant facts.

The case studies shall be the following:

1. Kenya's handling of the territorial dispute with the Somalia Republic
2. Kenya's relations with Uganda during the Idi Amin era.
3. Kenya and the refugee crisis in the Eastern African region.

These case studies have been chosen for this study because they are the major represent... international crises that the country has ever faced since independence. The events picked as case studies here were of significant impact to the nascent state that Kenya was having just emerged from the colonial domination

The dispute with Somalia Republic not only posed a threat to the country's sovereignty but it also threatened to herald an era of breakup of a nascent state struggling to develop into a coherent nation state.

The handling of the dispute with Somalia is used as a test case of Kenya's adherence to the international law principle of peaceful settlement of disputes.

The Idi Amin Era presented Kenya with a complex situation in which the country's national interests were threatened in more than one way. First the collapse of the Ugandan economy, and the collapse of the East African Community could be attributed to the anarchic style of Amin. Kenya being a major trade partner Uganda suffered economically as a result. It was open to Kenya to intervene in the affairs of Uganda, for purposes of securing peace there. This never happened and this case study will be used to test Kenya's adherence to the international law principle of non-interference in the internal affairs of other states.

The refugee crisis has been a major problem to the country given its negative effects of insecurity, strain on the environment and bringing about political misunderstandings between the sending and receiving state. The case

will provide a test tool for Kenya's adherence to the relevant principles of international law relating to refugee protection.

## ENDNOTES

1. See Morgenthau, H. Politics Among Nations: The Struggle for Power and Peace (Alfred A.K. Knof, 1960 – 3rd Edition
2. Morgenthau, H. "Positivism, Functionalism and International Law' 34 American Journal of International Law 1947-50 260-284.
3. Bozeman, Adda, The Future of Law in a Multicultural World (Princeton: Princeton University Press, 1971)
4. Anand, R.P. New States In International Law, (New Delhi: Vikas Publishing House (1972) p.6
5. See ibid
6. Cassesse, A. Internationational Law in a Divided World (Oxford: Clarendon Press, 1986)
7. Anand, R.P. op. cit.p.4
8. See for example Anand, 'Attitudes of the Asian States Toward Certain Problems of International Law. The International and Comparative Law Quarterly. Vol.15 (1966). Abi Saab, "The Newly independent States and the Rules of International Law", Howard Law Journal, Vol.8. Falk R. "New States and International Legal Order' Recueil des Course of the Hague Academy of International Law, Vol.118 (1966) pp.33-66.
9. Morgenthau, H. Political Among Nations: The Struggle for Power and Peace op. cit.
10. See Carr E.H. The Twenty Years Crisis, 1919-1939 (New York: Macmillan, 1991)
11. Swarzebberger, G. Power Politics: A Study of International Society (London: Stevens & Sons, 1951)
12. Brierly, J.L. The Basis of Obligation in International Law quoted in Mwagiru op.cit.
13. Kaplan, M.A. & Katzenbach, N. The Political Foundations of International Law (New York: John Wiley & Sons Inc. 1961) p.62
14. Tunkin, G.I. Theory of International Law (Havard: Harvard University Press 1974).
15. Boyle, F. A. World Politics and International Law (Durhan: Duke University Press, 1985) p.17
16. Levi W. Law and Politics in International Society'. 18 International Studies Quarterly (1974 417-86.
17. Lasswell, H. & Mc Dougal, M. "The Identification and Appraisal of Diverse Systems of Public

Order, 53 American Journal of International Law (1959).pp 50-101

18. Mwagiru, M. 'A Critical Comparison of the Analytical Frameworks of International Relations and International Law'. M.A. Dissertation, University of Kent at Cantebury. 1991 (unpublished).

19. Henkin L. How Nations Behave : Law and Foreign Policy (Ph. Frederick Praeger, 1968)

20. Forsythe D.P. The Politics of International Law: US Foreign Policy Reconsidered (New York Lynne Rienner Publishers. 1990)

21. Schweisforth, T. 'The Role of Political Revolution in the Theory of International Law' in Macdonald.J. and Johnstone D.M. (eds.) The Structure and Process of International Law (Dotretch Martinus Nijhoff Publishers, 1983) pp 913-153: 937.

22. See Anand. R.P. op. cit.

23. See Abi-Saab op. cit.

24. Kelsen. H. 'The Pure Theory of Law: Its Methods and Fundamental Concepts' ( 40 Law Quarterly Review (1934) pp.474-498;

25. Ibid

26. For the Critique of Kelsen's Pure Theory of Law. See Falk. R.A. 'The Relevance of Political Context to the Nature and Functioning of International Law: An International View' In Falk R.A. The Status of Law in International Society (Princeton: Princeton University, Press 1970), pp.41-43.

27. Lasswell, H. & McDougal, H. op. cit.

28. For Critique of McDougalian Theory, see Boyle, F.A. op. cit., pp.61-67, Anderson, S.V., 'A Critique of Professor Myres S. McDougal's Doctrine of Interpretation by Major Purposes', 67 American Journal of International Law pp.378-83 and Falk, R.A. The Jurisprudence of Myers S. MacDougal's in Falk, R.A. op. cit. pp. 642-659

29. Henkin, L. How Nations Behave; Law and Foreign Policy, op. cit.

30. Merrils, J.G. Anatomy of International Law (Sweet and Maxwell, 1981) pp.16

# CHAPTER TWO

## THE ATTITUDE OF AFRICAN STATES TOWARDS INTERNATIONAL LAW

## INTRODUCTION

The aim of this chapter is to give an overview of the African States's attitude toward international law. It shows the impact of the shift in the theoretical foundations of international law on the general relationship of international law and of international relations and foreign policy of third world countries. Some of the views of the third world legal scholars on the overall attitude of the African States toward international law and the bases for such attitude are revisited, with specific examination of the importance of the various sources of international law.

The chapter concludes that there is little that is fundamentally incompatible between the African countries and the regime of international legal rules but that there may be need for a changed approach to the promulgation of new rules and the modification and application of the old ones especially as these are relevant to the interaction between the west and African states.

### The Impact of the Evolution of International Law on African Attitude

Africa is a large collection of states, peoples and tribes with diverse economic, social, religious and political systems[1]. These countries differ not only in their traditions and languages but also in their concepts of government, political ideals and foreign policy. This state of affairs has been complicated further by the adoption of various opposing economic and political ideologies, which these nascent states of Africa had to contend with in the Cold War period.

---

There however abound certain common tendencies brought about by under-development and the dissatisfaction with the existing international order and the attendant legal regime that it has created[3]. The result has been that these countries have tended to exhibit more or less a similar approach and attitude to international law and international relations in general, which sets them apart from western states[3].

This common approach to international issues was given rise to by a number of events and factual situations. First, about seventy per cent of the world's population before the First World War was in a state of political or semi-colonial dependence[4]. As such their participation in international relations was greatly curtailed and were therefore reduced more objects than to subjects of international law.

Secondly, much earlier on before the first world war a club of powerful European states emerged in the realm of international relations. This club, owing to the relative military might and global reach of its members, assumed the right and had the power to decide the course of international events for the rest of the world. It was made clear by the events taking place at this time that everything done by these powers was designed to promote their respective national interests.

It is the contention of most of the third world international legal scholars and statesmen that during this period it was assumed by the Europeans that the international law applied only to relations among the Christians and the civilized

nations of Europe which shared a common set of values, civilization, history and cultural heritage.

Christianity and later "civilization" became the criteria for membership of the family of nations[5]. The non – European states were considered out of this circle and the community of nations of the natural law period was turned into an exclusively European club. One author has had the following to say in reference to this period:-

> During this period international law became a composite of principles by which the Western powers agreed to live and conduct business, it became associated with a small group of nations of Western Christendom. For the evidence of custom in international law it was enough to show that the rule in question was supported by the general opinion within the limit of European civilization. The Asian and African peoples who for centuries had been considered members of the family of nations found themselves in an ad hoc legal vacuum which reduced them from the status of international personality to the status of candidates competing for such personality[6].

The demotion of the African countries along with their third world counterparts from their place as subjects of international law to its objects was not made any better by the activities of the colonial powers who through unequal bilateral and multilateral treaties reduced these sovereign states to the status of colonial dependencies which had no identity in the arena of international relations.

**The Shift in the Theoritical Foundations of International Law**

It has been pointed out[7] that in the beginning of the organized state these rules of international law derived from the principles of *Jus Naturale* and Jus Gentium of the Roman legal system which were thought to be applicable between all the countries of the world. These principles, however, assumed a Eurocentric character in the nineteenth century. In as much as there were certain well-

developed principles of inter-state conduct in ancient non- western countries such as India, China, Egypt and Asyria. African and Asian countries had very little to do with international law created in the 19th century because they were conquered and colonized and their contribution, if any, curtailed. Prior to the 19th century it is the general opinion of international legal scholars that inspite of various ideological, philosophical and religious influences over the centuries the classical law of nations maintained its character of natural law which applied to and treated equally all nations regardless of their religion, culture and geographical situations. With the emergence of the legal literature of many western international lawyers particularly the positivists and the neo-positivists of the late 19th and early 20th centuries a view emerged that the Afro-Asian and other non Western nations did not participate in formulation of the norms of international law and that they did not make any contributions to its development.[8]

The natural theory character which the writings of Hugo Grotius, Gentili and Freitas gave to international law, that of being of a universal relevance and application, was challenged during this period when positive law theories gained ascendancy and questioned some of the bases of the theories of law based on natural law[9]. This development meant that international law had to be perceived as European law, set by the European states for the regulation of affairs between themselves. A Eurocentric international law was thus born based on the principle of equality of the states of Europe but leaving out the rest of the world who were perceived as mere objects of International law.

This development also meant that International law was no longer seen to be based on the teachings of the natural law scholars which perceived law as emanating from the tenets based on right reason and in which every human being

was an equal to the other. Positivism instead espoused the opposite and asserted the central place of the strongest powers being the decisive institutions to determine what the law should be.

This positivist reasoning further legitimized a acquisition of territories in the third world and the setting up of colonial empires over the inhabitants of these areas without their consent. A survey of the international legal affairs of the 19th century reveals high degree of retrogression in the development of the rules of the law of states particularly in their application and extension to non-European nations[ii]. In the face of the shift in the theoretical basis of international law as well as the attendant practice of the European powers international law all but alienated the peoples of the new states of Asia, Latin, America and Africa.

**The African Response to Positivism**

The state of affairs in which international law was viewed as western in origin led the African states on attaining independence to question some of the bases of the principles and rules of international law and to call for their revision to fall in line with their own peculiar circumstances and to meet their needs.

The attainment of independence by states meant a lot to the course of the development of international law and this development had to contend with this new reality. African countries made it clear, that they needed and deserved greater opportunity to participate in international affairs. In this process they have adopted a revolutionary attitude and aggressively lobby for the new international order in a number of fields; economic, international politics and international law.

Two main conclusions emerge from this discussion. First the discontent of these countries arises out of the feeling that some of the norms of international law may be opposed to their interests and their desires.

Secondly these countries resent their non-participation in the formulation of the rules which are now purported to bind them. Yilma[11] identifies these as factors responsible for the negative attitude of the African states. the origins and characteristics of the established rules of international law.

In order to get a clearer picture of the attitude of the African states towards international law it is imperative to give overview of some of the specific areas of international law where perceived disputes exists. This will entail the sources of nternational law which to a large measure inform the actual contents of the rules of international law.

**The Influence of the sources of International Law in the attitude of the African countries towards International Law.**

It has come to be realized that the acceptability of the rules of international aw by various states depends on the contents of such rules and their origins or source. As objects of study, the sources of international law are regarded as undamental because between them they provide the basic particles of the nternational legal regime[12]. The rules of state succession however provide that a iew state is bound by all the general rules of international law, which were in orce at the time of its creation regardless of their source.

In order to get a clearer picture of the attitude of the third world countries owards international law it is imperative to give overview of some of the specific reas of international law where perceived disputes exist. This will entail taking a lance at the sources of international law which to a large measure inform the ctual contents of the rules of international law. The African states are not nclined to accept all the rules of international law formulated before their

emergence[13] or without their participation. The rules of international law as in other legal systems derive from various sources with different actors and processes being responsible for the generation of rules of particular category of International law principles and rules depending on the manner of their creation. Thus we have the following categories:-

1. Customary International law
2. International treaty law
3. General Principles of law.
4. International Law as developed by the General Assembly Resolutions.

The sources of international law have been selected without necessarily paying the statute of ICJ. This is because this study intends to give a wider picture of the sources of international law than those envisaged under that statute but which nevertheless are favoured especially by the African states. Such sources of law include the resolutions of the UN General Assembly. The purpose of the study is not to merely give an analysis of the sources of international law but also to examine the impact that the effectiveness or otherwise of the various sources of what is considered a legitimate principle of international law by the majority of states.

These categories are picked to illustrate the preference of the African states for some rules over others depending on their origin and hence their contents. The sources of municipal law would not necessarily raise concern, as there exist a clearly spelt out hierarchy of these sources where questions of conflict are resolved according to predetermined criterion. The case with international law is different since the source of a particular principle or rule of international law necessarily invites the issue of whether its development took into

account the wishes and circumstances of all those to whom it is meant to apply and who are expected to obey it. These various sources will be taken in turn in order to show how they have affected the attitude of African countries towards the particular rules of international law emanating from them and by extension the attitude of these countries towards international law in general.

