

**AN APPRAISAL OF THE DOCTRINE OF STATE SOVEREIGNTY  
IN THE FACE OF INTERNATIONAL MONETARY FUND  
CONDITIONALITIES.**

*The Kenyan Experience*

A DISSERTATION SUBMITTED IN PART FULFILLMENT OF THE  
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*“...in African pork based politics, elite barracudas absconded with the bacon leaving the people to starve. The labyrinth of control and regulation instituted by the state provided the ruling elites with a rich opportunity for illicit enrichment... in many African countries the World Bank and I.M.F arrived too late – the state treasury had been already privatized by elites...”*

**Prof. G.B Ayittey.**

*“... a developing country may be asked by the IMF to tighten its belt even to the extent of cutting its waist under the euphemism of economic adjustments...”.*

**Dr. A.O Adede.**

*“ If slavery is the state of having someone else take important decisions about your life, owing to obligations that you can never hope to pay off, working for others without recompense and with no end in sight and being in danger of severe punishment if you try to escape, then external debt of poor countries is slavery.”*

**B. Sutcliffe.**

## DEDICATION

To my Grandmother Teresina Chitechi Mulondo. I know very well that you cannot read this paper however, this is an appreciation for your effort and inspiration you have always given me.

May God Bless you.

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## ABBREVIATIONS \ACRONYMS

1. AJIL - AMERICAN JOURNAL OF INTERNATIONAL LAW.
2. ESAF- ENHANCED STRUCTURAL FACILITY
3. GDP- GROSS DOMESTIC PRODUCT
4. HIPC- HIGHLY INDEBTED POOR COUNTRIES
5. IBRD- INTERNATIONAL BANK FOR RECONSTRUCTION AND  
DEVELOPMENT
6. ICJ - I NTERNATIONAL COURT OF JUSTICE
7. IDA- INTERNATIONAL DEVELOPMENT ASSOCIATION.
8. IFS –INTERNTIONAL FINANCE INSTITUTIONS.
9. IMF –INTERNATIONAL MONETARY FUND .
10. NGOs – NON GOVERMENTAL ORGANISATIONS.
11. OPEC – ORGANISATION OF PETROLEUM EXPORTING COUNTRIES.
12. PRGF – P OVERTY REDUCTOIN AND GROWTH FACILITY.
13. PRS- POVETY REDUCTION STRATEGY.
14. PRSP –POVETY REDUCTION STRATEGY PAPER.
15. SAF –STRUCTURAL ADJUSTMENT FACILITY.
16. SAPS STRUCTURAL ADJUSTMENT PROGRAMMES.
17. SDR-SPECIAL DRAWING RIGHTS.
18. UN –UNITED NATIONS .
19. UNGA –UNITED NATIONS GENERAL ASSEMBLY.
20. US – UNITED STATES OF AMERICA.

## CASES

ANTELOPE	1825 WHEAT p.122
CORFU CHANNEL	1949 ICJ p.31
ISLAND OF PALMAS	AJI L (1928) p.27
WEMBLEDON	1949 ICJ p.35

## STATUTES

1. BRETTON WOODS AGREEMENT ACT CAP 464.
2. CENTRAL BANK (AMENDMENT) ACT 2000.
3. INTERNATIONAL MONETARY FUND ACT CAP 467.
4. INTERNATIONAL MONETARY FUND (AMENDMENT) ACT  
CAP 468.

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## INTRODUCTION

There is an urgent need for doctrinal guidance for African states in assessing the legal trends and practices of international lending institutions.<sup>1</sup> The International Monetary Fund (IMF) has implemented policies and practices that have disregarded the sovereignty of member states by putting at stake both their political and economic independence.

The notion of sovereignty under international law has been traditionally considered as the concept of the supremacy of state in conduct its affairs both within its territory and in relation to matters affecting the state as to interacts with other international bodies. In consonance with the charter of the **United Nations**;

*'Every state has and shall freely exercise full permanent sovereignty including possession, use and disposal over all its wealth, natural resources and economic activities.'*<sup>2</sup>

The main function of the IMF is to help member states deal with balance of payment problems. In order to accomplish the desired economic results, the IMF has imposed conditionalities, which member countries are anticipated to pursue in order to access its much needed resources.

Conditionalities require states to implement certain economic measures before getting financial assistance. In light of the fact that sovereignty connotes independence to pursue policies without interference from any external

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<sup>1</sup> Adede A. O. Transnational law and Contemporary Problems Africa in International Law: key issues of the Second Millennium and likely trends in the Third Millennium vol. 10 No. 2 2000 p. 358

<sup>2</sup> United Nations General Assembly Declaration on Principles of Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations Resolution 2625 (XXV) 24<sup>th</sup> October 1990. Also see Article 2(1) of the Charter of United Nations.



authorities, does it therefore follow that the conditionalities impinge on sovereignty of states. **Adede** observes;

*'... International monetary Fund and the World Bank Group ... have implemented policies and practices that clearly disregard the sovereignty (piercing the sovereignty veil) of states to which they have given financial assistance'*<sup>3</sup>

Governments have grudgingly accepted the implementation of conditionalities and insist that they are harsh and inappropriate.<sup>4</sup> The debtor nations seem to be at mercy of unilateral decisions of the IMF and the club of industrialised states. **B. Sutcliffe** aptly puts it;

*"If slavery is the state of having someone else take important decisions about your life, owing to obligations that you can never hope to pay off, working for others without recompense and with no end in sight and being in danger of severe punishment if you try to escape, then external debt of poor countries is slavery."*<sup>5</sup>

The dissertation shall endeavour to evaluate firstly, what constitutes states sovereignty by tracing the origin and essence of the doctrine and now the doctrine has been transformed from its absolute nature by the passage of time. Secondly, the paper shall examine the International Monetary Fund (IMF) by firstly, tracing its historical development, structure and operations and its relations with Kenya. Thirdly, the study shall assess the conditionalities from the IMF and their effect on sovereignty and lastly conclusion and recommendations deemed necessary to buttress the principle of sovereignty.

This paper seeks to raise awareness to the readers about the plight of debtor nations, that have to dance to the tune of conditionalities from the IMF even at the expense of

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<sup>3</sup> Supra note 1 p. 358

<sup>4</sup> "Okemo outbursts on Aid conditions" DAILY NATION, Oct. 26 2001

<sup>5</sup> Sutcliffe, B, To Borrow and Borrow index on censorship for free expression vol. 29 January 2000

their own sovereignty. It is hoped that the readers shall appreciate that economic and political independence are inseparable segments of state sovereignty.

## CHAPTER ONE

### THE DOCTRINE OF STATE SOVEREIGNTY

This chapter shall endeavour to evaluate firstly, what constitutes state sovereignty by tracing the origin and essence of the doctrine of state sovereignty and how the doctrine has gradually transformed from its absolute nature by the passage of time. The writer shall then embark on a discourse of evaluating the content and scope of state sovereignty; such a study cannot be complete without an inquiry of the impact globalisation on the notion of sovereignty. The chapter shall conclude by a brief examination of the notion of sovereignty as perceived today.

#### **1.1. The Origin and Development of the doctrine of State Sovereignty:**

For any meaningful study of the concept of sovereignty, it is imperative to understand the philosophical foundations of its abstract theory, as the doctrine is embedded in legal science. The concept of sovereignty derives from Greek political thought transmitted to modern times through Roman law and medieval scholasticism. In ancient Greece it is traceable to Homeric times, where it is thought to have matured in Athens.<sup>6</sup>

The term 'sovereignty' in its contemporary multiplicity of meanings is in itself one of the most interesting products of legal historical and legal theoretical problem.<sup>7</sup> The present form betrays its late Latin origin from the word '*superanitas*' which seem to have emerged from the feudal era, denoting the idea of one ruler, commander or official

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<sup>6</sup> Jenks, W. Law in the World community, (Longmans, London 1966) p. 37

<sup>7</sup> Verzijl, J.H.W. International Law in Historical Perspective 1 General subjects (AW Sijthoft-beyden 1968) p. 256

being higher than another.<sup>8</sup> Its origin is therefore both etymological and historical signifying the comparative degree of greater than others.

However, when the feudal system was displaced as a result of the emergence of strongly centralized national kingdoms, legal theory began to concern itself with sovereignty. The celebrated French philosopher **Jean Bodin** (1530-1596) became the famous in his analysis in his book, Six Livres de la Republique published in 1577. He defined sovereignty as an absolute and perpetual power of a commanding state:

*“...though the presence of sovereignty is the chief property which distinguishes a state from other organization of men.”<sup>9</sup>*

For Bodin, a state demanded unity of power. It follows therefore that sovereignty became something more than mere superiority; it was at once the greater force and supreme authority within territorial limits, sovereignty could not be perfect unless it was absolute and indivisible.