**Customary International Law**

Article 38 of the statute of the International Court of Justice, following in this regard the footsteps of the statute of the Permanent Court of International Justice, prescribes in its paragraph 1(b) that the court should apply inter alia: "international custom as evidence of a general practice accepted as law".

According to Casesse in the creation of a customary rule of international law, a practice evolves among certain states under the impulse of economic, political, or military demands. If this does not encounter the strong and consistent opposition of other states[14] and is instead increasingly accepted, or acquiesced in, it comes to be viewed as being dictated by international law in that the states begin to believe that they must conform to the practice not so much out of economic political, or military considerations, but because they are enjoined to do so by an *international rule*[15].

Many of the rules of international law have developed in this way, that is as customary rules[16]. And this obviously raises a question as to the acceptability by third world states of a large body of international law the source of which is customary international law developed mainly before they came into being.

Since the second world war and largely owing to this state of affairs, custom has increasingly lost ground in two respects: existing customary rules have been eroded gradually by fresh practices, and resort to custom to regulate new matters

has been relatively rare. These developments, were largely due to the growing assertiveness of socialist countries and the massive presence of third world states in the international arena.

African states alongside their third world counterparts have insisted on the need to radically revise old customary rules. They have instead opted for a selective observance of the norms established by use of custom and which norms do not reflect their interests and participation. The new states insist that they cannot be expected to accept that a group of states may create rules of international law binding on all states. Customary law is viewed as having borrowed from legal systems which did not include those of the African states, and therefore as having developed in a social milieu radically different from theirs.[9] They perceive customary international law as a "distillation of traditional Western values".[10] Custom as a source of international law has also been seen to be slow in hastening the change that is urgently desired by such states on international law given its slow growth.

Custom has also lost some ground as a source of international law due to the expansion of the international society by the admission of new states with divergent economic, political and ideological orientations. The consensus on what has crystallized into customary international law has accordingly become difficult to reach. Similarly it is difficult to ascertain the emergence of a new rule for it is not always possible to get hold of the huge body of evidence required to prove customary law."

The rules of international law of customary origin were established during a period when, to prove existence for the evidence of custom, it was 'enough to

show that the general consensus of opinion within the limits of European civilization is in favour of the rule"[20]. African states do not lend their unqualified acceptance to norms thus established.

**Treaty Law**

In contrast with the process of creating law through custom, treaties (or international conventions) are a more modern and more deliberate method[21]. The ICJ statute at Article 38 refers to international conventions whether general or particular establishing rules expressly recognized by the contracting states.

A treaty is either a law making treaty which is intended to have universal or general relevance, or is a bilateral or multi-lateral treaty which apply only as between two, or a small number of states[22]. Certain treaties attempt to establish a regime which will extend to non-parties as well. For example the UN Charter in its creation of a definitive framework for the preservation of international peace and security declares in art 2(6) that "the organization shall ensure that states which are not member of UN act in accordance with the principles laid out in article 2 so far as may be necessary for the maintenance of peace."

Treaties have become the most frequent means of creating international rules and are more preferred over customary law by African states because *prima facie* these states enjoy full freedom as regards the modalities and form of agreement. The African states find that treaties provide them with an opportunity to participate in the formulating of the rules and they are not legally bound by these rules unless they accept them. The problem with treaties is experienced with those treaties adopted before these states attained independence. In this regard the newly independent states view is that they will only accept those treaties which

are based on universally accepted values, including their own or those which provide an effective basis of reciprocity[23].

African states believe that political and economic privileges have been extorted by the colonial powers in the past from them and thus reject "unequal" or inequitable treaties. The *Rebus sic stantibus* is pleaded by these state in order to terminate their inherited obligations which they deem unfair[24].

The doctrine of state succession in which the newly independent states wish to modify so that they start on a clean slate or *tabula rasa* has received much attention in the works dealing with the attitude of the African states toward international law as created by treaties.

**General Principles of Law**

Article 38 of the ICJ statute recognizes as a source of international law, "the general principles of law recognized by civilized nations." There is little consensus on the precise meaning of the phrase. However it is discernible in situations where tribunals are called upon to decide cases in which there is no relevant law to make use of. In such instances, according to Shaw,[25] the judge or the umpire will proceed to deduce a rule that will be relevant by analogy from already existing rules or directly from the general principles that guide the legal system whether they emanate from justice, equity or considerations of public policy. International law owing to its relative underdevelopment has to rely more often than not on the domestic legal system or the guidance provided by general principles of law in many instances[26].

The fact that there are few decided cases in international law than in the municipal system and no water tight method of legislating to provide rules to

overn new situations makes the general principles of law a rather critical source f international law. Writers are of different opinions as to the exact basis or eaning of the concept of general principles of law. Some regard it as an ffirmation of natural law concepts which are deemed to underline the system of ternational law and provide a yardstick for measuring the validity of the positive w rules[27]. Some writers, however, do not give the concept such credit and ismiss it as not qualifying for a place alongside treaties and custom as a source of ternational law.[28] It is however generally acknowledged that it constitutes a eparate source of international law albeit of limited value and influence[29].

The African states look with favour at the concept of the general principles f law and see it as an avenue for their legal and value systems to make a ntribution to the development of international law. This is because, according some views, general principles of law are based on the common legal nsciousness of the peoples on an equal footing. This becomes possible when ese states are represented in bodies like the International Court of Justice or in e International Law Commission. In addition opinions of the jurists of the ewly independent states in scholarly writings means that the interests and views these states can influence the development and change of international law rough the general principles of law[30].

**he General Assembly Resolutions**

African states have been among those third world countries who have over e decades campaigned for the strengthening of the position of the General ssembly resolutions so that these can be deemed legally binding by the ternational community. This has not been achieved since the UN Charter gives

ıe General Assembly very limited powers with regard to law making. This has :sulted in most General Assembly resolutions being of very limited effect. The 'estern states often oppose General Assembly resolutions because of these :solutions often have the support of the majority third world states. Nevertheless )me resolutions have been very successful and have in a sense acquired law ıaking status. Some of these resolutions have accelerated or in the least give vidence of the formation of customary international law. For example the doption by consensus of Resolution 2625 XXV testified to the fact that a wide ınge of factors, (treaties, General Assembly resolutions; declaration of states; atements by Government representatives in the UN; diplomatic practice) are to e taken into account when trying to determine whether certain international ronouncements have engendered a principle of universal scope and legally inding force.

There has been no consensus between the African states and the west as to ıe real value of resolutions; whether these possess legally binding force or not. he view of the west is that, except in very few instances and well defined cases, :solutions do not posses legally binding value *per se.* African view is that the ımulative effect of resolutions may prove sufficient for the creation of a new w. As put by a Zairean delegate in the Security Council in the course of the :bate on the situation in the then apartheid South Africa:

> There is not the shadow of doubt that all decision of the UN, through the general Assembly and Security Council and all other bodies which in one way or another deal with the situation in South Africa in particular, and in Africa in general are binding on all members of the UN whatever position they may have taken on a particular resolution. If that were not recognised then it would mean that any member could disown the mission, the goals and objectives of this universal organization[31].

The African view is that there is a definite way of assessing the possible impact of resolutions on customary or treaty law. As Abi Saab argued

> Three rules can gauge the real value or weight of the contents of a resolution beyond its formal status as a recommendation and chart its progress towards becoming part of the *corpus juris* of international law. The first refers to the circumstances surrounding the adoption of the resolution and in particular the degree of consensus obtaining over its contents. The second is the degree of concreteness of these contents and whether they are specific enough by themselves or in addition to those prior related resolutions to become operational as law i.e identifiable prescribed behaviour. The third is the existence and effectiveness of follow up mechanisms generating a continuous pressure for compliance[32].

And since African states together with their Asian and some Latin American counterparts command an unassailable majority in the General Assembly the value of resolutions to them is immense.

**African view of the International Court of Justice**

It is frequently asserted that African countries together with a number of their third world counterparts are generally reluctant to accept the jurisdiction of the International Court of Justice and are apathetic towards the use of the court or even any other third party judgement for the settlement of disputes according to the rules of international law.

This apathy towards the court is a product of many factors and scholars have endeavoured to explain them with some citing cultural factors while others point out at the inherent toothlessness of the court either to campel parties to appear before it nor enforce its judgements.

---

According to Professor Julius Stone[33]. the reasons for the divergence of ıttitudes between the western states and the underdeveloped states are not to be ound in terms of mere cultural differences but in the problems of conflicting nterests.

The underdeveloped African countries which have just emerged from :olonial status find their authority, or their territory burdened with debts, :oncessions, commercial engagements of various kinds or other obligations :ontinuing from the earlier colonial regime.

The African countries at independence found themselves overburdened with he rights of their past colonial masters which they have been feeling and still feel . ire unreasonable and, though accepted by the present international legal order, nequitable. They are hesitant to go to the International Court of Justice which is :xpected to enforce the present unsatisfactory legal rights[34].

It is due to this fact in a number of disputes between these newly established tates and the old colonial powers, the former are hesitant to go to the nternational Court of Justice which is expected to enforce the present ınsatisfactory legal rights.

It is however true that the court has not in its practice, taken a hardened onservative view of the law and rigidly adhered to old concept, but has on the ontrary been changing and modifying the law[35] and may do so in future. lowever, it is clear that unambiguous legal positions will continue to be adhered ɔ by the court.

As once noted by Kunz[36], courts are however unfit and unequipped for hanging the law, just as political agencies are unfit for giving objective and

impartial decisions[37]. There is a feeling among the African countries that the ICJ, as at present constituted is composed of judges most of whom have been trained in classical international law, and who may not appreciate the real feelings of the new and underdeveloped countries. There is no other effective international agency to change and modify the present international law. The only alternative left for these states, therefore, is to solve such disputes through political means.

As Max Sorensen[38] has observed, the process of adjustment between such established legal positions and the national aspirations of new and smaller states is essentially a political process, unsuitable for judicial settlement.

Despite its broad composition, the court as a whole is deemed unable to understand sufficiently the special problems of various regions of the world, nor does it have sufficient knowledge of the regional systems of international law. In this regard suggestions have been made to the effect that the court establishes special chambers for any group of states, composed of members of the court coming from a particular region or well acquainted with the problems of that region and having the same background of law and traditions. At present under Article 26 of its statute, the ICJ has the discretion to form chambers with the consent of the parties, for 'particular categories of cases' or for a particular case',. It is believed in many quarters that a more frequent use of this power may assist the court in having itself accepted more. Following the admission of new members to the UN especially from Asia and Africa, there is a strong feeling that the membership of certain bodies of the UN, including the Court, should be increased so as to give these new states a more adequate representation. Article 9 of the Courts statute only declares that in the body of judges 'the representation of the main forms of civilization or principal legal systems of the world should be

red. This is viewed as vague and does not guarantee Africa representation and if offered may not be adequate.

## ıclusions

This chapter has discussed the effect on the attitude of the African countries ıght about by the shift of international law from a universal law based on the ıral law precepts to the European centered positivist law which it assumed in 18th and 19th centuries. The shift introduced with it norms and principles ch tended to give supremacy to the wishes of the more powerful states and ch legitimized colonialism and other practices which the less powerful peoples were unfair. With the attainment of independence by the third world countries isis emerged in the realm of international law and in international relations in eral. This was the call by these new states for international law to be revised in ıe parts in order for it to reflect the reality and to give sanctity to the doctrines sovereignty and equality and to afford justice to all states regardless of their e of economic growth and military capabilities.

The sources of international law have been examined specifically and their ıortance in determining the attitude of the third world states toward ernational law analyzed. The space available and the scope of this dissertation s not allow for a discussion of the various rules and principles of international which form the subjects of dispute between the third world states and the eloped states. The discussion of the sources, captures a spectrum wide enough elucidate the position with regard to African attitude. It is clear from the cussion that the third world countries desire change in the way the rules of ernational law are developed and on some of the principles which they consider ust.

In the next chapter a study is made of Kenya, as an African country in an eavour to determine the influence of international law in the country's reaction xternally induced events.

## DNOTES

Sinha. Prakash, 'Some Reflections on the Impact of New Nations on International Law,' Howard Law Journal V. 13 (1967) pp320-353; Sarin, M.L., 'The Asian – African States and the Development of International Law' in Snyder, F.E. and Sattirathai.S(eds) Third World Attitudes Toward International Law: An Introduction (Dotretch: Martinus Nijhoff, 1987) p.49 at P.46.

Freidheim, R.L., "The Satisfied and Dissatisfied States Negotiate International Law: A Case Study." World Politics, Vol.17, (1965), pp.2-23: at p.2)

Carlston K.S, 'Universality of International Law Today: Challenge and Response' Howard Law Journal pp.79-105 at 80. See also Sihha, Prakash, 'Some Reflections on the Impact of New Nations on International Law' op. cit.

Mushkat, Marion, 'The Process of African Deceolonization', Indian Journal of International Law V. 6 (1966) p. 483.

6 Elias, T.O, "The Expanding Frontiers of Public International Law:

"International Law in a Changing World", (United Nations Office of Public Information: Oceana Publications, Inc., 1963) pp.80-149 :99

Sinha, Prakash, New Nations and the Law of Nations (Dortrech: Martinus Nijhoff, 1967) p.23.

Anand. R.P, 'The Role of the "New" Asian-African countries in the Present International Legal Order.' Americal Journal of International Law Vol.56 (1962) pp.383-396

Pathaks, G.S; 'Welcome Address' Indian Journal of International Law Vol.4(1960) pp.40-55

Sinha, Prakash, New Nations and the Law of Nations op.cit.

Jenks, The Common Law of Mankind (London: Praeger,, 1958) p.23

Makonnen, Yilma, International Law and the New States of Africa, (New York UNESCO, (1983), p.81)

Brownlie, I, Principles of Public International Law, (London: Oxford University Edition 1990),

P.I

Mushkat, M. "The African Approach to some Basic Problems of Modern International Law "Indian Journal of International Law V.7 (1967) No.1 pp.337-370 at 356.

Cassesse, Antonio, International Law in a Divided World, (Oxford Clarendon Press 1986) p.181

ibid

Sinha Prakash "New Nations and Law of Nations" op cit. p.22

Abi-Saab, G. "The Newly Independent States and the Rules of International Law: An outline". Howard University Law Journal, 1995. pp.106-150 at p.110.

ibid.

ibid.

Westlake, J. International Law Part I (Peace 1994) p.16.

Shaw, M.N, International Law (Cambridge Grotius Publications 1986) p.77``

ibid p. 78

Sinha Prakash op. cit. p.28.

ibid

Shaw. MN op. cit. p. 81

ibid

Browlie, Ian. op cit., Jenks. The Common Law of Mankind (op. cit.) p.169

See for example Shaw, MN op. cit p.82.

See generally David and Brierly, Major Legal Systems in the World Today, (op. cit.)

Abi Saab op cit p. 108

Abi Saab. op cit

Quoted in ibid

See for example. Anglo-Iranian Oil Co. Case, Pleading Oral Arguments Documents (1952), 572:quoted in Anand op. cit. p.160

autepacht, Development of International Law by the International Court of Justice (London: raeger 1958)

art 3.

unz J.L., "Compulsory International Adjudication and Maintenance of Peace"; American Journal f International Law 38 Oct 1944 pp.676-711 at 705.

orensen Max, "The ICJ: Its Role in Contemporary International Relations," International Organization,14 (Spring 1960) 274-290 at 279.

and op. cit p.169

# CHAPTER THREE

## INTERNATIONAL LAW IN KENYA'S FOREIGN POLICY

### Introduction

In this Chapter the central theme of this dissertation is focused on, namely e role of international law in Kenya's foreign policy.

The Chapter begins with an overview of Kenya's articulated foreign policy ositions as can be found in government statements and the Constitution and anifestos of the Kenya African National Union[1]. Three case studies; Kenya-ganda relations – Amin Era, The Kenya-Somalia conflict and the Refugee issue ith Kenya as a host country are presented and Kenya's reaction to these events in far as they impacted on its core national goals is examined. The relevant ternational legal principles and rules which are relevant to the manner of the ndling these events and the subsequent outcome are also set out with a view to aluating Kenya's deference to the dictates of international law.

### enya's Foreign Policy in Perspective: An Overview

Kenya's foreign Policy has been interpreted variously. Several views have me up in an attempt to explain the country's foreign policy. One view portrays enya as a country which pursues two types of foreign policy[2]. One of this is dical and, according to this view, is applied to international issues. The other is nservative and is aimed at maintaining the *status quo* and creating stable nditions in the East African region where Kenya has vested interests. Another aracteristic of Kenya's foreign policy is that it is dependent on the major estern powers, the former colonial master, Britain, and the United States. The rge presence of multinational corporations in the country, a large white settler

ommunity and a powerful westernized elite has led to a portrayal of Kenya as a lient state of the west and under neo-colonial influence.

This position has cast Kenya as the odd one out in a region of "otherwise rogressive regimes."[3] The country's articulated foreign policy are contained in ıe 1960 Kenya African National Union (KANU) Constitution and the 1961 and 963 KANU manifestos. The Kanu Constitution sets out the four aims of the overnment with regard to foreign policy.

First it is stated that Kenya is committed to safeguarding its national ıterests and to working with other nationalist democratic movements in Africa nd other continents to eradicate imperialism, colonialism, radicalism and all other ɔrms of national or racial or foreign oppression.

Secondly, it is stated that Kenya would join with the other UN members to romote and consolidate international peace and the peaceful settlement of ıternational disputes.

Third, the Kanu government would forester closer association of African erritories and states by promoting action among the people of Africa. The 1963, ANU election manifesto re-enacted the above principles and reaffirmed that the ANU government would take steps to:

> protect the security of the people, preserve the national integrity of Kenya
> maintain military forces capable of protecting the people and the state,
> forster East African Co-operation by building on the foundations of the East African Common Services Organization and the East African Common Market, conclude defense arrangements with regional states, give support to liberation movements in Africa, be non – aligned in global politics and international economic matters, and participate fully in international affairs.

---

Briefly set out, these forms the bedrock of Kenya's official articulated foreign policy position. Looking at these positions and their execution it is evident that at least three elements relevant to our theme stick out;

the preservation of the territorial integrity of the nation; the protection of the people's security; and the quest for the economic prosperity of the nation and its ruling elite.

These three elements form the central points from which an attempt will be made to evaluate of Kenya's deference to the dictates of international legal norms and principles in dealing with threats to the achievement of these policy goals. To do this use shall be made of three case studies, namely:-

Kenya's relations with neighbours, in the East and Central African region Uganda; the refugee crisis in the region – with Kenya being a major host country; Kenya's handling of its dispute with Somalia over the Northern Frontier District (NFD).

**The Kenya – Somali Dispute Over NFD and the Principle of Peaceful Settlement Disputes**

The Kenya – Somalia dispute over the Northern Frontier District (NFD) dates back to pre-independence days.[4] By an agreement in which Italy was to join the first World War as an ally to the British, the British Colonial Office and the Italians agreed as part of the bargain in 1916 to split the territory occupied by the ethnic Somali between themselves ceding some part to the Italians and retaining the rest in Kenya. The arbitrary drawing of borders to suit the colonial interests was later to prove a difficult problem as it became the source of tension between Kenya and Somalia for decades just before their independence and after.

The Somali living in northern Kenya ethnically, religiously and linguistically belong to Somalia. This is true of the Somalis in Ethiopia and Djibouti as well and the issue of Somali expansionism affected these two other countries equally.

Prior to Kenyan independence Somali leaders in north eastern Kenya petitioned the British authorities to alter the boundary and let them join their brothers in Somalia. A Commission appointed to survey the wishes of the people living in the area reported that the Somali population desired to be part of Somalia and not Kenya.[5] These findings were however, not acted upon by the colonial authorities and at independence the boundaries remained as they were in 1916. At independence a guerrilla like violence erupted in the NFD and involved Somalis from both sides of the border engaging the Kenyan Security forces in intermittent warfare.

The Kenyan position was that in as much as the so called shifta, (the armed secessionist bands) included Kenya Somalis much of the support for them came from the Somali government and the same government was seen to be actively involved in the violence which Kenya viewed as an act of violation of its territorial integrity.[6] The Somali government on its part insisted on the right to self – determination of the northern Kenya Somalis and based its support for them on that ground.

More specifically the Kenyan government held its Somalia counterpart culpable of:-

> aiding the shift militarily and with other logistics; engaging in hostile propaganda directed towards inciting shifta against her territory; and not co-operating with her in suppressing shifta operations.[7]

---

Various attempts at the resolution of the dispute proved fruitless until omalia as a nation collapsed under the assault of its own civil strife thereby hifting its energies elsewhere. The low grade violence in the NFD region ontinued right up to 1992. Insecurity in the region however persists to-date.

**Kenya's Response to the NFD Crisis**

Beginning with the pre-independence period the Kenyan African leaders nsisted on the inviolability of its territorial integrity and argued that at ndependence in line with the OAU principle on the sanctity of the borders nherited at independence, the Kenya-Somalia boundary remain unaltered. While ne Kenyan leadership viewed the question of North Eastern province as an nternal affairs it saw external interference in Kenya's affairs by Somalia because ne latter was actively engaged in aiding and championing the cause of the ecessionist movement in the NFD.

Mr. Ronald Ngala and Mr. Jomo Kenyatta of Kenya African Democratic Union (KADU) Kenya African National Union (KANU) respectively traveled to Mogadishu just before independence in 1962 to discuss with the Somali uthorities the issue of the NFD. This mission was however unsuccessful.

The representatives from Kenya, Somalia and Britain met in Rome again in ugust, 1963 to try and resolve the dispute. The Rome summit did not prove ruitful either and Jomo Kenyatta reacted by outlining what Kenya's policy would e in the matter once independence was achieved. These included:-

agreement would be sought by peaceful and lawful means and all parties should work to reduce tension; the British government could not decide the dispute involving a change on the frontiers of Kenya before the latter became independent and able to act in international matters as a sovereign state; and

if Somalia and Kenya failed to reach acceptable solution to the dispute Somalia was free to pursue the matter at the OAU with the spirit of Addis Ababa which called on member states to settle their disputes by peaceful means.

Kenya hosted an East and Central African leaders meeting in Nairobi in vhich the Somali-Kenya conflict was discussed. The meeting endorsed the Kenyan view on the conflict and urged the states to respect the principle of good ıeighbourlines. It also underscored the importance of observing the principles ıtipulated in the OAU Charter especially that regarding the sanctity of boundaries ınd non-interference in the internal affairs of other states. The Somali government vas also represented at the Nairobi meeting.

In 1965, owing to the efforts of President Nyerere of Tanzania, Kenya and Somalia leaders attended a series of meetings between the two countries including ıne in Dar-es-salaam. These meetings achieved no tangible results.

The two parties met yet again in September, 1967, in Kinshasa during the 5th )AU summit meeting where President Kaunda of Zambia was the mediator. This ıegotiations produced a declaration which enabled further negotiations to take ılace and in October, 1967 Prime Minister Egal and President Kenyatta met in Arusha Tanzania which meeting Kaunda chaired and was attended by Presidents )bote and Nyerere as observers.

The two countries signed a Memorandum of Understanding (also known as hc Arusha Agreement) calling off mutual hostilities and forming the basis for the stablishment of diplomatic relations between the two countries as well as the onsideration of measures encouraging the development of economic and trade elations.

This agreement officially brought to an end Somalia's claim over Kenya's territory. It was however a short lived agreement as the government of Egal which had signed it was soon overthrown in a coup and replaced by the Siad Barrer regime which renewed its claim to the NFD clearly frustrating efforts made so far in trying to achieve a peaceful resolution to the dispute. Apart from deploying security forces in the NFD the Kenyan authorities engaged in public denunciations of the activities of the Somali government and persistently called upon the international community to assist in finding a solution to the conflict.

The Kenyan government at one time protested to the US for supplying arms to Somalia, intercepted and forced to land an Egyptian cargo plane ferrying war supplies to Somalia and closed the Iranian embassy in Nairobi because of that country's support for Somalia in the war.

**The Principle of Peaceful Settlement of Disputes**

International law has always considered its fundamental purpose to be the maintenance of peace. Shaw indicates that although ethical preoccupation's stimulated its development and inform its growth, international law has historically been regarded by the international community as a means to ensure the establishment and preservation of world peace and security.[8]

The principle of peaceful settlement of disputes between states therefore occupies a prominent place in the efforts undertaken since the beginning of the wentieth century in order to secure a better organization on inter-state relations based on the maintenance and the strengthening of international peace and ecurity. It has over the decades become a basic principle of international law as a esult of a long and constant evolution.

---

Beginning with the Hague Conferences of 1899 and 1907 in their respective nsequent conventions on the peaceful settlement of international conflicts the ntracting parties undertook to use all efforts to ensure the peaceful settlement of ternational disputes. The parties agreed to make use of good offices, mediation inquiry commissions in order to solve international disputes. Both Conventions owever failed to provide for an obligation to resolve international disputes by eaceful means and only made recommendation to that effect.

The League of Nations Covenant went a step further than the Hague onventions and in its article 12, members were enjoined to submit to arbitration r to Council for examinations any dispute which might lead to conflict. There ere sanctions under article16 against any state failing to respect established rocedures. The Covenant fell short of stipulating an obligation to resolve all isputes exclusively by peaceful means in that it was still open for states to go to ar as a last resort. This position was to radically change with subsequent evelopments.

The Declaration adopted by the Assembly of the League of Nations in 1927 rovided for a general obligation to settle all international disputes by peaceful ieans at a multilateral level. It stipulated that all peaceful means of whatever ature should be used to settle disputes arising between states.

By the Briand-Kellog Pact of 1928 the contracting parties agreed that the ettlement of any disputes or conflicts of whatever nature or origin that might arise etween them should be sought only by peaceful means. The Pact was followed y the conclusion of the General Act on the Peaceful Settlement of International isputes of the same year. This Act laid down that legal disputes should be ubmitted to arbitration or be referred to the Permanent Court of International ustice, whereas disputes not lending themselves to settlement by such means

ould be submitted to a conciliation procedure and, in the last instance to bitration.