**Bodin's** conception of sovereignty found support of **Francis Hinsley** who opined that, the idea of sovereignty, was the idea that there is an absolute political community and no final or absolute authority elsewhere.<sup>10</sup>

**Jean Bodin's** perception on indivisibility of sovereignty received challenge in the 18<sup>th</sup> C., that saw the recognition of divisibility of sovereignty. The emergence of many

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<sup>8</sup> Ibid

<sup>9</sup> Bodin J. Le Six Livres de Republique, (1602) pp. 15-28

<sup>10</sup> Hinsley, F. Sovereignty .(Cambridge press 1986)

reigning princes who constituted the German empire that exercised some independent powers although they were not fully sovereign illustrated this.<sup>11</sup>

Professor **J.W. Verzijl**, posited that the historical development of the notion of sovereignty unraveled the notion by distinguishing the different facets, one directed inward, one outward and sideward and another upward.<sup>12</sup> The inward aspect denoted the absolute power of the king, after the subjection of his once powerful vassals, to rule the country as its highest authority. **Charles de Vischer** observed, in support;

*“The absolutist conception of power tends to make law exclusively the word of him who has the right to command others. Law is simply because the sovereign decrees it.”*<sup>13</sup>

This corollary of sovereignty is in *pari materia* with the classical doctrine of English law expounded by **Bracton** and reaffirmed by **Fotescue** and **Coke**;

*“The King ought not be under any man, but he ought to be under God and the law, since the law makes the King, therefore let the king render to the law what the law has rendered to the king, namely dominion and power; for there is no King where will prevails and not the law”*<sup>14</sup>

The outward and sideward aspect affects the King’s relationship with his fellow kings and his position vis-a-vis the high Pontiff while the upward facet covered the supremacy of the sovereign within its territory and independent from outside.

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<sup>11</sup> Hood, F. C. Thomas Hobbes; An Interpretation of Leviathan (Clarendon Press, Oxford, 1964 The Divine Politics of) p. 264

<sup>12</sup> Supra note 7 pp. 258-259

<sup>13</sup> Vischer, C. Theory and Reality in Public International Law 3ed (1960) Translation by Corbet

<sup>14</sup> Supra note 2 at p 261

**J.W.Verzijl** observes;

*'Sovereignty' can only be maintained as an acceptable legal concept it is used in the connotation of freedom for nations to lead their national existence as they think fit, in complete mutual independence, but within the limitation of international law*<sup>15</sup>

Owing to political evolution in Europe and concomitant development of jurisprudence, the conception of notion of sovereignty was challenged by liberal intellectuals and restless aristocrats who rejected the absolute sovereignty and enunciated the theory of 'sovereignty of the people'. They posited that absolute and perpetual power belonged to the people and not the state. The celebrated English jurist, **John Locke** theorised the concept of sovereignty of the people. According to him, the sovereign had to exercise supreme power in the public interest otherwise the public reserved the right to resist. He noted:

*"The community perpetually retains supreme power of saving themselves from attempts and designs of anybody even if their legislations, wherever they shall be so foolish or so wicked as to lay and carry designed against liberties and properties of the subject"*<sup>16</sup>

Other jurisprudential expositions are derived from the writings of **Jeremy Bentham** and **John Austin** reputed to be the fathers of modern positivism. **Austin** posited that the indicia of sovereignty was a habit of obedience or submission to a determinate and common superior, which superior is not in a habit of obedience to a determinate human superior.<sup>17</sup> **Bentham** found sovereignty in the artificial person of the common-wealth, who is obeyed by subjects out of fear that persons in power might inflict punishment following disobedience and reward upon obedience.<sup>18</sup>

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<sup>15</sup> Supra note 7 p. 13

<sup>16</sup> Franklin, J. A. John Locke and the Theory of Sovereignty (Cambridge press 1978) p. 10

<sup>17</sup> Austin J, Lectures on Jurisprudence (London: Murray Albermarte 1992) p. 21

<sup>18</sup> Bikhu, B. Bentham Political Thought (London, Croom Helm, 1973) p. 69

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The interactions of the monarchs of Europe saw the need to redefine the concept of state sovereignty and take into account such interactions. The emergence of completely independent states did not vanish overnight, and so was the legal and political structures of Europe especially within the compass of the Holy Roman Empire. The most significant milestone in the interactions was the signing of the Peace Treaty of Westphalia of 24<sup>th</sup> October 1648, which ended the bloody religious wars. This saw the emergence of juridical sovereign that states relied on to a balance power and regulate their mutual relation.<sup>19</sup>

### 1.1.2 The Nature of Definitions of Sovereignty

The doctrine of sovereignty has been variously depicted as the linchpin upon which international relations are based, the cornerstone on which international law rests and the prime motivating force of international law development.<sup>20</sup> According to **Hobbes**, the logic of sovereignty is unassailable, it rests on the truism that the sovereign who makes the law cannot be subject to the law.<sup>21</sup>

Judicially, the classical definition was spelt out by Judge **Max Huber** in the Island of Palmas case. He observed:

*“Sovereignty in the relations between states signifies independence in regard to a portion of the globe is the right to exercise therein to exclusion of any other state functions of a state.”<sup>22</sup>*

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<sup>19</sup> Biersterker, T. and Weber, C. ed. State Sovereignty as Social Contract (Cambridge Press 1996) p. 35

<sup>20</sup> Nwabuzor and Mueller, M. An Introduction to Political Science for African Students

<sup>21</sup> Brierly, J. L. Basis of Obligation in International Law and other Collected Papers Ed. Lauterpacht, H. (Oxford 1958) p. 69

<sup>22</sup> A J I L (1928) p. 875

The definition underscores sovereignty as independence or autonomy of states to make and implement decisions within their territories without interference from other states.

In *Re Corfu Channel* case, Judge **Alvarez** had to say this about sovereignty

*“By sovereignty, we understand the whole body of rights and attributes which a state possesses in its territory to the exclusion of all other states and also with the relations with all other states. Sovereignty confers rights upon states and imposes obligations on them”*<sup>23</sup>

This definition is least debatable, as sovereignty necessarily rest states with rights for instance, the right to self defence, similarly, sovereignty imposes obligations on states for instance a sovereign state is bound by treaties it has entered into and such a state will not be heard to plead its municipal law as a defence for violating an international obligation.

According to **Henry Wheaton**, sovereignty is two-pronged, encompassing its constitutional and international aspects. He defines sovereignty as the supreme power by which any state is governed. This power is exercisable either internally or externally<sup>24</sup> His definition is dichotomous, the internal sovereignty is vested in the state by virtue of the constitution or any fundamental law. On this token, the Kenya constitution declares Kenya a sovereign state<sup>25</sup>

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<sup>23</sup> 1949 I.C.J. P 15 pp. 31-32

<sup>24</sup> Wheaton, H. *‘Elements of International Law.’* (The literal publication edition 1986) p 27

<sup>25</sup> The Kenyan Constitution of Kenya at section 1



**Allan James**, perceives sovereignty as the objective feature entitling states to engage in international relations, he maintains that sovereignty as a constitutional concept has three attributes namely; it is legal, absolute and unitary condition.<sup>26</sup>

**M.Fowler** and **J.Bunk** argue that to maintain sovereignty the state must sustain its independence from its peers in the international arena. The state must not only demonstrate its domestic political supremacy, but also actual independence of outside authority in foreign affairs.<sup>27</sup> The same sentiments as shared with **Thomas Biersteker** and **Cynthia Weber** who define sovereignty as; ‘a political entity’s externally recognised right to exercise final authority in its affairs.’<sup>28</sup>

To crown it all, **Ruth Lapidoth** extracts three salient features from the foregoing definitions, Firstly, the sovereign state is a full subject of international law, secondly, that it is not under the control of any other state and lastly, that it is able to exercise fair amount of power.<sup>29</sup>

## **1.2. Content and Scope of State Sovereignty**

The content and scope of state sovereignty is controversial, it follows from its historical development that it has been construed differently with different thinkers and at different times. The arguments and reflections of writers have been largely determined

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<sup>26</sup> James, A. Sovereign Statehood: The basis of International Society (London Allan and Unwin 1986) p. 39

<sup>27</sup> Fowler, M and Bunk, J. Law Power and the Sovereign State (University of Park Pennsylvania state press 1996).

<sup>28</sup> Supra note 6 p. 39

<sup>29</sup> Lapidoth, R. ‘*Sovereignty in Transition*’ Journal of International Affairs 45 (1992)

by ideological factors and some have construed it to serve purposes for various socio-political systems of the day.<sup>30</sup>

According to **F.N.Hinsley** sovereignty has political and legal thought. He observes;

*‘sovereignty as traditionally understood in origin and essence, is the conceptual expression of a dominant political fact. It is not in itself a fact but a theory or assumption concerning facts of authority and power which brook no discipline by law or higher authority, is the basis of effectiveness of state, peace and security of citizen.’<sup>31</sup>*

Independence is a facet of sovereignty and can be claimed in international law subject to the right of other states. According to **Max Huber**, *‘sovereignty means independence’*, it signifies political and the legal spheres of the peoples’ insistence that their state shall be supreme and individually inviolate<sup>32</sup>

**N. Stephen** concurs with that observation, he argues:

*‘sovereignty and independence are no abstraction, fetishes or dogmas without effect on the plane of interpersonal relations. On the contrary, they are actual judicial political instruments, whose political content lies in the contribution of equality, to the normal unfolding of international relations.’<sup>33</sup>*

It follows that, state sovereignty is a legal right transcending that of independence in relation to other states.