In the United Nations Charter the peaceful settlement of disputes is given a ntral place. Among the core UN principles is the obligation of member states to ttle their international disputes by peaceful means so as not to endanger ternational peace and security and justice.[9] There is no obligation in general ternational law to settle disputes, and procedures for settlement by formal and gal procedures rest on the consent of the parties.[10] And at the regional level, the AU has as one of its principles "the peaceful settlement of disputes by gotiation, mediation, conciliation or arbitration[11]. A Commission of Mediation, nciliation and Arbitration has been established specifically to ensure that this inciple achieves the desired measure of implementability.[12] However African ites and other third world states have had misgivings about, and are unwilling to sort to, judicial or arbitral methods of dispute settlement. This, however, far m implying lack of these countries adherence to the principle has been casioned by their preference over these methods of the informal third party ocedures.[13]

**nya-Uganda Relations:- Idi Amin Era and The Principle of Non-tervention in the Internal Affairs of Other States**

Kenya and Uganda are two countries which share much of history and nomic interdependence among other things. Apart from having had the same onial master, the economies of these two countries have been tied together in nt complementary dependence[14]. To mention some examples, Uganda relies

heavily on the Kenyan port of Mombasa as a transit point for its export and imports while Kenya, apart form deriving foreign exchange from this service, has Uganda as its chief importer of the locally manufactured goods and for re-exports. Further Uganda supplies quite a large percentage of Kenyan electric power requirements. This close relationship came close to a political union when Uganda. Kenya and Tanzania made their first attempt attempt at the East Africa community which collapsed thanks to various factors. The following section will set out the development in the Kenya-Uganda relations which upset the close links between these countries costing both much in terms of economic development and political certainty during the Idi Amin era.

**The Developments in the Kenya Uganda Relations: Idi Amin Era**

The coming to power in February, 1971 of Field Marshall Idi Amin in a military coup d'etat brought with itself a fairly changed and unpredictable political environment in East Africa owing to Amin's peculiar style of leadership and appalling dictatorial tendencies.

The overthrow of Obote, a civilian president, by Amin was initially, however, welcomed by Kenya as it was thought by the Kenya politicians that the left leaning regime of Obote had been replaced by one which would be more accommodative of Kenya's capitalist brand of economy. This would provide Kenya with an ideological partner with whom to counter Tanzania's increasingly hostile ideological orientation towards Kenya. This view was strengthened by the fact that Tanzania immediately reacted belligerently towards Amin at his takeover.[15] Kenya's celebration was short-lived as Amin's tenure turned out to be both unpredictable as it was erratic[16] Apart from this the Kenyan government was made uncomfortable by the atrocities being committed by the Amin regime in

Uganda itself as well as the close links he was forging with fundamentalist Muslim countries and with Libya in particular.

**Economic Decline in Uganda**

Uganda economy suffered greatly under Amin. Owing to political uncertainty, poor economic management and general insecurity coupled with Amins handling of the foreign businessmen in Uganda mainly Asians, the Ugandan economy begun a downward trend which was only stemmed by the assumption of power by Museveni in 1986.

Miller identifies as a key factor being responsible for the decline of Kenyas relations with Uganda, the destruction of Ugandan economy under Idi Amin.[17] First the tourist industry suffered badly because of the bad press that Eastern Africa suffered then in the west.

Kenya depended on Uganda as a vital outlet for its exports and re-exports for example Kenya exported goods worth Kenya pounds 19.1 million to Uganda which compared very favourably with Kenya pounds 78:3 million to the general inter-East African markets[18]. Kenya depended as well on Uganda for one third of its total electric power consumption.[19] Further there were at least 100,000 Kenyans working in Uganda during the Amin period.

The destruction of the Ugandan Economy was made worse by the expulsion of the Asian migrant workers in Uganda hence scaring off investors as well as interfering in the normal operations of Ugandan businessmen. Amin's destruction of the Ugandan economy had serious ramifications for the Kenyan economy and therefore posed a threat to Kenya's key national objectives.

## Amin's Claim to Kenya Territory and General Attitude Towards Kenya

In February, 1976, Amin made a claim that the more than one third of Kenya's territory, that is to the West of the Rift Valley which historically was part of Uganda should revert to it[20]. The boundary between these two countries was drawn by the British who transferred to Kenya what had been north-eastern Ugandan. This move had implications for Uganda's economic potential which was thereby reduced to Kenya's advantage. This territory stretches as far as 20 miles outside Nairobi.

Amin's antagonistic attitude towards Kenya was manifested further by the war of words that engaged the Kenyan political elite in. In 1972 Asians, (both citizens and non-citizens) in Uganda were expelled and their property confiscated. Amin's utterance at that time implied that it was President Jomo Kenyatta who was hindering the rapid Africanization of the Kenyan economy and should have instead followed his example in expelling the Asians. The Kenyan authorities considered this a slight on their leader by Amin.[21]

The insecurity which engulfed Uganda during the Amin days led to the disappearance of several Kenyans working there with the East African Railways. Negative reaction from the Kenyan press, the Kenya Railway Union officials and the Central Organization of Trade Unions provoked Amin into threatening to expel Kenyans working and living in Uganda some of whom he accused of collaborating with the deposed Obote to destabilize the Ugandan military government. It is the official dropping of this threat by Amin in 1973 which enabled the two countries reduce tension between themselves.[22]

---

The Entebbe raid was another source of tension between Kenya and Uganda. In this incident Kenya had allowed the Israeli planes returning from a successful hostage rescue mission to refuel in Nairobi. Amin threatened to retaliate against Kenya for its part in the raid. This threats was however not actualized after Kenya cut the oil supply to Uganda which had no alternative but to seek reproach with the Kenyans to dropping the threat against Kenya.

**The collapse of the East African Community and the Role of Events in Uganda.**

In 1977, the East African Community, a culmination of efforts predating the independence of the three African countries collapsed, thanks to a combination of factors one among them the unfolding political events in Uganda. The Ugandan role, owing mainly to its strained relations with Tanzania, can be identified as a major factor which militated against goodwill necessary to mediate for the survival of the community. A word of caution is however necessary here. "a mere culmination of an objective historical phenomenon for which the leadership, of the three States involved and the Community itself were just subjective conditions". He states that the dynamics of the community's is collapse were beyond the control of the leaders, There were many other reasons for the collapse of the community. However be that as it may it was clear from the day of the Ugandan coup which brought Amin to power Nyerere of Tanzania could not work together with him and as such the Community's days were numbered. Anin's quarrel with Kenya on numerous issues and his tendency to transform Uganda's domestic problems into interstate conflicts with Kenya in an effort to divert attention from these internal matters did not help matter. The military also allegedly

failed to pay to Kenya a debt of 400 million Kenya shillings owed to Kenyan enterprises.[26]

Among other factors Amin's conduct and the consequent relations between Uganda and the two other East African states led to the collapse of the East African Community an eventuality from which Kenya lost much more than the rest.[27]

This account briefly sets out the effects of Uganda's role in the economic and political developments in Kenya during President Idi Amin's rule. These events impacted negatively on Kenya's efforts for rapid economic growth, the prerequisite regional stability among other goals. It remained open to Kenya to take upon itself the task of putting things in order in Uganda because events in that country fundamentally affected Kenya's vital national interests.

It is clear that this would have included intervening in the events taking place in Uganda as did Tanzania or as in the case of Grenada and Cuba when the US intervened in the affairs of these two countries ostensibly to protect its interests.[28] It is this principle of non intervention in the internal affairs of other states that is implied in the Kanu manifesto, of good neighbourlines, in the OAU charter and the UN Charter both of which Kenya is a signatory.

**The Principle of Non Interference in the Internal Affairs of Other States**

That "no state shall organize, assist, forment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another, or interfere in internal affairs of in another state" is clearly stated in the Declaration on the In-admissibility of Interference in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. This

as reiterated in the Declaration of Princi les of International Law Concerning iendly Relations and Co-operation among States in accordance with the Charter the United Nations.

In the "Draft Declaration on Rights and Duties of States" the International aw Commission declared, *inter alia* that every state has the right to dependence and hence to exercise freely without dictation of any other state, all legal powers including the choice of its own government.[29]

Together with the principle of sovereign equality of states this principle of on – interference was designed to ensure that each state respects the sovereignty the other members of the Community of nations. It acquired renewed impetus the post second world war period owing to the activities and request of veloping and socialist countries[30].

The principal reason behind its development at the initial stages was that it nerely reflected the structure of the world community which valued the formal uality of states and the *laisse – faire* doctrine"[31]. States were deemed sovereign d equal. However, it was easy to ignore the restraint on non interference in the ernal affairs of other states whenever there was adequate justification to do so. ith the advent of the new states major developments emerged which gave new ce to the principle. The prohibition of the use of force by member states of the N ensured that the ambit of interference was massively curtailed.

Cassese[32] identifies three customary rules as being responsible for the nesis of this principle and which have continued to define its extent. The first these is the customary rule prohibiting states from encroaching upon the ernal affairs of other states. The second rule enjoins states to refrain from

nstigating, organizing or officially supporting the organization on their territory of activities prejudicial to foreign countries. The third customary rule on the principle deals with cases of civil war. States are not expected to assist insurgents n a case of civil war within a country. These rules could however be ignored by tates if it served their purposes to do so and the Covenant of the League of Nations of 1919 and the Treaty of Paris of 1928, which prohibited war except in exceptional cases only restricted themselves to the use of force which was mainly geared to preventing war. The Covenant also contained in Article 10 an undertaking to respect and preserve against external aggression the territorial ntegrity and existing political independence of all members of the League. The JN Charter prohibits its members from "intervening in matters which are ssentially within the domestic jurisdiction of any state".[33] Enforcement measures n which collective action is taken against a state whose activities are a threat to nternational peace is however allowed under Chapter VII of the Charter.

The new states, jealous of their new found freedom and fearful of nterference in their sovereignty by their erstwhile colonial masters, took this principle seriously and campaigned rigorously for the expansion of its scope.[34] The organization of African Unity for example has this principle of non-nterference as one of its major principles guiding relations between its members tates.

Kenya Uganda relations remained peaceful despite events in Uganda due to he observance of the principle of non - interference in the internal affairs of other tates as this legal principle is set out in the international legal instruments and the ttendant customary rules.

**Kenya and the Refugee Crisis in the Great Lakes and Horn of African**

**Regions**

Owing to the frequent incidents of conflicts in the Great Lakes region and Horn of Africa Kenya has played host to thousands of refugees within its borders. These refugees have come from as far as Zaire and according to a recent study[35] at a refugee camp in the North Eastern province the refugees, a total of 35,000 were found to have come from Sudan, Uganda, Ethiopia, Somalia, Rwanda, Burundi, Zaire and Mozambique.

Kenya hosts to refugees from practically all countries involved in conflict of one kind or the other in the region of our reference. The Eastern and central African region in general account for the majority of African refugees[36] thanks to the unceasing civil strife in the region and to some extent the impact of natural disasters for example drought.

Tanzania, Uganda, Kenya Somalia, Sudan and Ethiopia have had to bear the brunt of these refugee movements with some of the same countries being the major sources of their own emigrants. Kenya and Tanzania however have had a disproportionate high number of incoming refugees than emigrants owing to their relative political stability since independence.

By the end of 1967 there were about 730,000 refugees in Africa and a majority of these were found South of the Sahara and an estimated 200,000 of these were in the Eastern Africa region.[37] The Kenyan refugee population in the past three decades grew steadily and reached all time high during the Somali civil war of 1992. In 1972, the official UNHCR records showed Kenya as hosting about only 1500 refugees with in its borders. In 1979 the number had shot to 6,500. There was as light drop in 1983 with the figure coming down to 5,200

owing to the relative stability in Uganda which enabled the people who had fled civil strife there to return.

Owing to the flare up of violence in Uganda, Ethiopia, Somalia and Rwanda, Kenya found itself be sized by a flood of refugees with the number hitting the 14,000 margin by the end of 1990. This was to be superseded by far in 1992 when due to the total breakdown of order in Somalia and the intensification of the Sudanese civil war the Kenyan refugee population shot to a staggering 400,000. Like elsewhere, the refugee influx into the country presented the government with a serious challenge and for a developing country struggling with issues of economic decline and general insecurity, the refugee problem remained a serious issue to the government. The influx of refugees has been perceived to be responsible for a number of problems which are reviewed here.

**Impact of Refugee Influx**

**Conflict with Neighbouring Countries**

The tensions, suspicions and conflicts that have marked the interactions between many of the countries in the Eastern Africa region can be attributed to refugees. Refugees have been a major cause of conflicts between these countries owing to their activities and the suspicions experienced between the sending and the receiving country.[38]

**Kenya – Uganda relations**

Since 1966, Kenya has played hosted to thousands of Ugandan refugees, owing to the civil strife in that country and due to the Amin dictatorship which saw many Ugandans flee their country. These refugees could be found within the major urban centers and at designated refugee camps. The presence of Ugandan refugees has on several occasions caused an exchange of words between the

eaders of the two countries with Uganda accusing Kenya of harboring rebels ighting for the overthrow of the government in power in Uganda.[39] Kenya's iew has been that some of the Ugandan refugees have been spies or are esponsible for the general insecurity in the country and therefore deserve to be rrested and if possible sent back to Uganda.[40]

**Kenya – Sudan Relations**

Kenya and Sudan have had their relations marked by the presence of udanese refugees in Kenya with the Islamic government in Khartoum accusing ie Kenyan government of aiding the Christian and animist rebels in the south. his accassioned the cooling of relations between the two countries immediately fter the launch of the Sudanese Peoples Liberation Movement.[41]

**nsecurity and Crime wave**

The Kenyan authorities have on several occasions complained that the calating crime wave in the country is due to the activities of the refugees it is osting within its borders.[42] No independent study is available, however, to termine the veracity or otherwise of this claim but taking the general case that uld be verified elsewhere it is to some extent true that arms and other forms of eapons always find their ways to the territories of the host country. Kenya is no ception. A number of incidents have been reported in which refugees especially om Uganda and Rwanda have been arrested after armed robberies or murders.[43]

The refugee influx into the country has in general posed a security problem the country owing to the fact that some of the refugees are merely ordinary minals fleeing justice in their country, and also owing to the possibility of the nuine refugees carrying arms with them which is then sold to criminal elements

in the country. Apart from being a major cause of conflict between Kenya and its neighbours and for the increase in insecurity and crime refugees have been known in Kenya to cause strain on the national food supplies, distort the market for consumer commodities and put a strain on housing and other social ammenities.[44]

**Kenya's Response to the Refugee Crisis**

Kenya's response to the refugee flow into its borders has been erratic and in many cases been confined to rhetorics.

On April 30th 1991 in a rare international press conference at State House, Nairobi, President Moi made an impassioned appeal to the international community to come to grips with the refugee problems in the Horn of Africa and appealed for international aid to enable Kenya to cope with the Refugee problems.[45] In October, 1991, the then Kenya Minister for Foreign Affairs and International Co-operation Mr. Wilson Ndolo Ayah appealed to the UN for more aid to help Kenya cope with the more than half a million refugees in the Country.[46]

During the early years of Museveni's rule in Uganda the distrust between him and President Moi caused the Kenyan government to adopt a hostile attitude towards the Ugandan refugees in Kenya. This attitude was mainly as a result of the view then held by the Kenyan government that these Ugandans were not genuine refugees but spies sent here by the Ugandan government to destabilize the Moi government.[47]

During Idi Amin's rule during which Kenya hosted hundreds of Ugandan refugees it nevertheless continued to co-operate with Uganda yet allowing in those refugees sympathetic to the deposed Obote government. However unlike Tanzania, Kenya did not support these refugees in their fight against Amin

After Amin's overthrow Kenya expelled about 4000 Ugandan refugees claiming that they were involved in the country's violent incidents of crime.[48] Uganda complained bitterly terming Kenya's action inhuman. This was after the ouster of Prof. Lule who was replaced by Godfrey Binaisa whose tenure the Kenyan government did not approve of. In 1987 Kenya Alice Lakwena, the leader of the so called "Holy Sprit Movement"(HSM) which was fighting for the overthrow of the Museveni in government fled to Kenya and was granted asylum prompting protests from the Ugandan government.[49] Kenya did not however repatriate Lakwena.

In October, 1999, following an armed invasion of Rwanda by Rwadese exiles living in Uganda Kenyan President Moi directed that all Rwandese refugees and the Ugandan ones involved in illegal activities leave the country. This move was occasioned by the fact that the Rwandese exiles invasion into Rwanda from Uganda was aimed against President Moi's close friend and business associate the late Javerile Habyarimana. The refugees targeted were those perceived to be sympathetic to the Tutsi-Uganda axis in the Rwandese conflict.[51]

In summary Kenya's Policy towards the refugees crisis within its borders has been one which eludes any blanket conclusion particularly with regard to whether these refugees are as a general matter welcome within its borders or not. Despite the perception of Kenya that the refugees are responsible for crimes, cause strain on social amenities and are a cause of tension between Kenya and the sending countries no refugee has been turned away at the Kenyan borders. However refugees have been arrested or deported if the government felt that they were sympathetic to their home governments especially those of Uganda and Rwanda.

The Kenyan refugee policy has therefore earned it praise from the international community with the UN. Secretary General Dr. Boutros Ghali in 1992 thanking the Kenyan government for the part it has played in looking after the refugees and other displaced persons and pledging UN support[52].

**International Legal Framework**

It has been acknowledged that that the problem of the word's refugees and internally displaced is among the most complicated issues before the world community today.[53] Much discussion takes place in the U.N as the search for more effective ways to protect and assist refugees continues. And since its creation the U.N. has expended efforts to protect refugees around the world. Two world wars, and many other armed conflicts since 1945 have given rise to millions of mass displacements and exoduses in the world. One of the aims of the U.N. was to help achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character"[54], and to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[55] And one of the first issues on the agenda of the U.N was the fate of refugees, displaced persons, stateless persons and "returnees", all uprooted by war and in need of assistance.[56] Several efforts have since been made both at the U.N. level, regional levels and at national levels in order to secure the full protection and welfare of refugees.

In 1946, the General Assembly of the U.N established the International Refugee organization (IRO) with a mandate to register, protect, resettle and repatriate refugees who came mainly from Eastern Europe owing to the effects of the second world war. Due to certain realities and the lack of capacity of IRO to

cope with the many refugees that fall under its mandate it was realized that the responsibility for refugees deserved further international effort under the auspices of the U.N itself.

By resolution 319 A(IV) of 3rd December, 1949, the General Assembly decided to establish the office of the United Nation's High Commissioner for Refugees. The Office was set up as a subsidiary organ of the General Assembly in 1951 initially for a period of 3 years. This mandate was renewed constantly after every 5 years thereafter. As of 1993, it had well over 17 million refugees around the world under its care.

Against this background of refugee protection an impressive regime of international refugee law has been developed vide international instruments to establish and define basic standards for the treatment of refugees. The most basic of these are the 1951 U.N Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees.

**The 1951 Convention Relating to the Status of Refuges and the 1967 Protocol Relating to the Status of Refugees**

The 1951 Convention which was drafted as a result of a recommendation by the newly established U.N Commission on Human Rights, was a landmark in setting standards for the treatment of refugees. Its application is however restricted to the results of events occurring before 1st January, 1951. It gives a definition of a refugee as any person who "as a result of events occurring before 1st January, 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear is unwilling to avail himself the protection of the country; or who not having

a nationality and being outside the country of his former habitual residence as a result of such events is unable or owing to such fear is unwilling to return to it"

The Convention sets the minimum standards of treatment of refugees, including the basic rights to which they are entitled. It also establishes the juridical status of refugees and contains provisions on their rights to gainful employment and welfare on the issue of identity papers and travel documents, on the applicability of fiscal charges, and on their rights to transfer their assets to another country where they have been admitted for the purposes of resettlement.

The Convention prohibits the expulsion or forcible return of persons having refugee status. Its article 33 states that "no contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". The rest of the provisions deal with such rights as access to courts, education, social security, housing and freedom of movement.

Since the 1951 Convention could only benefit persons who had become refugees as a result of events before 1st January 1951 it was recognised that new refugee groups emerged particularly in Africa in the late 1950s and 1960s. The 1967 Protocol was passed with the aim of extending the application of the 1951 convention to the situation of persons who, while meeting the 1951 Convention, had become refugees as a result of events that took place after 1st January 1951. Apart from the two there is an array of other international instruments which contain provisions relevant in various ways to the issue of refugees. The 1949 Fourth Geneva Convention Relative to the Protection of Civilian persons in Time of War; The 1954 Convention Relating to the Status of Stateless Persons; The

61 Convention on the Reduction of Statelessness and the 1967 UN Declaration Territorial Asylum are just some.

Regionally, several instruments have been promulgated to complement and al with the peculiar refugee situations that obtain locally. Africa which has perienced a disproportionate number of wars and internal conflicts has as a gion adopted what is considered the most comprehensive and significant gional treaty dealing with refugees. This instrument, the OAU Convention overning the Specific Aspects of Refugee Problems in Africa adopted by the AU in 1969 has as its primary importance the expanded definition of the term ugee. It defines a refugee as "every person who, owing to external aggression cupation, foreign domination or events seriously disturbing public order in her part or the whole of his country of origin or nationality is compelled to ve his place of habitual residence in order to seek refuge in another place tside his country of origin or nationality."

Apart from the broad refuge definition, the OAU Convention regulates the estion of asylum (Art II). It contains also provisions on voluntary repatriation rt v) and on the prohibition of subversive activities by refugees (Art III)

**fugee Rights**

Parties to the various refugee treaties are under an obligation to observe the iversally recognized human rights with reference to refugees. These include the ht to life, protection from torture and ill treatment, the right to a nationality, the ht to freedom of movement, the right to leave any country, including one's own d to return to one's country and the right not to be forcibly returned. These hts are affirmed, among other civil, political economic, social and cultural hts for all persons, citizens and non-citizens alike, in the Universal Declaration

of Human Rights, the International Covenant on Economic, Social and Cultural Rights which together make up the international Bill of Human Rights.

**The Right of Non-refoulment**

This particular right deserves, especially for purposes of this study, specific mention. A central element of international protection is the right not to be forcibly returned or expelled to a situation which would threaten ones life or freedom. This is the principle of non-refoulment which is given as a right to refugees in article 33 of the 1951 Convention.

The UN Convention against Torture and other Cruel, Inhuman and or Degrading Treatment or Punishment outlaws forcible return of a refugee to a state where there are substantial grounds for believing the he would be in danger of being subjected to torture.

Looking at the meaning and scope of non-refoulment one comes to the conclusion that it forms, as a principle, part of general international law. There is substantial, if not conclusive, authority that the principle is binding in all states, independently of specific assent.[57]

**ENDNOTES**

1. Use is made of the Manifestos and Constitution of the Kenya African National Union (KANU) as it is the only Party that has formed the Government from independence to date.
2. S. Melinda, 'From Quiet Diplomacy to Cold War Politics: Kenya's Foreign Policy'; Third World Quarterly 5(2) 1983 pp 30-62, 300-1 and also C. Legum (ed) (African Contemporary Record 1972/73 (London)) 1974. B161.
3. Timothy Shaw 'International Stratification in Africa: Sub Imperialism in Southern and Eastern Africa" Journal of Southern and Eastern African Affairs, Vol.;: 2(2) April 1977. p.145-210; and also G. Lamb'Review of Colin Ley's Underdevelopment in Kenya' Review of African Political Economy. May – Oct. 1975,p.84-5.

4. For background to the dispute see Castagno. 'The Somali – Kenya Controversy: Implications for the Future. Journal of Modern African Studies 292), 1964 pp.2-36 and Ian Lewis, "Pan-Africanism and Pan-Somalism". Journal of Modern African Studies 1,2, June 1963. pp-62-111

5. See Great Britain, Report of the Commission on the Northern Frontier District, (London: 1962) pp.2-3.

6. See, Korwa, Adar, Kenyan Foreign Policy Behaviour Toward Somalia, 1963-1983, (New York: University Press of America, 1984).

7. ibid

8. Shaw, T.M., International Law, (Cambridge: Grotius Publications, 1986) p.496.

9. Article 2(3) UN Charter

10. Ian Brownlie, Principles of Public International Law, (London: Oxford University Press 1990), p.708.

11. Art. 7, OAU Charter

12. For detailed discussion see H.A. Amankwa, "International Law, Dispute Settlement and Regional Organizations in the African Setting" in Snyder F.E. and Sathivathai S., (eds) Third World Attitude Toward International Law: An Introduction, (Dotretch Martinus Nijhoff 1987 ) p.197

13. Antonio Cassesse, International Law in a Divided Word (Oxford: Clarendon Press 1988)

14. See Okoth, Godfrey, 'The Foreign Policy of Uganda Since independence Toward Kenya and Tanzania' in Oyugi, W., Politics and Administration in East Africa, (Nairobi: East Africa Publishers, 1994) pp.359 – 394: 369

15. ibid

16. T.V. Santhyamurthy, 'Uganda's Political System 1962 – 1990: The Balance between External and Internal Influence' in W.O. Oyugi (ed) Politics and Administration in East Africa, op. cit. p.503-536 at p.512

17. Norman Miller, Kenya: The Quest for Prosperity, (RoulderWest View Press, 1980)

18. See Republic of Kenya, Statistical Abstract 1972, p.49

19. Godfrey Okoth; Foreign Policy of Uganda since Independence Towards Kenya and Tanzania op. cit.p.371

20. ibid p.370

21. ibid

22. ibid

23. ibid p.369

24. ibid

25. ibid

26. ibid

27. See IMF, Direction of Trade Statistics Year Book, 1974, 1974, and 1983 editions, (Washington D.C.) which show that Kenya dominated intra EAC trade, controlling 48.7% of this trade between 1969 and 1978; see also Katete, Orwa, Foreign Policy – 1963-1983 in Ochieng, W.R (ed), A Modern History of Kenya 1895 – 1980 ( Nairobi: Evans Bros. Kenya Limited) 1989).219-244: 230-31

28 See full treatment in Chapter 4 of Year Book of the International Law Commission, (New York, 1956) p.287.

29. Antonio Cassesse, International Law in a Divided World, (Oxford: Clarendon Press, 1988) p.144.

30. ibid

31. ibid p.144

32. ibid p.146

33. Art of 2(7) UN Charter

34. Antonio Cassesse, International Law in a Divided World op.cit. p.143

35. Singo, Stephen M. Rufugees and Interstate Conflicts in Eastern Africa, 1960 – 1995', MA Dissertation, University of Nairobi, 1996 (unpublished)

36. For the Statistical information see ibid

37. ibid

38. For example in 1986 Kenya and Uganda were involved in a brief border skirmishes with each side accusing the other of harbouring and assisting rebels against it.