According to a Soviet jurist **V.V. Evengenyev**, sovereignty is the possession of supreme power unlimited by any other state resulting in authority within a state and

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<sup>30</sup> Louis, D.Droit International ed. Durand (Paris 1964) p 80

<sup>31</sup> Hinsley, F. N. Sovereignty (C.A. Watts and Co. 1966) p 31

<sup>32</sup> Supra note 22

<sup>33</sup> Stephen, N. Independence: The corner stone of contemporary International Law in Review Sociolista 1 (Buchares 1978) p. 78

independence in relation to other states.<sup>34</sup> The right of state independence encompasses the competence of a state to participate in international agreements of concern to them and to join international organizations dealing with matters affecting their interests.<sup>35</sup>

Writers from communist states distinguish between national and state sovereignty. The former is regarded as an inchoate right which is realized through self determination and becomes immaculate when a nationality forms its state, sovereignty of the nationality fuses with that of state to constitute state sovereignty.<sup>36</sup>

Another attribute that stems from sovereignty is equality. Western scholars generally hold the view that equality means equal protection of the law but does not include equality of rights and functions.<sup>37</sup>

For instance **J.L Brierly** argues;

*“... All states do not have equal rights more than Englishmen have ... but it is true that all states are equally entitled to have those rights which are protected, in both the charter and the covenant the great powers exercised primacy among state.”*<sup>38</sup>

Sovereign equality constitutes the linchpin of the whole body of international legal standards and the fundamental corner stone upon which international relations rest. It acknowledges claims that states must be treated equally regardless of their actual

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<sup>34</sup> Evengenyev, V. Subjects of International Law; Sovereignty and Non Interference in International law (NO 2 OF 1955) p. 77

<sup>35</sup> Observed in Mexico at meeting of the United Nations special committee on Principles Concerning Friendly Relations And Co-Operation Among States A/AC 119/sr 35 (1964)

<sup>36</sup> Supra, note 29 at p. 524

<sup>37</sup> Brierly, J. I. The Law of Nations 6ed. (Oxford 1958) Chapter 4 paragraphs 2

<sup>38</sup> Ibid

stature. **E. Vattel** wisely observed; a dwarf is as much as a giant, a small (state) is no less sovereign than the most powerful kingdom<sup>39</sup>

The important of the doctrine of equality is manifested widely, as it has found expression in numerous international instruments for instance, Article 3 of the O.A.U.

Charter provides:-

*'The member states in pursuit of the purposes stated in Articles solemnly affirm and declare their adherence to the following ... inter alia, sovereign equality of states.'*<sup>40</sup>

Equality in mutual relations should exist irrespective of any legal differences between in size territory, number of populations, economic, political or military power<sup>41</sup>, it was observed in the Antelope case that; no principle of general law is universally acknowledged than the perfect equality of nations. It results from equality that no one can rightfully impose a rule on another.<sup>42</sup>

Equality means impartial and uniform application of international law to international law subjects. Experience has shown that whatever the attributes of states as size, population, wealth, strength or degree of civilization states in reality can never be equal. However, the doctrine of state equality cannot be claimed to be bereft of merit.

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<sup>39</sup> Cassese, A. International Law in A Divided World (Clarendon Press, Oxford 1986) p. 130

<sup>40</sup> The Charter of the Organization of African Unity Article 3

<sup>41</sup> The United Nations General Assembly Declaration on Principles of Law Concerning Friendly Relations and Co-operation Among States. Resolution 2625 (XXV).

<sup>42</sup> 1825 Wheat p. 122

Another attribute that stems from sovereignty is state jurisdiction otherwise known as 'reserved domain'. Professor Verzijl argues that matters within the domestic domain are not regulated by positive international laws, he shrewdly noted;

*“whilst other matters are not regulated by the law of nations ... are those which the law has not been able to place under its control because they are refractory or judicially unmanageable, the special category of matters belonging to the reserved domain”*<sup>43</sup>

The state jurisdiction concerns the power of the state to affect people and circumstances without interference from external quarters. **Article 2(7)** of the **Charter of the United Nations** out rightly prohibits intervention on matter essentially within the domestic jurisdiction of state.

It has been argued by one scholar that the purview of this right extends to the right of a nation to choose its social system and to freely dispose its national wealth, any treaty that purports to curtail this right is at variance with international law.<sup>44</sup>

The international law territorially principle is embedded in the notion to state jurisdiction, this principle entitles a state to prosecute offences committed in its territory, the principle of state jurisdiction is rendered redundant by the application of a concepts of state and diplomatic immunity.

It follows therefore that, a sovereign state is entitled to exercise sole legislative, administrative and judicial powers within its territory. This power is exercisable over all person or things within its frontiers and such a state enjoys personal jurisdiction over its

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<sup>43</sup> Supra note 7 p. 272

<sup>44</sup> Supra note 34 p. 53

nationals wherever they may be. Theoretically, a state may legislate over persons and things outside its territory but such a legislation becomes only effective once the subject comes into its jurisdiction.<sup>45</sup>

### 1.3. Sovereignty and Sovereign Equality.

The sovereignty of states and equality of states represents the basic constitutional doctrine of law of nations that states have a uniform legal personality.<sup>46</sup> Equality is a basic element in the political philosophy of the late 17<sup>th</sup> C.<sup>47</sup> It emanated from the expositions of the naturalists that equality is an attribute of man upon which the legal structure of the society is built.

The legal content of the term sovereign equality however remains elusive. It was observed in the case of *Schooner Exchange V M'Fadden*, that sovereign equality merely means independence under a different name.<sup>48</sup> Equality is asserted by states to mean not merely equality of legal rights but also equality in voice, in the exercise of those rights and equality of protection for them.<sup>49</sup> Naturalists posited that equality is unimpeachable if never defined. In the *Wimbledon Case*, the Permanent Court rejected the argument that a treaty provision could not deprive a state of the sovereign right to apply the law of neutrality to vessels through the Kiel Canal.<sup>50</sup> The court observed;

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<sup>45</sup> Berman, N. "Sovereignty in Absence: Self Determination and International law" Wisconsin International Law Journal 7 (1988) pp. 51-67

<sup>46</sup> Brownlie, I. Principles of Public International Law. 5 ed (Oxford 1998) p 289

<sup>47</sup> O'Connell, D.P. International Law 2 ed. vol. 1 (London, Steven and Sons 1970) p. 320.

<sup>48</sup> 7-Cranch p 116 at 217.

<sup>49</sup> Wolff, Jus Gentium Prol S. 16, S. 395.

<sup>50</sup> 1923 PCIJ 1930 Ser A no. 1 p 25.

*“The court declines to see, in the conclusion of any treaty by which a state undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty.”*

There however, exist a convergence of views by states both naturalists and positivists that sovereign equality is an aspect of sovereignty and that states equal faculties exercised in an identical manner and uniform degree and therefore cannot be bound by laws they have not consented.<sup>51</sup> **Brownlie, I.** argues that the sovereign equality of state may be qualified by institutional aspects of organization like having a weighted voting system or even be permitted to take decisions without the express consent of all or any other states. He opines;

*“Of course it can be said that on joining the organization each member consented in advance to the institutional aspects and thus in a formed way the principle that obligations can only arise from the consent of states and the principle of sovereign equality are satisfied.”<sup>52</sup>*

During the San Francisco conference that led to the adoption of the United Nations Charter, weaker states realized that unequal voice in international organization would lead to inequality of rights.

They therefore advocated for a General Assembly with equality in voting.<sup>53</sup> As understood today sovereign equality means that all states are deemed equal in the international arena and that no state has the ability to influence policy decision of other states.

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<sup>51</sup> Supra note 47 p 322

<sup>52</sup> Supra note 46 p 292

<sup>53</sup> Supra note 51

#### **1.4 Sovereignty and the United Nations**

The notion of sovereignty is the basis of international relations and is now considered to be the very cornerstone of the United Nations. It places the state at the apex of social structures among all the peoples of the world. The concept of sovereignty received a land mark recognition after the end of the First World War. The autonomy of the state was summed up in the expression of independence and equality that embody the cardinal rule that no state can be restricted save from rules emanating from its will.

Rules immunizing states from external interference and fortifying equality among states have attained peremptory status under international law and have found expression in the salient provisions of the charter of the United Nations. Article **2(1)** provides:

“The organization is based on the principle of sovereignty equality of all its members”

The foregoing provisions are further reinforced by the provisions of Article **2(7)**<sup>54</sup> that prohibits the United Nations from intervening in matters squarely within the domestic jurisdiction of any state. It follows therefore that when the organization encroaches on the domestic jurisdiction of a member state to a substantial degree not only will its competence be in issue but also its personality.<sup>55</sup>

In consonance with the charter of the United Nations the General Assembly has adopted a number of resolutions recognizing the right to sovereignty. In 1970, the General Assembly adopted the Declaration on Principles of Law Concerning Friendly Relations

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<sup>54</sup> Article 2(7) of the Charter of the United Nations.

<sup>55</sup> Brownie, I. Principle of International law 4ed (Clarendon press, Oxford 1990) p. 293



and Co-operation Among States which proclaimed that every state has and shall freely exercise full permanent sovereignty including, possession, use and disposal over all its wealth, natural resources, and economic activities.<sup>56</sup> The Charter of Economic Rights and Duties of States declares that every state has the right to its own independence and it is free to provide for its well being and to develop both materially and spiritually without domination from other states (read and organizations). It is the most vocal instrument within the framework of the United Nations that clearly sets out rules to be employed as a yardstick in determining what should be and what should not be done in the context of economic rights of states.