39. See "Weekly Review" June 16th 1988 p.52, Daily Nation June 2nd 1998 p.24

40. See Editorial "Daily Nation" 29th March, 1982 p.4

41. Singo, op cit.

42. See 'A' Case for Kenya, is the Refugee Problem a Real Burden to the Kenya Government? Kenya Jurist, January, 1993 Vol. 1 p.33-34

43. ibid

44. ibid

45. Daily Nation, March, 18th 1987 p.1

46. 'A case for Kenya , is the Refugee Problem a Real Burden to the Kenya Government? Kenya Jurist, January, 1993 Vol. 1 p.33-34

47. Singo, op. cit. p.117

48. ibid

49. ibid p.123

50. ibid

51. ibid

52. 'A Case for Kenya , is the Refugee Problem a Real Burden to the Kenya Government? Kenya Jurist, January, 1993 Vol. 1 p.33-34

53. United Nations Factsheet No.20 (Human Rights and Rufugees) 1993

53. Art. 1 (3) UN Charter

54. ibid

55. UN Factsheet No.20 op.cit. p.3

56. Guy Goodwin, Refugee in International Law (Oxford: Clarendon Press, 1983) p.97.

# CHAPTER FOUR

## An Analysis of the Role of International Law in Kenya's Foreign

**Introudction:**

As seen in Chapter Three, Kenya's foreign policy consists of the attainment of three major goals namely the preservation of the territorial integrity of the state, the protection of peoples security, and the quest for the economic prosperity of the state and its ruling elite. The case studies have demonstrated threats to these goals and how Kenya reacted to these threats.

This Chapter examines the place of international legal principles in determining the foreign policy direction adopted by Kenya in dealing with these situations. It is argued that adherence to international law goes a long way in many cases to help countries achieve their long term objectives and that this is as true of Kenya as an African country as it is true of western states. A brief comparative analysis is presented of US intervention in Grenada as well as US policy and practice on refugees in order to give a clearer picture of the practice of the western states vis-a-vis that of the African states.

Before this is done it is necessary to begin with a word of caution with regard to foreign policy of an African state in as far as determining the place of international law in the formulation and execution of foreign policy is concerned.

**Foreign Policy in an African State: Formulation and Execution**

It is no mean task to determine with accuracy which of the various factors has gone to direct a particular policy in state matters especially with regard to the conduct of foreign relations.

First the secrecy with which most state affairs are conducted makes it almost impossible for an outside observer to make out what has actually gone to inform a particular policy choice over another. During Kenya's formative days, that is immediately after attainment of independence, the executive assumed complete authority and had exclusive prerogative over foreign policy issues which were seen to be the preserve of the presidency and his most trusted aides in the government[1]. Owing to a constitutional lacunae parliament was not empowered to question the governments conduct on the foreign policy front and had only an advisory role,[2] and the citizen could not question the executive's action in that area either due to lack of legal avenues for or information necessary to do so. As such foreign policy issues remained remote from public censure and debate.

Secondly due to the multiplicity of factors themselves which go to influence foreign policy formulation it is not often easy to lay a finger on which factor has been determined of a particular outcome. Silvio Brucan[3] has tabulated these factors to include material natural basics including the size of territory population, geographical location, resources and the state and level of economic-technological development of societal structure and forces including social classes, ethnic composition, and the cultural and psychological factors at work in the society; and contingency and situational factors including political, economic crises, coups d'etat, elections, strikes among other factors. All these factors come into play in determining the picking a particular policy option over the other and they rank according to the situation sought to be reacted to. It is therefore not easy to determine with scientific accuracy which of the factors are determinative of the final outcome of a decision. Thus as Forsythe points out:

> "The application of international law to the controversies of public policy is not a simple and easy matter. Some policy makers are ignorant of international law. Some find the structures inconvenient and at variance

with their impulse and ideology and political agenda. Some find it generally difficult to match the law with the factual complexities that arise"[4].

He adds however, that:

"Yet international law exists, it is law and repeatedly intersects with the controversies of public policy. Sometimes its impact is greater, sometimes less but never entirely absent"[5].

This situation is generally true of Kenya. The influence of international law in foreign policy may not be public knowledge but the interplay of the political situation and the manner used to solve a problem in order to protect the country's national interests reveal a high degree of deference to the principles of international law which result in the enhancement of the national interests in the long term.

**Kenya-Uganda Relations – Idi Amin Era: The Influence of International Law**

In Chapter Three it was demonstrated how the events in Uganda posed a threat to Kenya's key national objectives. Many options were available for responding to this threat.

First Kenya had the option of joining forces with Tanzania to invade Uganda and install a government of their choice there as this was what Tanzania expected her to do.[6] Amin had proved to be a let down to Kenya and became more hostile towards it than the Obote government had been. Another justification Kenya would have had to invade Uganda alongside Tanzania was that of humanitarian intervention, that is, in order to protect its nationals then being murdered and tortured by Amin's soldiers. Yet a third reason for Kenya to involve in Ugandan affairs was to forestall the Tanzanians from installing a regime in Uganda which would be more accommodative towards them (Tanzanians) as Obote had been. Kenya actually feared this eventuality such that

when Tanzania finally invaded Uganda Kenya reacted fearing that Tanzania wanted to establish as socialist regime in Uganda. One of Kenya's major concerns was the prospect of being encircled by socialist countries led by Tanzania and whose economies had been nationalized in order to strungle Kenya's capitalist based economy[8].

Kenya kept off Uganda affairs despite the fact that Amin posed a serious threat and actually made suffer Kenya's steps towards the achievement of its core national goals.

Other factors in the neighborhood would indicate that for short term gains Kenya would have been engaged in the domestic unfolding in Uganda. The presence of other communist leaning states in Kenya's neighbourhood like Somalia, Tanzania and Ethiopia would have been a strong reason to be used by the west to destabilize these states. This did not happen and Kenya never served as a base for any super-power to destabilize other states or Uganda in particular even though there was the possibility of Tanzania getting involved to install another socialist leaning regime in Uganda.

This posture can be attributed to the pragmatist approach by Kenya in foreign policy which also meant that it would pursue a conservative course in its foreign policy especially in the neighborhood[9] and this helped strengthen the rule of law in the region especially with regard to non-interference in the internal affairs of other states.

**U.S Intervention in Grenada[10]**

The U.S has over the decades made claims to the right to democratic interventions in situations of political instability which threaten to spill over to its borders. These claims, as Forsythe puts it, fail to persuade and are recipes for chaos and instability[11]. Nevertheless several U.S presidents since 1945 have

ngaged in forceful intervention to remove governments they have considered ındesirable. These interventions have received condemnation from the nternational community and have been deemed to have weakened the hold of nternational law within the areas concerned[12].

In the Grenada invasion, for example, in October 1993 a military coup ;taged by Deputy Prime Minister Bernard Coard toppled the pro-Maxist regime of 'rime Minister Maurice Bishop. This action led to a serious and unstable ;ituation in Grenada and foreigners were refused by the new government from leparting.' This situation, it was feared, would create instability in the whole of :he Caribbean region and was therefore a major cause of concern. To rectify this ;ituation a multinational invasion was launched against Grenada being led by 1,900 U.S marines. By 30th October the invasion had been completed and the island militarily secured.[13]

The main reason behind the U.S action in Grenada has been perceived to be that military force was necessary to protect the few hundreds of U.S nationals resident in Grenada. Such a measure would bar the possibility of the U.S nationals being seized and held hostage by the new Government as had occurred in Iran during 1979-1980. The U.S. action received support from the other Caribbean States because they felt that it would help restore political order in Grenada and therefore avoid instability in the entire region.

**Legal Merits of the Intervention**

The legality of the U.S action on Grenada was to be debated for along time after. The US action has been seen as a blow to the rule of law in international relations.[14] The action has also been viewed as wrong in that under general international law, states are obliged to refrain from militarily intervening in the internal or external affairs of other states, save in specific circumstances[15].

The American action was not occasioned literally by self-defense against "armed attack" as required by the relevant legal provisions.[16] The huge gap in military terms between the US and Grenada in the view of some makes, it inappropriate for the US to claim that events in Grenada posed a security threat to the US as to justify invasion[17]

International law is clear that every state possesses the inherent legal right under the legal principles of internal self-determination to choose any form of government or political institutions it desires.[18] This right is deemed to be available without interference from other states. Ideological unattractiveness of the regime does not legitimize military intervention by another state.

Wright[19] argues that overt or subversive complicity by a state in the overthrow of an adverse regime should be construed as unlawful intervention and therefore an infringement on the relevant international law norms. Thus the American invasion in Grenada constituted a serious disregard for the relevant norms of international law.

**The Relevance to Uganda - Kenya Relations**

This account of the criticism of US action to Grenada is important in the evaluation and analysis of Kenya - Uganda relations during the Idi Amin era. The similarity of the facts is striking but the respective reactions of the two, that is Kenya and the U.S, are markedly different.

First Kenya is a regional hegemony as argued by Shaw[20] who has stated that Kenya is a sub-imperial power able to exert influence on East African affairs which it does in the terms of its ruling elites' and those of the elites external associates. Kenya had the wherewithal to bring its weight to bear on its neighbours, especially, Uganda during the Idi Amin time. Unlike the American

action in Grenada, Kenya took a "wait and see attitude" and did not involve itself in the events in Uganda.

Secondly in the US-Grenada problem the US action received the blessings of the other Caribbean States. For it would only be joining Tanzania in their joint action against Amin. Kenya by refusing to join lost on the diplomatic front as Tanzania was angered by Kenya's decision to stay out of the war.[21] This plus other short term gains examined earlier like, the possibility of Tanzania to hand picking another socialist regime for Uganda after Amin proved Kenya's cautious approach which was explained as being premised on good neighbourliness and non-interference in the internal affairs of other States. The policy statements of government officials at that time and later on bear this out and as reported in one of the local daily papers:

> "Ole Tipis the Minister of State in the Office of the President has reiterated Kenya's stand of maintaining good neighborliness with other African Countries"[22]

This stand on good neighbourliness presupposes non-interference so as to maintain normal relations with the other countries. Speaking also in 1987, Kenya's Minister for Planning and National Development was quoted as follows:

> "... he said Foreign policy was clear. He said the country had no enemies neither was it seeking any. He added that non interference in other countries affairs was the cornerstone of Kenya's foreign policy.

Speaking of the Kenyatta legacy President Moi was more emphatic of Kenya's posture with regard to its neighbourhood on the observance of the international legal norms. He stated thus:

> "... outside our country, this posture was manifested in non interference in domestic affairs and national integrity of other states, in strict observance of recognized rules of conduct among nations"[23] .

When asked about Kenya's recognition stand on the Ugandan regime of Idi Amin the then Kenya's Minister for Foreign Affairs was categorical that:

> "The people of Uganda will have to determine and recognize the kind of government they want and that is the government we shall have to recognize".[24]

The position summarizes Kenya's conduct with regard to its neighbours since independence and was an indication of the governments commitment to those norms of international law which go to serve the long term national interests. of the state thereby indicating Kenya's unwillingness to be drawn into the Ugandan internal affairs[25].

**Outcome for Kenya**

The non-involvement of Kenya in the internal affairs of Uganda which found justification in the international legal principle of non-interference in the internal affairs of other states served Kenya's interest in various ways. Speaking at Kenyatta's funeral President Moi stated that Kenyatta brought peace, unity and justice and formulated policies to protect those very rights and freedoms for which Kenyans had struggled under his guidance.[26] He added as noted earlier that outside the country this posture was manifested in the non-interference in domestic affairs and national integrity of other states in strict observance of recognized rules of conduct among nations[27].

Here there is a clear linkage of the states respect for the norms of international law having a direct impact on the national pursuits which were served well by the observance of the "rules of conduct among nations". Kenya avoided the prospect of armed conflict between the two States. Tanzania which

took a keen interest in Ugandan affairs and took it upon itself put things in order" in Uganda was later to engage in an all out war which analysts point out is partly responsible for Tanzanias poor economic performance due to the cost of the war. Kenya avoided this prospect as military expenditure would have occasioned economic decline. This view is aptly captured in President Moi's speech when he stated that in this particular part of Africa there has been seen ugly and horrible consequences of conflicts. These conflicts which arise from territorial ambitious are extremely costly ... "because of the unnecessary loss of life and because the resources wasted in wagging them are for ever lost." Kenya's non involvement in the Ugandan affairs definitely avoided such situation.

Secondly Kenya, by keeping off Ugandan affairs during the Idi Amin period reserved the privilege of being able to constructively get engaged with the various regimes that came after Amin in that Kenya never came to be identified with any camp in the Ugandan conflict. During the whole period of conflict in Uganda exiles from all political camps in Uganda were found in Nairobi. Kenya had the advantage then of keeping its options open and able to engage in friendly relations with any succeeding regime.

On the diplomatic front Kenya gained in that after the second overthrow of Obote there followed a period of instability in Uganda with the National Resistance Movement (NRM) fighting to overthrow the military regime of Tito Okello. President Moi of Kenya was able to attempt a mediatory role and hence try to boost his own image as an international statesman and portray Kenya's relative stability vis a vis the rest of the region to the outside world. Generally Kenya's foreign policy and objective of creating stable conditions in the immediate neighbourhood was greatly enhanced by the observance of the principle of non-interference in the internal affairs of other states. Moral

justifications and short term gains aside, Kenya by and large was influenced by international law in these situations.

**Kenya Somali Dispute and the Application of the Rule of Peaceful Settlement of Disputes**

As seen in Chapter Three the Kenya Somali conflict was a threat to Kenyas interest for various reasons. It was a violation of the states territorial integrity and sanctity of its borders/frontiers. The conflict owing to insecurity and the measures it necessitated for its eradication caused general stagnation of development in the NFD thereby affecting the overall development of the nation. The conflict cost the lives of civilians and civil servants who had no direct role in the fighting.