The United Nations General Assembly addressed the question of intervention in 1965 upon the promulgation of the Declaration on the Admissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.<sup>57</sup>

Which declaration solemnly declares, that no state has a right to intervene directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state and further that, the state may use or encourage the use of economic, political or any other types of measures to coerce another in order to obtain from it subordination of the exercise of its sovereign rights or to secure advantages of any kind.<sup>58</sup>

The resolution in paragraph 5 states:

*“Every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state.”*

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<sup>56</sup> Supra note 41

<sup>57</sup> Resolution 2113(XX), adopted by vote of 109-0-1 with the abstention of the U. K.

<sup>58</sup> Paragraph 1 and 2

The International community as it prevails today is both volatile and versatile so much so that the principles enshrined in the charter of the United Nations may be derogated on grounds of necessity or in self defence. One may for instance juxtapose the provisions of article 2(7) of the charter and intervention on humanitarian grounds.

According to **Javier Perez de Cueller**, the right to intervene has been reserved by the relevance of political events at the material time. He supported the movement towards a regime that allows intervention on moral grounds for instance, in cases of mass suffering, which should prevail over frontiers and legal documents.<sup>59</sup>

### **1.5. Globalisation**

The world has been caught up with new innovations this being the so-called 'information age' this changes have had tremendous effect on the sovereignty of nations. What is termed as 'globalisation' is an attribute or a recurrent tendency of world capitalism since early times, it is not a new phenomenon as it is oftenly thought.

Professor **Ljubisa Mitrovic** argues:

*“Mondialization or globalisation is the process of interdependence of contemporary states with the world system. Mondialization is not a new world phenomenon. Interaction of societies is as old as history of mankind, although its mechanism and effects differed in different epochs. There is an essential difference between interactions among societies of the old pre-capitalistic times and those in the process of mondialization, which had arrived with capitalism or contemporary global world society.”*<sup>60</sup>

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<sup>59</sup> United Nations SG/SM/456 24<sup>th</sup> April 1991

<sup>60</sup> Ljubisa Mitrovic “*Globalization and the New world order*” Review of International Affairs p.11

Different writers have viewed the concept of globalization differently. According to **George Soros**, globalization is the global spread of *laissez faire* capitalism, where the customer is considered as the king.<sup>61</sup> The market forces demand and supply shape the *laissez-faire* market. Governmental controls are deemed unnecessary, the role of a state in this arena diminishes.

**Thomas Friedman** who is accredited to be one of the early thinkers of globalisation, views globalisation as the integration of trade, finance and information to create a single global market culture<sup>62</sup>

Writers have posited that globalisation presents unprecedented threat to the sovereignty of especially developing nations, They point out that developed countries use globalisation for neo-imperialist purposes of domination and subjugation of the rest of mankind. **S. Avramor** opines:

*“Globalism takes man as citizen of the earth, members of one single community. This cosmopolitan vision of globalism runs against nation-states sovereignties. In this sense globalisation is an expression of the interest of the transnational corporations and the United States which is yearning to become a leader of global unification of the world.”*<sup>63</sup>

The concept of globalisation has aroused a myriad of perspectives among writers, others view its as a creature of the global economy while others have posited arguments favouring political or social globalisation, but be that as it may, there is unanimity that,

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<sup>61</sup> Bradley, G.R. *Economics For East Africa: An introduction Course* 2ed (Cassell 1979) p.4

<sup>62</sup> ‘Role of Hawks and Doves’ *New York Times* February 2<sup>nd</sup> 1997 p. 4

<sup>63</sup> Avramor, **S. Trilateral Commission – A World of Government or A World Tyranny** (Veternik 1998) p. 64. He illustrates by pointing out that George Bush in 1989 at the University of Texas, expressed this globalisation tendency, as the building of a new world order that would serve the rich and powerful: world financial oligarchy, transnational corporations and military – industrial complex.

the movement towards unification through the phenomenon of globalisation weakens the sovereignty of nation-states. In Kenya, the IMF has been an agent of globalisation, thanks to the Structural Adjustment Programme set in motion in early 1990's that forced the government to liberalise the economy and reverse the protectionism and controls that followed independence.

### **1.6. Sovereignty Today**

The doctrine of state has suffered irreparable erosion over ages. As early 1890, Sir **Fredrick Pollock** pointed out that the concept of sovereignty was inadequate like all dogmatic formulae to account for complex fact.<sup>64</sup> But paradoxically claims for sovereignty are more vigorous asserted than even before. There have been a myriad of factors that have contributed to the erosion of sovereignty. Some writers have argued that the United Nations and other transnational organization are the greatest threat to absolute sovereignty, we shall support this argument in the third chapter of this paper.

The notion of sovereignty as defined by the Peace Treaties of Westphalia has undergone unprecedented erosion. Some jurist have argued that the notion of sovereignty is obsolete. **Wilfred Jenks** has posited that ,the concept of sovereignty is an illusion which converts reality of power into a miasma of irresponsibility<sup>65</sup> However, some scholars believe that sovereignty only becomes relevant if it is limited, because without such limitation diplomatic, economic and cultural relations cannot develop among states. **V.V. Evengenyev** argued;

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<sup>64</sup> Supra note 6 p. 31

<sup>65</sup> Supra note 6 p. 33

*“a limitation of sovereignty, if it is mutual and voluntary in nature is not only possible but indispensable, becomes without such a limitation economic and cultural relations could not develop among states”<sup>66</sup>*

It flows from sovereignty that states are entitled to a number of legal rights and concomitantly obligations. Crucial among this right is equality in the eyes of other states. But when one considers the manner in which developing countries are being dictated by developed countries and with international organizations, one is bound to agree with **Karl Max** in his work *Communist Manifesto* that modern state power is merely the executive committee charged with managing the affairs of the ‘bourgeoisie’. The present ‘bourgeoisie’ are transnational institutions like the IMF, financial corporations and the developed countries.

Developing countries are at a risk of being eclipsed to obscurity by globalisation. As one writer observes, succinctly;

*“... at the end of the 20<sup>th</sup> century, sovereignty of nation states is being assailed from both inside and outside. From outside influenced by globalisation and its protagonist a deterritorialisation of sovereignty is taking place”<sup>67</sup>*

The onus is therefore on developing nations to grapple with the question as to whether state sovereignty holds any meaning in the wake of globalisation and whether they shall survive the tide of globalisation.

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<sup>66</sup> Supra note 34 p. 255

<sup>67</sup> Infra note P. 6

## 1.7. CONCLUSION

The notion of sovereignty remains a crucial and indispensable facet of international relations despite having undergone a substantial transformation over ages. The content and scope of notion has been dramatically metamorphosed; nevertheless it remains the central pillar upon which international relations are embedded. There may be a need to reassess the concept of sovereignty today so as to make it be in tandem with changes in the world. However, every sovereign state should have inalienable right to choose its political, economic, social and cultural systems without any interference from another state or organization. This will definitely foster unity and bring peace to mankind.

## **CHAPTER TWO:**

### **THE INTERNATIONAL MONETARY FUND**

This chapter shall endeavor to trace the historical development of the IMF and the Bretton Woods institutions, followed by a brief discussion on the structure and the operations of the IMF and shall conclude with a highlight on Kenya as a member of IMF.

#### **2.1 The Historical Development of the IMF and the Bretton Woods Institutions.**

The need for an organization like the IMF become evident during the great depression that ravaged the economies of European countries in mid 1930s.<sup>1</sup> At the end of the Second World War, the economies of European countries had been severely ravaged by the aftermath of the war. As the saying goes, necessity is the mother of invention, there was an urgent need to reconstruct, revitalize, and to remedy the effects of the great depression. Uncertainty about the value of money that no longer bore a fixed relation to gold, exchanging money became very difficult between countries that retained gold standard and those ones that did not.<sup>2</sup>

One of the post second world phenomena was the establishment of a number of public international organizations to assist in economic development.<sup>3</sup> The critical problem of the period was the need for the investment capital for reconstruction of war torn Europe

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<sup>1</sup> David, D. What is the International Monetary Fund, A pamphlet distributed by the World Bank p. 7

<sup>2</sup> Supra note 1 p. 5 -

<sup>3</sup> Adede, A.O. Legal Trends in International Lending and Investment in the Developing Countries 180 RECUIL DES COURS.p.76.

and for economic development of less developed countries. In a nutshell there was an urgent need to promote international monetary co-operation and to facilitate expansion of growth in international trade.<sup>4</sup> Exchange rates were chaotic as each member freely modified its currency to stimulate its own exports and protect its own import substitutive industries.

The above-mentioned factors culminated a multinational monetary and financial international conference held at Brettons Woods, New Hampshire in July 1944, at the initiative of the United States and Britain. Participants at the conference realized that the need for capital would be so great that private capital would be unable to fulfill without some government guarantee.<sup>5</sup> This saw the need for an international institution that could be authorized to grant loans for reproductive construction and for prudent development projects and hence the International Bank for Reconstruction and Development (IBRD) was established, whose major purpose was to mobilise economic resources for long term economic development.

There was also urgent need to bring order to the chaotic situation that existed in respect to international payment system, and the need to promote international monetary co-operation. This saw the establishment of the International Monetary Fund (IMF) at the conference. The purposes of the IMF were to establish a framework for a multilateral system of payment and a mechanism that could prevent significant fluctuations in currency exchange rates, to foster multilateral systems of payments for current

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<sup>4</sup> Ibid

<sup>5</sup> Ibid



transactions; thereby making available financial resources to countries suffering from balance of payment problems.<sup>6</sup>

The chief architects who are considered as the brain-child of the IMF were **Lord John Maynard Keynes**, a special consultant to the UK treasury, and **Henry Dexter White** a US Assistant Secretary for international finance. Each of them produced a plan for post war international monetary co-operation, which plans revealed a just system to be supervised not by occasional meeting but by a permanent organization.<sup>7</sup> Articles of the Fund adopted at the Bretton Woods Conference in 1944, came into force on 27<sup>th</sup> December 1945. The Fund began its operations in Washington D.C in may 1946.<sup>8</sup>

The Articles of the IMF are a combination of an organizational charter and of rules of conduct for members. The principal purpose of the Fund was to make assets contributed by members available to other members. The Articles contain detailed rules concerning the availability and use of such assets. An American economist **George Gold** opined that, the Articles had established a code of legal regulation binding on member states in matters, which were hitherto subject to almost no limitation on the exercise of their sovereignty.<sup>9</sup> The objectives of the IMF are enshrined in Article 1 of the Articles:

- (i) To promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.

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<sup>6</sup> Henkin, L. *et al* International Law Cases and Materials 2ed (American Casebook series West publishing co. 1992) p. 1185

<sup>7</sup> Plans produced in vol III of the Official History of the International Monetary Fund Horsefeld 1945-46 Published in 1969

<sup>8</sup>Supra note 1 p. 5

<sup>9</sup> Joseph, G. "The Next Stage in the Development of International Monetary Law: the deliberate control of liquidity" 62 AJIL pp. 365 –405 at 365 -366

- (ii) To facilitate expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and the development of the productive of all members as primary objectives of economic policy.
- (iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.
- (iv) To assist in the establishment of a multilateral system of payment in respect of current transactions between members of the elimination of foreign exchange restrictions which hamper the growth of world trade.
- (v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them an opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.
- (vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balance of payments of members. not successful as economic development as a purpose found expression in the Articles of IBRD.<sup>10</sup>

Economic development is not expressively enumerated under article as a direct objective of the IMF. During the Bretton Woods Conference, India the only developing country present demanded that economic development be included in the Articles as a purpose of the IMF. This endeavour was however

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<sup>10</sup> Parkinson, F. “ The IMF in Economic Development: Equality and Discrimination” 26 *AJIL* pp.19- 48 at 20. Also See Appendix A

## **2.2. Structure of the IMF**

The administration of the Fund is composed of Board of Governors, the Executive Directors and a Managing Director. The Board of Governors is composed of one governor for each member country. Not all members of the IMF are represented directly in the Executive Board<sup>11</sup>. Certain members with homogenous interests are grouped together to elect line executive Director of the group. The board meets once a year in conjunction with an annual meeting of the World Bank<sup>12</sup>

The Executive Director of the group is able to combine votes of the members he represents. There are twenty executive Directors, six of whom are appointed by six countries having the largest quotas i.e. United States, United Kingdom, Germany, France, Japan, and China<sup>13</sup> and sixteen elected at two-year intervals<sup>13</sup> by the remaining members through the formation of “constituencies”<sup>14</sup>. The appointed directors may be augmented by one or two if during the year the two years preceding an election the six member countries with the largest quotas do not include two members that have the largest absolute amounts to the Fund, vide by the provisions of Article xii(c)

The Executive Director supervises the day-to-day management of the Fund. The Board is also charged with the duty to vet applications made by countries for admission into the Fund’s membership. The applicant must send the letter of application to the Fund’s

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<sup>11</sup> Supra note 3 p. 88

<sup>12</sup> Supra note 6 p. 1186

<sup>13</sup> Ibid

<sup>14</sup> ibid p. 1187

Headquarters<sup>15</sup>. The applicant must accept all conditions attached to membership. The staff prepares a paper and submits to a committee of the Executive Board, which recommends to the Executive Board of Directors. Upon approval by the Executive Board, it forwards to the Board of Governors the proposal, before membership resolution to the Board of Governors which grants the final approval before a country can be admitted to membership<sup>16</sup>

The Board of Governors, is the highest authority of IMF, since the Governors or Alternate Governors are usually occupied in their own capitals, they gather only during occasions of annual general meetings to deal with the formal IMF matters. They convene and consult at times when it is necessary.<sup>17</sup>

In the course of the year the governors communicate the wishes of their governments to their representatives who form the executive board at the headquarters.

The Managing Director of Fund is appointed by the Executive Directors for an initial term of five years. He serves as the chief of operating staff, of the Fund and chairs the Executive Directors during meetings and manages the ordinary business of the fund.<sup>18</sup>

### **2.3.Operations of the IMF**

The operations of the Fund are pegged on the quota system, which resembles the system, of stock ownership in a corporation. The quota for each member is determined

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<sup>15</sup> Folson, R.H. and Michael, W.G International Business Transactions. 2ed American Casebook Series, West Publishing Company.1991 p. 87

<sup>16</sup> *ibid* p. 801

<sup>17</sup> *Supra* note 3 p. 88

<sup>18</sup> *Ibid* note 12

according to its economic size. It is the quota of the member that determines the rate of subscription, the weight of vote in the IMF and the drawing rights. Under this system those with the power of the purse always make their voices heard<sup>19</sup> **Parkinson** argues that the quotas seen to place under developed countries at a permanent disadvantage in gaining access to resources of the Fund as industrial strength seems to be the significant criterion of classification.<sup>20</sup>

Following the first amendment of the Articles of Fund in 1969, the first international reserve asset was created by a decision of the international community<sup>21</sup>

The Board of Governors allocates Special Drawing Rights (SDR) to a particular country in order to supplement the existing reserve assets. SDR was originally defined in terms of gold, but is now defined in terms of a 'basket' of specified amount of six currencies.<sup>22</sup> SDRs are located to particular members by the board in order to supplement existing reserve assets. Parties can engage in SDR transactions when one member requires currency for balance of payment outflows only with the approval of the Fund and the designation of a member to receive SDR in exchange for currency.<sup>23</sup>

The resources of the fund are mainly derived from subscriptions of its members. The normal proportion has been 25 per cent in gold and 75 per cent in currency of the member.

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<sup>19</sup> Ibid note 17

<sup>20</sup> Supra note 10 p. 27

<sup>21</sup> Ibid note 12

<sup>22</sup> Ibid note 17

<sup>23</sup> Ibid note 12

Members may apply to use the resources of the Fund to assist them in dealing with balance of payment problems. Free convertible Funds for instance, US Dollars, Sterling pounds are sold to member states on understanding that they will repurchase the convertible funds within a stated period (usually 3-5 years) for other currencies acceptable by Fund and subject to conditions negotiated by the Fund pertaining the economic policies to be pursued by a member for that period.<sup>24</sup>

The drawing rights of members are usually made in 'tranches' that usually represent a quarter of the member's quota. The first tranche is a drawing that raises the funds holdings of the member's currency to 25per cent. It is normally, automatic and could be made without charge, and could be made without conditions<sup>25</sup>. Since the first quota of a member was actually contributed by its gold or reserve assets, has the effect of drawing of against assets it has contributed.

However, successive credit tranches may increase the Funds holding of the members in tranches up to 200 per cent of the member's quotas. Such purchases are not commensurate with the member's subscription and are regarded as credit. Purchases under four of credit tranches are subject to conditionality, which gets over more vigorous as the member borrows on later credit tranches that exceed 125 per cent quota of the fund's holding.<sup>26</sup>

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<sup>24</sup> Ibid p. 1191

<sup>25</sup> Supra note17 p. 90

<sup>26</sup> Supra note 6 p. 1187

### 2.3.1. Voting

Unlike other international organizations, the IMF has unequal voting power. In recognition of equality in states each member is allotted same number of basic votes (250).

Additional votes are allotted in proportion to a country's quota. For instance, as in April 1985 the United States being the largest allottee held 19 per cent of the votes while Maldives the smallest held 0.02percent of the votes.<sup>27</sup> The voting scheme applies both the Board of Governors and the Executive Board.

The idea of weighted voted was favoured during the formative stages the Fund at the Bretton Woods Conference; it followed the argument that a member's voice should correspond to her contribution. Usually decisions of the Board and the Executive Directors are by a simple majority, but important decisions as rate of interest chargeable for the use of Funds resources, a majority of 75 per cent is required. Very sensitive matters as changes in quotas, the structure of the Fund and allocation of SDRs require a high majority of 85 per cent.

In practice decisions are taken by the Board are arrived at by consensus with special regard to the distribution of voting power.<sup>28</sup>

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<sup>27</sup> Ibid

<sup>28</sup> Ibid

#### 2. 4. The IMF Response to Contemporary Issues:

The main objective for the formation of the IMF at the Bretton Woods Conference was, as it has been underscored earlier in this chapter to help member countries surmount with balance of payment problems. The Fund has over years shifted from the objective to respond to other problems affecting its members. **Adede A. O.** observes: -

*“The IMF has similarly abandoned the original concern of balance of payment problems and convertible currencies facing its clients to financing growth and poverty reduction.”<sup>29</sup>*

The Fund has introduced different policies at different times designed to solve different problems facing its members. Conditionality was first introduced in 1952, though formally legalized in 1968 following the second amendment to the Articles. The Fund released guidelines to the conditionality, to mitigate negative results of conditionalities.<sup>30</sup> The Fund introduced Structural Adjustment Programmes (SAPS) in 1980's.<sup>31</sup> SAPS were economic reforms designed to stabilize developing countries external and internal balances and therefore facilitate growth.