The claim to succession supported by Somali, it was feared, would trigger similar claims at the coast region of Kenya and possibly even Uganda's claim to much of Western Kenya. It is therefore clear that the resolution of this dispute was a national imperative of uppermost importance not only to enable the country concentrate on internal issues of economic development and nation building but also to ensure security within its borders, goals which were clearly being frustrated by the conflict.

In the analysis of the resolutions to the conflict it will be realized that there existed a general tendency by the Kenya government to premise its efforts in solving the conflict on the principles of territorial integrity and non-interference in its internal affairs by Somali as its justification for the hard-line position it took against Somalia.

Somalia in the other hand, while openly belligerent and the hostile partner, insisted on the right to self determination of the Somalis in the NFD. These positions as premised on legal claims, enabled the possibility of negotiations between the two countries which ameliorated the dangers of going to outright

full-scale armed conflict with each other . This approach enabled negotiations to take place and armed skirmishes kept at a minimum.

**Kenya's Response: International Law**

Kenya's response to the perceived Somali aggression can be summarized here as one which tended towards negotiated settlement of the dispute. Therefore it submitted to a number of international foras (these have been discussed in Chapter Three) where the dispute was discussed and it offered legal justifications for its refusal to ceede part of its territory to Somalia

First, according to Adar, Kenya invoked the principle of territorial integrity throughout its dispute with Somalia since independence[29]. The subsequent Kenyan posture showed an inclination towards the resolution of the dispute through a negotiate settlement with the protection of the country's legally recognized rights being compromised. At the first summit conference of the Independent African States the Kenyan delegation attending as observers had the following views on the NFD:

> The new constitution leading to Kenya's self government makes no provisions for referendum, secessions and such other disruptive activities. The question of referendum and the principle of self determination for the NFD Somalis is ultra vires and therefore does not arise... the NFD is a part of Kenya and shall always remain as such[30].

This was Kenya's main stand on the question of the NFD. However, it was prepared to reach a peaceful settlement to the dispute with Somalia over the area. This in 1963 when the Kenyan leaders met with their Somali counterparts in Rome, August 1963 their draft proposal stated:-

> "Primary consideration will be given to the inhabitants of North - Eastern region. Agreement shall be sought by peaceful and lawful means and all concerned will cooperate to reduce tension in the area"[31].

This shows that while Kenya was not ready to cede part of its territory; it still favoured a negotiated settlement within the limits of the international legal framework. To this end the Kenyan side offered arguments based on settled principles of international law to buttress its case.

Okumu has argued that once Kenya's sovereignty became a fact, any further claims to this territory by the Republic of Somalia were seen as a direct threat to Kenya's territorial integrity and an interference in her internal affairs and that was the view of the Kenyan leaders throughout the duration of the dispute.

During his address to the National Assembly in December 1963, President Kenyatta outlined his government's policy on the NFD in which he stated that as an African government guided by the determination of the policy of African unity, the new Kenyan Government was of the view that problems between Kenya and Somalia ought to the settled peacefully[32]. The Kenyan minister for Justice and Constitutional Affairs on his part stated that Kenya does not consider that Somalia has any legal, direct or indirect, responsibility over the North-eastern region. This basically was Kenya's view on the issue which reflected its mode of handling the dispute.

According to McEwen Kenya's basic position was that of territorial integrity and that this position was in common with most other new African countries which favoured the 'crystallization"of national boundaries in the positions they occupied at the time of independence[34].

As noted in Chapter three at the Rome Summit Kenya outlined its policy in the dispute with Somalia in which it stated that an agreement would be sought by peaceful and lawful means and that all parties would work to reduce tension and that; if Somalia and Kenya failed to find an acceptable solution to the dispute, Somalia was free to pursue the matter through the Organization of African Unity in accordance with the spirit of Addis Ababa which called on member states to settle their disputes by peaceful means[35].

This showed Kenyas inclination to deal with the problem under the internationally sanctioned institutional framework like that one offered by the OAU. It avoided a belligerent approach and can thus be said to have been in compliance with international law.

In the Kenyan governments view Somalis aggression was itself a violation of international law and it was Kenya's duty to counter this by peaceful means whenever possible thus Kenyatta while addressing parliament in 1967 stated that:-

> Kenya wishes to live in harmony with all our neighbours. We covet no inch of their territory. We will yield no inch of ours. We stand loyal to the OAU and its solemn decision that all African States shall adhere to the boundaries inherited at independence ... All that Kenya wants is an end to the bloodshed, misery and waste ...[36]

According to Adar this indicated that as far as Kenya was concerned, amicable relations between her and Somalia could not come into being unless the latter adhered to the UN and OAU positions on respect of territorial integrity of other states.[37] From the this, what emerges is that Kenya premised its position on the principle of territorial integrity as it is stipulated within the framework of the UN and the OAU Charters.

Further Kenya's approach to the issue of setting the dispute by peaceful means as has been demonstrated is evidence of the pervasive influence that international law exercise in the country's conduct of its foreign policy.

This approach was viewed by the Kenyan leadership as effective in helping it achieve its long term national goals. Thus Kenyatta had this to say in 1965:-

> "Ever since my speech in this House on the issue of Somali aggression and *shifta* unrest in North Kenya, we shall pursued a policy based on defence of our rights and our territory, human tolence and understanding, and belief that justice and patience would together bring about a return to normal conditions .... We can no longer permit the complete frustration of economic and social development in this huge area[38].

**The Rufugee Crisis in Kenya and the International Legal Rule of Non-Refoulment**

As already noted in Chapter Three refugees have had a negative impact on the quest for the achievement of Kenya's national goals and have been perceived in to be responsible for many political, social and economic problems facing the country.

Firstly, Kenya's strained relations with the neighbours especially the sending country and secondly, insecurity and crime have been blamed on the refugees who commit crimes within the country and escape back to their countries of origin as well as being responsible for smuggling of illegal arms into the country. Thirdly, refugees have been perceived to be responsible for putting strain on the meager and already overstretched social amenities in the country.

Despite these problems posed by refugees Kenya's response has not been one of the consistent violation of refugee right of non-refoulment.

Kenya is signatory to all the relevant refugee instruments namely; The 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa; The Convention Relating to the Status of Refugees and its 1967 Protocol Relating to Status of Refugees. These together with the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights as well as the 1965 Convention on the Elimination of All Forms of Racial Discrimination provide an impressive international legal framework which Kenya has willingly committed itself to observe with regard in this particular case, to refugees. This commitment at the international level aside the state has gone further and domesticated though in a limited way some of the provisions of the Convention Relating to the Status of the Refugees.

The Alien Restriction Act of Laws of Kenya which is the statute cited as being used to prevent refugee entry into the country clearly confines its operation to the following instances; that is, the Minister may restrict the entry of non

citizens into the country when:- state of war exists between Kenya and the foreign state, and when it appears that an occasion of imminent danger or great emergency has arisen[39].

These are reasonable conditions meant to first and foremost protect the security of the state.

The Immigration Act, of Laws of Kenya, entrenches the recognition of refugees under Kenyan law by incorporating the definition of a refugee as given in the Convention Relating to the Status of Refugees.

The refugees so defined in the schedule as class "M" immigrants are by S.5(3) entitled to appeal to the minister in-charge of immigration against a decision to refuse them entry permits into the country Section 6(2) recognizes the right of refugees to engage in "employment, occupation, trade, business or profession" and in sub-section 6(2) refugee children are even protected from child labour by the stipulation that the right to employment shall not apply to them.

From the foregoing it is clear that Kenya has given recognition to its international obligation toward refugees by entrenching in the right of refugees to enter as well as provided for the remedy of appeal in case entry is unlawfully refused.

However, the practice with regard to the handling of the huge populations of refugees into Kenya has often-times threatened and actually occasioned infringement of refugee rights.

The Kenyan Government has nevertheless adopted a liberal policy toward refugees and has allowed without even proper screening of refugees to enter its borders as put by a newspaper editorial.

"The (Kenyan) Government has largely pursued an open door policy to refugees. Thus many migrants are accorded refugee status without the scruitiny that they would undergo under the UN Convention and Protocol and the OAU Convention".[40]

This has been true despite the fact that :

> "Donor support for refugees has been contradictory. For instance, at the peak of the Somali refugee crisis in 1991/2 many donors froze development aid citing the lack of democracy in Kenya as their reason for doing so".[41]

Kenya has also recognized the need for a more elaborate domestic legislation to give teeth to the international obligations it has assumed in order to protect refugees within its borders thus speaking at the 14th Anniversary of African Refugee Day, the Kenya Minister for Foreign Affairs was quoted as having said that:-

> Kenya is to introduce a national refugee legislation to be in line with the internationally accepted standards. He said that Kenya has only adopted a liberal policy of granting asylum especially in times of large influx using objective analysis of the country of origin.[42]

Kenya's adherence to its obligations toward refugees under international law has, as we have seen in Chapter three, been recognized by the other players in the refugee issue. Mr. Peter Kessler the UNHCR spokesperson in Nairobi while urging Kenya to continue supporting the organization in hosting refugees within the country was of the view that:-

> Kenya has been very hospitable to refugees, we expect that it will continue being good to them.[43]

The same sentiments have been repeated by the same spokesman when he praised Kenya for its refugee policy thus: Kenya has acted in a very respectable and honorable manner all these years by giving numerous refugees a place to stay.[44]

These sentiments have been echoed by the UNHRS head Mrs Ogata who while attending the World Summits for Social Development was quoted as having. "thanked President Moi and his government for hosting refugees at great cost."[45]

What can be gathered from this discussion is that Kenya, despite the great pressure put on it by the refugee population in the country as consistently conformed to the international law tenets regarding the principle of non-refoulment of refugees who have or who intend to cross its borders.

**Western Practice on Refugees and the Principle of Non-Refoulment**

The Kenyan approach to the refugee issue compares favourably to that of the western state especially, Europe and the USA. Here a brief overview of reported instances of refugee treatment by these states is presented, albeit selectively, to show the trend adopted by these countries in the face of large influxes of refugees. This approach, it is intended, will serve as a comparative analysis of the adherence to the principle of non-refoulment by an African State.

According to Mathew Gibney,[47] western democracies are pursuing simultaneously two courses, one illiberal and the other liberal with regard to the refugee problem. He adds that both these course international refugee regime and that western states are making systematic attempts to keep asylum seekers away from their borders. Cementing on the handling of the refugee crisis posed by the military coup in Haiti in 1991, Adam Roberts found the US guilty of flouting the relevant safeguard in the regime of refugee law and states:-

> "A prime interest of the US and some other Neighbouring countries in crisis in Haiti following the Military Coup d'etat in September, 1991 was the huge number of refugees. This US interest led to a number of more or less sinister arrangements to stop Haiti refugees at sea Some were forcibly returned to Haiti, others consigned to Guantanamo Base in Cuba"[47].

The American government's disregard for refugee law has been aptly captured by Forsythe when he concludes with regard refugees fleeing political turmoil in the Caribbean:

> The Reagan administration sought to forestall refugee entry by denying these legitimate refugees their recognized right to asylum under both US domestic law and international law, and indeed continued to deport refugees back to Central America even in the face of mounting evidence that the may

suffer persecution, torture and death upon their return. The Reagan administration sacrificed the lives of these human beings in the name of its own determination of US national security interests despite the rules of international and US domestic law".[49]

The west has often come under heavy criticism for the way it is handling the refugees who seek asylum within their borders as this group of people are perceived as posing a threat to the national interests of these countries. This has led to these refugees being refouled returned to their countries of origin or being sent to third countries hence frustrating the aim of the international refugee regime which envisages the corporation of the members of the international community tackling international problems of social, and economic nature. This is captured by one commentator who argues that:

> "The present European system of retribution for the handling of refugees is less an expression of an emerging Pan-European System of co-operation and burden sharing, in which all states co-operate on an equal basis, than an attempt of major western refugee receiving countries to relieve their domestic asylum procedures by transferring their legal and humanitarian responsibilities to other usually less wealthy states ..... this has the effect of weakening the regime of refugee protection".[50]

Kenyan approach to the refugee crisis therefore compares favourably with the current practice in other countries especially, the so called "civilized" nations of the west. Generally, refugee protection regime is under threat in the modern world with numerous domestic problems facing many states. The UNHCR report aptly captures this when it says:

> Sadly, it is becoming increasingly difficult for refugees to find a place of safety beyond the borders of their homeland. Confronted with domestic problems and declining international support, a growing number of countries have closed their borders to impending large scale refugee influxes. In many parts of the world, moreover, people who have taken refuge in another country have been harassed, attacked and even forced to go home against their wish.[51]

This has forced many legal specialists to urge for the existing international legal regime regarding refugees to be strengthened. [52]

**Outcome for Kenya**

Kenya's handling for the refugee influx into its territory has been one that is consistent with respect for the rule of *non-refoulment*. This has not necessarily resulted in the suffering of Kenya's long-term interests nationally or in the international scene. Far from it, several positive aspects enhancing Kenya's national interests are discernible.

First, Kenya in the eyes of the wider international Community has been perceived as a safe haven in turbulent region. The fact that refugees are welcome here and as well as that they find it a safe place has gone along way to paint a very positive picture of Kenya as one of the very few places where things like foreign investment, tourism and a host of other international presence like refugee agencies are located.