The IMF role in helping the poorest countries achieve sustainable improvements in their balance of payment position and economic stability increased considerably. This saw the introduction of the Structural Adjustment Facility (SAF) in 1986, and then the

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<sup>29</sup> Adede A.O “Africa in International Law: Key issues for the Second Millennium and Likely Trends in the Third Millennium”<sup>10</sup> TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS No. 2, 2000 p 360

<sup>30</sup> “Making the Global Economy Work for All”, IMF Annual Report 2000 p 49

<sup>31</sup> Walter E. He Cox. The Role of Adjustment and Donor Conditionality in Reshaping Industrial Development Strategies. A World Bank paper p. 3



Enhanced Structural Adjustment Facility Adjustment(ESAF) in 1987, as concessional assistance to poor countries.<sup>32</sup>

In 1999 at their annual meeting, the IMF and World Bank launched a new collaborative initiative to deal with poverty. The Poverty Reduction Strategy (PRS) initiative.<sup>33</sup> For the IMF centre piece of the strategy is its concessional loan facility, the Poverty Reduction and Growth Facility (PRGF). In effect the IMF transformed the ESAF into PRGF to make poverty reduction a key element of growth-oriented, country owned strategy by combining concessional ending from the IMF in support of appropriate macro economic policies with antipoverty assistance from the World Bank and other development agencies.

The Poverty Reduction Initiative (PRS) requires that low-income borrowing governments would with their citizens, civil organizations and Non-Governmental Organizations (NGO's) to shape a Poverty Reduction Strategy Paper (PRSP). If the IMF and World Bank endorses a government's (PRSP) it qualifies for foreign grants, loans and debt relief. PRSP must include a description of causes of poverty, growth and poverty reduction strategies and indicators by which citizen's groups can monitor progress towards key goals.<sup>34</sup> Kenya has shaped it PRSP for the period 2001-2003 that was launched by the Ministry of Finance and Planning in September 2001.

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<sup>32</sup> Neil Spooner and Lawrence Smith: *Structural Adjustment Policy Sequence in Sub Saharan Africa*.  
FAO Economic and Social Development paper at p. 9

<sup>33</sup> Economic Justice News Vol. 3 No. 3 August 2000 p. 1

<sup>34</sup> Anupam, Basu "*The Role of IMF in African*", UNITAR TRAINING PROGRAMMES IN THE LEGAL ASPECTS OF DEBT AND FINANCIAL MANAGEMENT, Geneva July 2001 P. 11

## 2.5. Kenya

Like many African countries Kenya is a member of the IMF, which membership was signified by the adoption of Articles of the IMF into the domestic law. Kenya enacted the International Monetary Fund Act 1969<sup>35</sup> which was revised in 1970 following the amendments to the Articles of the IMF establishing special drawing rights.

The Central Bank of Kenya is the custodian of special Drawing Rights through the salient provision of section 4(2).<sup>36</sup> The bank is authorized on behalf of the government to acquire or dispose of such SDR or to make payments in or in respect of any use of such rights and to use any sums in that account in accordance with the Amendment.

Kenya relies heavily on financial assistance from bilateral and multilateral donors in order to meet its capital and recurrent expenditure. This was manifest in the last two Budget proposals laid before the parliament by the then minister for finance,<sup>37</sup> estimates were prepared factoring financing from the IMF notwithstanding fact that IMF had suspended its financial support to Kenya.

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<sup>35</sup> Cap467

<sup>36</sup> Ibid

<sup>37</sup> The Budget Focus, A publication of IEA Budget Information Programme, Issue No.5, May 2001

## CHAPTER THREE:

### 3.0. CONDITONALITIES AND SOVEREIGNTY OF STATES

#### 3.1. Meaning and purpose of conditionalities

##### 3.1.1. Meaning

The term 'Conditionality' does not lend itself to expression in the Articles of Agreement of the IMF. That notwithstanding, the term underscores a wide array of mechanisms and a plethora of controls put in place by the Fund which it anticipates a member government to follow if it plans to use the funds resources.

Owing to non-definition of the term by the IMF Articles, much juristic ink has been shed in order to give a concise definition to the term. In an endeavour to give a definition,

**Adede A. O.** observes: -<sup>1</sup>

*“The term ‘Conditionality’ refers to the policies that the Fund expects a member to follow in order to enable it use the Fund’s resources. The general characteristics of these policies is that in varying degree, they should help a member to overcome its problem, make it unnecessary to resort to measures detrimental to its own interest or to the general welfare, and help it to achieve and maintain a suitable balance of payments position over a reasonable period ahead.”<sup>2</sup>*

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<sup>1</sup> Adede, A. O. Legal Trends in International Lending and Investment in the Developing Countries 180 RECUIL DES COURS. P. 99

<sup>2</sup> See also another scholar **Henkin L.** in an endeavour to define the term gives a rather restricted definition though almost on all the fours with the above.

*“ Conditionality refers to policies members are expected to follow when they use the fund’s resources to assist in dealing with balance of payment deficits’*

### 3.1.2 Purpose

The new emphasis upon broad policy based conditionality on development assistance stems from the international consensus that domestic adjustment development policies have been at fault seriously and that African governments require not only external advice but also pre-shaped before they adopt appropriate policies.<sup>3</sup> It is important to recognize that in Africa, the need for conditionality is no longer issued primarily on the basis to ensure repayment.<sup>4</sup>

The extreme difficulties of many Africa countries in the 1970's and 1980's have left them more desperate for external finance and have emboldened financiers to tightened their demands on those whom they provide resources. Donors attribute the 'new conditionality' to *inter alia* increased need for reform,<sup>5</sup> brought by the incessant rhetoric and grandiloquent posturing by African leaders that are designed to dupe donors.<sup>6</sup> The political commitment and will to reform has been supercilious and weak. Debtor countries have engaged aid donors on what has been dubbed the ECONOMIST as a ritual dance: -

*“Over the past few years, Kenya has performed a canon mating ritual with its aid donors. The steps are; one, Kenya wins its yearly pledges of foreign aid,. Two; the government begins to misbehave, back tracking on economic reforms and behaving in an authoritarian manner. Three; a new meeting of donor countries looms with exasperated foreign governments preparing their sharp rebukes. Four; Kenya pulls a placatory rabbit out of*

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<sup>3</sup> Helleiner, G. K. “*The IMF and World bank Adjustment and External Debt problems: Unofficial view*” World Development XX No. 6 (1992 program) p. 779-792 at p. 783

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> Ayittey, G. B. “*LAW AND POLICY IN INTERNATIONAL BUSINESS: How the Multilateral Institutions Compounded Africa's, Economic Crisis*” THE INTERNATIONAL JOURNAL OF GEORGE TOWN UNIVERSITY (1991) P. 585.

*the hat. Five; the donors are mollified and aid is pledged. The whole dance starts again.*"<sup>7</sup>

During the 1970's particularly after the first oil shock, the IMF provided substantial amount of low-conditionally financing to developing countries. In the 1980's virtually all financing were conditional than ever before.<sup>8</sup> This can be attributed to lack of accountability among debtor members and the ever-shrinking IMF budget. **Ayittey, G. B.** opines;<sup>9</sup>

*"In African pork based politics, elite barracudas absconded with the bacon leaving the people to starve. The labyrinth of control and regulation instituted by the state provided the ruling elites with a rich opportunity for illicit enrichment. To help the unwary navigate the stifling mace of regulations, enterprising ministers demanded bribes and exhorted commissions, In many African countries the World Bank and IMF arrived too late – the state treasury had been already privatized by the elites..."*<sup>10</sup>

A consensus has emerged that foreign aid to Africa has not been effective, it is indisputable that multilateral donors can help reverse Africa's economic woes however even after the provision of more than US\$ 600 billion in foreign assistance, loans and credit, much remains undone. USAID admitted in that, much of third world investment finances by USAID between 1960 and 1980 had disappeared without trace.<sup>11</sup> **Lee Hamilton** had this to say of one former African President: -

*"Mr. Mobutu claims ... that during the cold war he and his fellow African autocrats were concerned with fighting soviet influence and were unable to concentrate on creating a viable economic and political system. The reality is that during this time Mr. Mobutu was becoming one of the*

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<sup>7</sup> "The Kenya version of ritual dance the Moi Massamba: Aid for Kenya; Stop. Go," *ECONOMIST* August 19, 1998.

<sup>8</sup> *Infra* note 27

<sup>9</sup> *Supra* note 6

<sup>10</sup> *Supra* note 6 p. 9

<sup>11</sup> Dong Bandow. "Fan Rallying to Foreign Aid Case," *WASHINGTON TIMES*, October 10, 1996 p. A19

*world's richest individuals while the people of Zaire, a once wealthy country were pauperized.*"<sup>12</sup>

According to the IMF, central to its mandate of improving the operation of international mastery system is its oversight (or surveillance) of the economy and financial policies of its members.<sup>13</sup> Surveillance i.e. a mechanism through which most initiatives being pursued or planned as part of the international community's efforts to strengthen the architecture of the international monetary system. It follows therefore that, the IMF encourages countries to introduce greater transparency and fuller disclosure of timely, reliable and comprehensible data.<sup>14</sup> **Adede A. O.** observes: -

*"As president of the world economy, the IMF knows that. As local policeman, it believes that offenders must be brought to book. That schizophrenia was sensible when deficits were small and not caused primarily by a cartel. In the 1980s it is harmful, especially for the many countries that would benefit from the IMF advice (and, to a lesser extent, its money) if the advice was different."*<sup>15</sup>

For the conditionality policy to yield result for which it was intended, and to not bring negative responses, the IMF produced guidelines in 1999 to be followed where borrowing from Fund would be on the basis of conditionality.<sup>16</sup>

Arguments on conditionality have been advanced on ideological grounds. The international community was hitherto based on a bio-polar system which pitted the capitalist USA and the socialist/communist USSR. The bio-polar power was manifested

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<sup>12</sup> "Has Mobutu Seseko Really Converted to Democracy," WASHINGTON TIMES July 6, 1966, p. A18

<sup>13</sup> "Making the Global Economy Work for all," IMF ANNUAL REPORT 2000 p. 16

<sup>14</sup> Ibid

<sup>15</sup> Supra note 1 p. 100

<sup>16</sup> See selected Decisions of the IMF (ninth issue) 15, June 1981 p. 19 at p. 20-22. Also see Adede A. O. (Supra note 1 at p 101)

during the war to stem the rise of communism and counter the inferences could effort under such arrangement to survive by playing at the one against the other while being officially non-aligned.<sup>17</sup>

The reaction of African countries on conditionalities and reforms in general has evolved over time. Initially Africans strenuously denied that bad policies were major contributors to their economic woes, blaming terms-of-trade losses and other external factors. As more countries accepted reform these attitudes some what changed but did not disappear. Today most Africans recognize the need for change but also have strong reservations about market approaches advocated by donors.<sup>18</sup>

Adjustment programmes from the IMF are tailored at reducing government deficits by decreasing government expenditure, increasing export productions privatization of state owned corporations, liberalization trade and investment policies. The major objective of these reforms is to help member countries become more economic robust, credit worthy and therefore be able to pay of their debts, these polices are unpopular because they are prerequisite to lending.

The IMF conditionality suffer have aroused scepticism from many quarters. One author argues that the IMF has never been a saviour to Africa, he adds that, it has participated in

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<sup>17</sup> "Aid and Political Reform" Overseas Development Institute, Briefing paper Jan 1992 London p.1. Also see supra note 11

<sup>18</sup> Stephen Brent, "Aiding Africa" Foreign Policy, No. 80, 1990 p. 121

what can be described as 'the gorry feast of milking Africa dry' and that adjustment programs have in fact aggravated Africa's economic problems in addition to severe social costs.<sup>19</sup>

### 3.1.3 Non Compliance

Non-compliance with conditionalities from the IMF will elucidate undesirable consequences the most obvious being the caesation of aid. The reasons for the halting of aid and non approval of assistance are varied both in substance and magnitude. There is limited tolerance of amount of leverage that country has to deviate from agreed terms. It follows therefore that conditionality attached to loans calls for immaculate conformity with the agreements negotiated under the programs. In addition, there is an implicit requirement that countries eliminate practices that are inimical to sound economic growth.

There will even be worse consequences should a debtor member choose to repudiate a debt. The perils that will bedevil such a member are best illustrated by the words of

**MacNamara;**

*"(If) a borrower unilaterally renounces responsibility for some or all debts obligations. Under such circumstances, the foreign assets of a country that has repudiated its debt would be attached by creditors at each clock they landed; its national Air lines unable to operate; and its sources of desperately needed capital goods and spare parts virtually eliminated, In many countries even food imports would be curtailed. Hardly a pleasant scenario."*<sup>20</sup>

Kenya is faced with a myriad of conditionalities from the IMF that are to be implemented that shall be discussed in detail later in this chapter. Failure by the country to comply

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<sup>19</sup> George, S. "A fate Worse Than Debt:: A radical Analysis of the Third world Debt crisis" (London penguin) p. 67

<sup>20</sup> Ibid



with the requisite conditionalities has seen a suspension of aid from the Bretton Woods Institutes for rather unprecedented longer period.

### 3.2.0 Economic Dependence

Foreign aid has become an integral part of many economies of developing nations. The sub-Saharan Africa still requires significant increase in transfer and debt relief from external official sources.<sup>21</sup> Foreign aid has done more harm than we care to admit, as it has led to a situation where Africa has failed to set out its own pace and any direction of development free from external interference. Today Africa's development plans are drawn thousands of miles away on the corridors of the IMF and the World Bank.<sup>22</sup>

The canon of sovereignty is well established in international law and countries have endeavoured jealously to safeguard their sovereignty. However a celebrated jurist poses a crucial question;

*“What is sovereignty of a country that its government cannot unilaterally determine its own domestic interest rate, set out its tax policy, or establish its own programs of incentives for business or talented individuals?”<sup>23</sup>*

Many African countries struggled in a myriad ways to liberate themselves from the imperialists. Blood was shed and lives lost for the very course of being independent. But was this struggle in vain? **Nancy Alexander** and **Charles Abuge** observe: -

*“Many nations threw off the yoke of independence in 1960's their citizens set about to realize their dreams of freedom. Imagine that they had a crystal ball and could see their future some 40 years hence (around year 2000), what could they see? They would see the day when*

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<sup>21</sup> Supra note 2 p. 779

<sup>22</sup> Supra note 22p.585

<sup>23</sup> Jackson, H. *et al*, International Economic Relations: Cases materials and Text on International Regulation of Economic Affairs 2ed (West publishing) p. 1

*foreign creditors – the IMF and World Bank have power to approve or veto national plans... They would see themselves providing in-put to these plans alongside dozens of donors and creditors (although these donors and creditors were, themselves citizens). They would see their nations in virtual receivership... a condition wherein severing national lifeline to creditors we could result in catastrophe, they would see a proud nation bowed ... a wash in debt and managed by a collection of northern (and northern dominated) donors and creditors. Surely, they would feel outrage. After all, why should foreigners shape their countries' future? They would be insulted that their citizenship became demeaned; their rates became cheap; their voices became whispers.”<sup>24</sup>*

National aid is a new-fanged nostrum of rootless radicals; it is part of imperishable tradition of western and eastern civilization alike; is hoped to scale. In recent years the principle of mutual aid for economic stability has been recognized intermittently for generations and has presented a consistent philosophy and not merely an occasional interlude as during a war or an economic depression.<sup>25</sup> It was in the field of monetary policy that the principle of mutual aid crystallized into firm international obligation comprehensive in nature and geographical extent. The IMF essentially a device for mutual aid in the maintenance of currency stability, the currency ground rules for monetary policy accepted by its member are conditions for the availability of such aid.<sup>26</sup>

Foreign aid has in my view compounded Africa's problems. The notion of foreign has a deep-rooted historical dimension that perhaps can be traced from the oil crises of 1973 and 1979. The Organization of Petroleum Exporting Countries (OPEC) limited supply of

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<sup>24</sup> “IMF White Wash for IMF Blackmail”, *ECONOMIC JUSTICE NEWS*, Aug 200 Vol. III No. 3, p. 1

<sup>25</sup> Jenks, W. *Law in the World Community* (London's Longmans) 1966 p. 66

<sup>26</sup> *Supra* at p. 77

petroleum in consequence whereof the cost of the products plummeted flowing from the desire by some western investors to reap higher profits.<sup>27</sup>

Most developing countries whose economies depended on oil incurred astronomical expenses in importing the then black gold. As a desire to meet their balance of payment problems they had recourse to external funding. During the 1973 oil crisis the rates of inflation were low, as there were situations where the interest rates were negative<sup>28</sup> and it was even profitable to borrow. A precursor to most developing countries problems was the 1979 oil crisis. The inflation rates were comparatively higher and so were interest rates, the loans therefore became a greater burden to service, coupled as we have seen in this chapter with gross mismanagement and illegitimate use of the resources.

The overall economic performance African countries continued to be miserable in the 1980's with only a few exceptions, the prognosis of African countries offered little prospect for improvement.<sup>29</sup> Forty countries experienced a virtual debt crisis. Paradoxically OPEC members from third world also bore the brunt of this crisis.

During the 1970s after the first oil shock, the IMF provided colossal amounts in loan of low-conditionality to developing countries. However, in the 1980s, virtually all of IMF's

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<sup>27</sup> Drimmelen Bob, Global Economy (WCC Publisher 1969) p. 57

<sup>28</sup> Supra note 19 p. 28

<sup>29</sup> Supra note 3 p. 779

financing was conditional involving far and wide and deeper range of policy conditions than ever before.<sup>30</sup>

Economically, Africa has had a tragic story, her performance economically has remained dismal. All other regions of the third world have had some progress and the Sub-Saharan Africa has retrogressed. The continent is wracked by never –ending cycles of civil wars, instability, chaos, and gratuitous mayhem.<sup>31</sup>

On the same token, Kenyan's economic performance has never been satisfactory since her independence. What remains a moot issue in the minds of many scholars and economists is whether there is any possibility of recovery. In the post independence period, the country has suffered retrogressing trends of economic growth. In the 1960's there was an annual average of 6.6. per cent, growth between 1964-74 it declined to 6.0 per cent, Over 1974-1979 continued decline to 5.2 per cent, 1980-89 to 4.0 per cent and as low as 2.4 per cent over the 1990 – 2000 period.