Secondly, Kenya has benefited from the image created as a country that respects the rules by which states are governed. This definitely earns a country diplomatic advantage over and above those countries which are perceived to be impervious to the plight of refugees as well those countries which produce refugees.

It can therefore be concluded in this respect that Kenya as an African country far from showing complete disregard for international law on refugee issues that is perceived to be a threat to its core national interests actually does strive to meet the guidelines provided by that legal regime. This observance of international law as already demonstrated goes along way to help advance the country's interest in the long term perspective.

## ENDNOTES

1. N. Ngunjiri, The Interaction of Kenya Parliament backbenchers and the Kenya Foreign Policy;

Bachelor of Arts Dissertation, University of Nairobi, (unpublished) 1974 J.J. "Okumu, Some Thoughts on Kenya's Foreign Policy"; The African Review III (2) 1973, p.265. See also Katete Orwa, "Foreign Policy", 1963 1986' in William Ochieng (ed) A Modern History of Kenya, 1895-1980(Nairobi: Evans Brother (Kenya) Ltd pp 219-244 223.

2. See Adams Oloo, 'The Role of Parliament in Foreign Policy Making Process in Kenya; 1963-1993' M.A Thesis University of Nairobi (1995) (unpublished).
3. Silvia Brucan, 'The Dialectic of World Politics, New York: The Free Press) (1978) Chapter 3
4. D.P. Forsythe, The Politics of International Law: US Foreign Policy Reconsidered, op.cit. at p 141.
5. ibid
6. D. Katete Orwa, The Politics of Stabilization: Kenya's Foreign Policy Posture in Eastern Africa op.cit
7. Norman Miller, Kenya: The Quest for Prosperity op cit p.131
8. ibid
9. See Generally, Katete Orwa, The Politics of Stabilization Kenya's Foreign Policy Posture in Eastern Africa op.cit. and Katete Orwa "Foreign Policy; 1963-1986" op.cit.
10. For full discussion of this see Christopher Joyner 'United States Action in Grenada' in F.Snyder and S. Sathirathai (eds), Third World and Altitudes Toward International Law: An Introduction (Dortrech: Martinus Nijhoff Publishers) 1987 p.57-72.
11. D.P. Forsythe, Politic's of International Law: US Foreign Policy Reconsidered op cit
12. ibid
13. ibid
14. Christopher Joyner: United States Action in Grenada; Reflections on the Lawfulness of the Invasion op.cit.66
15. See Chapter 3
16. ibid
17. See generally Wright, "Subversive Intervention', 54, American Journal of International Law (1950) p.521
18. See Art V of the UN Charter
19. Wright, "Subversive Intervention" op. cit
20. T.M. Shaw, 'International Stratification in Africa: Sub Imperialism in Southern and Eastern Africa' Journal of Southern African Affairs 2(2), 1977, pp. 145-201.
21. Norman Miller, Kenya: The Quest for Prosperity op. cit. p.131
22. See, Kenya Times 15th Oct. 1987 p.2
23. See, The Standard 9th April, 1987 p.3

24. Daniel T. Arap Moi, Transition and Continuity in Kenya: Selected and Prefaced Extracts from the Public Speeches of H.E. President Daniel T. Arap, Moi of the Republic of Kenya, August, 1979 to October, 1979 (Nairobi). p.7

26 ibid

27. ibid

27. ibid pp. 44-45

28. Korwa G. Adar, Kenyan Foreign Policy Behaviour Toward Somalia 1963 – 1983; (new York: University Press of America, 1984 p.165

29. Catherine Hoskyns, Case Studies in African Diplomacy, (Dar-es-Salaam: Oxford University Press, 1969), pp.38-40

30. Kenya, Kenya-Somalia Relations: Narrative of Four Years Inspired Aggressions and Direct Subversion Mounted by the Somalia Republic Against the Government and People of the Republic of Kenya, (Nairobi: Government Printer, 1967), p.8

31. Kenya, National Assembly, House of Representative, Official Report Vol.2 December 1963, cols.40-42

32. Kenya, National Assembly, Senate Official Report, Vol. I, July-September, 1963, p.30

33. M.C. Ewen, International Boundaries of East Africa, (London: Oxford: Clarendon Press), 1971), p.113

34. Jomo Kenyatta, Harambee: The Prime Minister of Kenya Speeches, 1963-1964, From the Attainment of Self Government to the Threshold of the Kenya Republic (London: Oxford University Press) 1964 pp 38-39

35. Kenya, Main Address by His Excellency the President Mzee Jomo Kenyatta at State Opening of Parliament, 15th February, 1967, (Nairobi: Government Printer) 1967 p.6

36. Korwa G. Adar, Kenyan Foreign Policy Behaviour Toward Somalia, 1963-1983 New York: University Press of America ) 1984. p.32

37. Kenya National Assembly, Senate Official Report, Vol.6 November, 1965, Columns 12-13.

38. Section 3

39. Editorial, "Daily Nation" Friday, 22nd January, 1993

40. ibid

41. "Daily National" 7th March, 1995 p.4

42. Daily Nation 12th March, 1995 p.2

43. ibid

44. ibid

. A Gibney, Mathew "Is there a Future for Asylum in the West, Draft Manuscript", quoted in Adam Roberts; "More Rufugees Less Asylum: A Regime of Transformation" Journal of Modern African Studies, Vol.II No. 4 of 1998, pp.575-395

5. ibid p.387

7. Boyle, Francis, "Afterword" in D. Forsythe The Politics of International law op. cit. pp.163-164.

3. UNHCR, The State of the Worlds Refugees, 1997 – 1998: A Humanitarian Agenda, Oxford London: University Press) p.51

9. ibid

# CONCLUSION

International law, as it developed during the hundreds of years of practice in
e and as it has become in the present century has presented legal scholars
complex question namely that of whether it should qualify for the
ology "law". Distinction has been made of the social infrastructures of
integrated communities and more loosely organized international societies
past and present. The highly integrated societies rely on intricate legal
is with sophisticated of symmetry public and private rights and duties. This
situation with municipal legal systems. On the international scene, a central
comparable to those of national communities has not quite materialized. As
t from the substantive rules of internal law the rules of international law for
ves depend on the consent and goodwill of those states it is intended to bind.
t as it may, it is an acknowledged fact that international law is by and large
if only to keep the world away from total anarchy. A few violations of
tional law especially on matters of high politics do give the impression that
tional law is ineffective as a restraint system and that states which conduct
nternational affairs within the limits set by international law are doing so at
eril. This study has examined the various theoretical positions advanced
e years to support or refute the effectiveness of international law in
g world peace and order.

Owing to the weaknesses of international law as a restraint system especially
compared with the situation obtaining in municipal legal systems it is often
or states to interpret international law in a manner that supports their actions
it about by purely political considerations. This is also true of the
gence and development of the rules of international law. The rules of
tional law have been viewed as outcome of a partisan process where the

stronger states have over the decades deliberately developed a body of rules which they have imposed on weaker states.

These rules of international law which developed during the 18th and 19th centuries are looked at with disfavour by third world countries which view them ignore to legalize and therefore perpetuate international subjugation.

However it is also realized by the weaker states that they have more stake in an orderly international system in which their grievances against the more powerful states can be resolved by other means than military power. Therefore despite campains to change certain aspects of international law, the third world countries have in the same vein been careful not to weaken the positive aspects of international law.

Western literature on the practice of the third world countries with regard to international law has however not been fair in its analysis of the position of these countries.

It is the view of the western commentators that the developing states owing to their lack of a tradition for the respect of the rule of law are extending the same attitude to the international scene. The need to reform international law so as to make it acceptable to all members of the international community is something that is yet grasped by most western commentators.

How a country conducts its foreign policy is often used to gauge a state's adherence to the rules of international law. From its interactions with the external environment, it is possible to discern instances of observance or non-observances of the relevant rules of international law.

Therefore this study set out to examine the influence of international law on the foreign policy of African states with focus being on Kenya as a case study.

Argument is advanced to the effect that the shift in the theoretical assumptions of international law, that is from the natural law theory to

international legal positivism brought with it new rules which tended to make the emergent and militarily weaker states subordinate to their more powerful counterparts. This led to resentment not only to the emerging international order but also to the resultant economic and political structure it has led to and continue to perpetuate.

It has emerged that despite spirited campaigns by the African countries together with other third world counterparts and the then socialist states the rules of international law are generally observed by these states in their international intercourse.

From the analysis of Kenya's reaction to events within its immediate neighbourhood it is evident that its policy makers recognized early that its vital interests lay in East Africa. The stability of the region was therefore of paramount importance. It declared itself committed to and was seen to practice the principle of non-interference in the internal affairs of other states.

This policy of non-interference premised on the other policy of good neighbourliness was actually an expression of balance of power considerations. Here is seen a confluence of respect for international law and achievement of core national goals as not being necessarily hostile pursuits.

The Kenya-Somalia dispute provides a classical test of a state's willingness to play by internationally sanctioned rules relating to the settlement of disputes. Many other factors were at play which necessitated a peaceful settlement of the dispute including the high economic cost of waging the war. However as illustrated in this dissertation the relevant rules of international law regarding peaceful settlement of disputes were clearly at play in the process of the settlement of the dispute between Kenya and Somalia over the Northern Frontier District.

On refugees and their right to non-refoulment this study has demonstrated that considering the practice of the more economically endowed states of the west the Kenyan practice with regard to hosting of refugees has been quite impressive.

At a great cost it has contrary to certain western states provided sanctuary to refugees fleeing from civil strive in the countries of the Horn of Africa and the Great Lakes Region.

It can therefore safely be concluded that both the west and the rest of the world are interested in an effective international legal order and what stands in the way is a responsive system which takes cognizance of the hopes as well as the fears of all the players in the international political arena.

## BLIOGRAPHY


1. Abi-Saab, "The Newly Independent States and the Rules of International Law: An Outline: Howard Law Journal. 1963-99.

2. Aluko, Olajide The Foreign Policies of African States (London: Hodder & Stonghton. 1977)

3. Anand, R.P., New States in International Law, (Delhi, Vikas Publishing House 1972).

4. Anand, R.P. " The Role of the "New" Asia-African Countries in The Present International Legal Order" AJIL 56 (1962) 383 -450.

5. Boyle, F.A. World Politics and International law (Dule: Dule University Press, 1985).

6. Bozeman, Adda, The Future of Law in a Multicultural World (Princeton University Press 1971).

7. Brierly, J.L. The Basis of Obligation in International Law (OUP, 1958)

8. Cassesse, A. International Law in a Divided World (Oxford: Clarendon Press, 1986).

9. Castaneda, J. ` The Underdevelopment Nations and the Development of International Law' International organization 15 1961:38-120.

10. Corbett, P.E. The Growth of World Law (Princeton: Princeton University Press, 1971)

11. Fenwick, `The Scope of Domestic Questions of International 19 AJIL, American Journal of International Law (1925), 143-160.

12. Forsythe D.P. The Politics of International Law US Foreign Policy Reconsidered (Lynne Rienner Publishers, 1990).

4. George. 'The Case for Multiple Advocacy in Making Foreign American Political Science Review (172) 751-810

4. Henkin, L. How Nations Behave: Law and Foreign Policy (London: Frederick Praeger, 1968).

5. Jenks, C.W. Law in the World Community (London: Longmans, d 1968).

6. Kaplan, M.A. & Katzenbach, N. The Political Foundations of International Law (London: John Wiley & Sons Inc. 1961).

17. Kunz, 'The Changing Science of International Law', 56 American Journal of International Law 488-582

18. Levi W. Law and Politics in International Society (Beverly Hills: Sage 1976)

19. Levi, W. 'International Law in Multicultural World', 18 International Studies Quarterly )1974), 417.

20. Malawer, 'A Juridical Paradigm for Classifying International Law in the Foreign Policy.

21. McDougal, Lasswell, 'The Identification and Appraisal of Diverse System of Public Order', 53 American Journal of International Law

22. McDougal Lasswell and Chen, 'Human Rights and World Public Order: A Framework for Policy Oriented Inquiry', 63 AJIL (1969)

23. Merrills, J.G. Anatomy of International Law, (London: Sweet and Maxwell, 1981)

24. Morgenthau, H. Politics Among Nations: The Struggle for Power and Peace (New Delhi:Kalyani Publishers, 1995).

25. Morgenthau, H. "Positivism, Functionalism and International Law" American Journal of International Law 34 (1940) 260-294.

26. Mwagiru, M. 'A Critical Comparison of the Analytical Frameworks of International Relations and International Law', M.A. Dissertation, University of Kent at Cantebury, 1991 (unpublished).

27. O'Brien, W.V. (ed.) The New Nations in International Law and Diplomacy (London: Steven & Sons, 1985).

28. Oppenheim, 'The Science of International Law: Its Task and Methods', 2 American Journal of International Law (1908) 313-410.

29. Peasler, 'The Sanction of International Law', American Journal of International Law (1916) 328-392

30. Potter, 'The Nature of American Foreign Policy', American Journal of International Law (1972) 53-106.Process', The Mid East War 1967, 10 Virginia Journal of International Law (1970) 348-403.

31. Rubin, 'Order and Chaos: The Role of International Law in Foreign Policy', 77 Michigan Law Review 1979) p.33-92.

32. Ryan, K.W (ed) International Law in Australia ( Canberra: The Law of Book Company, 1984)

33. Snow, 'International law and Political Sciency', American Journal of International Law (1913) 315-410

34. Swarzenberger, G. Power Politics: A Study of International Society (London: Steven & Sons, 1951).