A glance at the latest Quarterly Budget Reviews reveal the high indebtedness that the country has to service.<sup>32</sup> The External debt estimate stood at US\$ 4, 825 M at the end of September 2000, a decline of 4.9 per cent over June 2000, which amounted to 5.074 M in stock dollar terms. External debt stood at approximately US\$5b at the end of June 2001 showing a decline of 0.63 per cent from the June 2000 position.<sup>33</sup>

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<sup>30</sup> Ibid

<sup>31</sup> Supra note 6 p. 585

<sup>32</sup> See Appendix C

<sup>33</sup> Appendix D

The foregoing statistics attest to the fact that Kenya has been inevitably thrown in a quagmire of dependency, with an onerous risk of servicing the astronomical debts. The country is placed in an awkward position of having to borrow in order to service her debts. This problem is exacerbated further by the fact notwithstanding that the country is endowed with rich agricultural potential, her products are basically raw materials that fetch relatively low prices at the world market.

There has emerged consciousness among activist dramatically calling for debt relief to third world countries. A number of NGO's and civil rights bodies have emerged to pilot this clamour, yet others have advocated not for debt relief but debt cancellation.<sup>34</sup>

The issue of debt relief has received a cold reception among key players.<sup>35</sup> The international community recognised in the mid 1990's that the external debt situation for a number of poor countries, had become extremely difficult. It followed therefore that without a comprehensive debt relief, most of these countries would remain indefinitely depended on the external financing to pursue their economic policies. Highly Indebted Poor Countries (HIPC) was launched in 1996 by the multilateral Paris club and other official bilateral and commercial creditors in a joint endeavour to reduce the debt stock of

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<sup>34</sup> An example of such organizations is **50 years is Enough Network** which is based in Washington D. C. It is a coalition of 208 grassroots organizations dedicated to the profound transformation of the World Bank and the IMF. Through Education action the Network is committed to making international finance institutions (IFIS) democratic and accountable to those who have to live with the effects of their policies. It was formed on the 50<sup>th</sup> anniversary of the founding of the IMF and World bank. Its website is: W.W.W.50yrs.org. Courtesy of the organization, on the 16<sup>th</sup> April 2000 about 30,000 people converged in Washington D. C to create the largest protest ever in the history of US against the IMF and World Bank.

<sup>35</sup> On July 13, the US house of representatives passed its Foreign Appropriations Bill. After much debate, the bill included nearly the full amount president Clinton requested for the joint IMF/World bank "debt relief program", the heavily indebted poor countries (HIPC) initiatives. The law contains provisions that represent the first initiative by the Congress to use its leverage to stop some of the worst aspects of the Adjustment Programmes. Also see Economic Justice News vol. 3, No.3 August 2000 p. 3

the world debt-stressed poor countries to sustainable levels. The central to the initiative is continued effort by debtor countries towards macroeconomic adjustment and structural social policy reforms. The initiative also seeks to ensure that additional financing for sector social sector programs as basis health and education.<sup>36</sup> However, HIPC initiative is limited to countries eligible for the Poverty Reduction and Growth Facility (PRGF) and World Bank International Development Association loans (IDA) that have a strong track record of policy performance.<sup>37</sup>

### **3.3 CONDITIONALITIES AND SOVEREIGNTY OF KENYA**

#### **3.3.1 The Nature of Conditionality**

Kenya faces a myriad of conditionalities from the IMF. The IMF has imposed more than two hundred and fifty on conditionalities.<sup>38</sup> The purview of the conditionalities is wide and affects almost every sector of the economy. The most crucial conditionalities that will receive much highlight in this paper and which are more germane to this thesis are *inter alia* as set out in the Memorandum of Understanding between Kenya and IMF.<sup>39</sup> Reference will also be made to a letter dated July 10<sup>th</sup> 2000 endorsed by the then Minister of Finance Chris Okemo and the then Governor of Central Bank Micah Cheserem and the annexed memorandum outlining policies and reforms that the government of Kenya

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<sup>36</sup> Ibid

<sup>37</sup> See Appendix B

<sup>38</sup> 'Editorial' DAILY NATION October 28<sup>th</sup>, 2001 p. 8

<sup>39</sup> Dated July 2000

planning to undertake during the period of 2000-2003, and addressed to the managing Director of IMF Horst Kohler.<sup>40</sup>

The government of Kenya following the devastating effects of intense drought that affected most parts of the country occasioned heavy financial deficits for the year fiscal year 2000/ 2001. The government appealed for aid from the IMF under the Poverty Reduction and Growth Facility (PRGF).<sup>41</sup> In order for the country to receive aid under the PRGF the country had to fulfill some conditionalities.

The IMF insisted that the Kenyan parliament must debate and pass a new corruption law. That, however, disguises the fact that the details of the law had been prescribed by the Fund regardless of parliament's deliberations.<sup>42</sup> The Fund insisted that within 30 days, the report on the parliamentary select committee on corruption dubbed by the press as the "list of shame" was to be discussed. The government undertook to publish in the official gazette an Anti-Corruption and Economic Crimes Bill that was to be essentially similar to the annexed report of the select committee not later 30 days after the determination of the report.<sup>43</sup> Parliament published a report on May 9<sup>th</sup> 2000 by the Parliamentary Select Committee on Corruption chaired by Hon. **Musikari Kombo**. The report implicated prominent Kenyans as the Vice-President, Members of Cabinet, Members of Parliament,

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<sup>40</sup> Memorandum of Economic and Financial Policies of the Government of Kenya 2000-2003

<sup>41</sup> Poverty Reduction strategy paper outlines priorities and measures necessary for the reduction of poverty and economic performance and priority actions that will be implemented by a country to reduce poverty incidence. Measures are set out in the implementation matrix which shows costing of each indicated policy measure, the implementing agencies and specified time frame well as monitoring of expected outcome. See Poverty Reduction Strategy paper for the period 2001-2000 prepared by Ministry of Finance and Planning.

<sup>42</sup> Adede; A. O. "Africa in International Law: Key issues of the Second Millennium and Likely Trends in the Third Millennium" 10 TRANSNATIONAL LAW AND CONTEMPORARY, No. 2 2000 p. 358

<sup>43</sup> Supra note 40

Civil Servants, Local authorities on graft scandals involving millions of shillings. The report called for the prosecution of those implicated and subject to the coming into force of the Anti-corruption and Economic Crimes Bill. All perpetrators who were to own up within a year were to be granted amnesty in so far as they agreed to pay the taxes they evaded. The bill was later passed into law by Parliament but did not exist for a longer time as the authority established thereunder was declared by a constitutional court as illegal.<sup>44</sup>

The Fund also insisted that parliament must also introduce a code of conduct binding all public officials except the president to declare their wealth. The requirement to declare assets and liabilities included that of immediate families of the official and to broaden the definition of assets and assets under the ambit of the Act.<sup>45</sup>

The government was required to submit daily balance sheets of the Central bank of Kenya, to the IMF Africa Department every month in Washington D. C. The budget outturn showing total revenue, expenditure and deficits had to be availed to the IMF officials for inspection. The government was also required not to undertake a new project in the financial year 2000/2001 without the approval of the IMF.

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<sup>44</sup> "Judges quash KACA", DAILY NATION December 23, 2000 p. 1. The High Court in the case of **Stephen M. Gachiengo and another vs. Republic** (H. C. Misc. APP No. 302 Of 2000). The Applicant contended that it was unconstitutional and against the principle of separation of powers for the Kenya Anti-Corruption Authority (KACA) to be headed by a High Court judge and that it infringed their right to a fair trial under section 77(1) of the Constitution. And whether provisions establishing KACA were inconsistent with the Attorney General Powers under Section 26. High Court judges Kasanga Mulwa, Msagha Mbogholi and Johnson Mitey ruled that the authority was unconstitutional.

<sup>45</sup> See PART 1 of the Memorandum



The Fund insisted that the government should remove supervision of ministry spending from Permanent Secretaries to a new team of Treasury officials that will have direct control over other government departments. The government undertook to strengthen expenditure control and uphold responsibility over the management of public funds.<sup>46</sup>

The Memorandum emphasized that the government shall liberalise the marketing of tea and by June 2001 and the Kenya Tea Development authority be abolished. Other measures germane to the coffee sub-sector included improving management of coffee marketing by separating the regulatory and marketing arms of the board. The government was to establish a new institution to market coffee by June 2001, leaving the board only with regulatory framework.

On privatization the government also had to offer for sale to a strategic partner identified preferably by a bidding process at least 26 percent of the Kenya Commercial Bank shares it held and that the remainder was to be offered for sale on the market by march 31, 2001. Another condition on privatization included the sale of 49 per cent of government's stake in TELKOM Kenya Ltd.

The memorandum also contained detailed conditions for strengthening of the accountability institutions, viz; the defunct Kenya Anti-Corruption Authority (KACA) and the office of Controller and Auditor General, and to motivate and retain up competitive terms of service.

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<sup>46</sup> Ibid

Other public sector reforms included Ministerial rationalization, reduction of the size of the government and restricting ministers to their core functions. Civil service reforms were inevitable and therefore 22, 190 civil servants were to be retrenched in the first phase.

The IMF has since added some requirements to its conditionality menu, These are *inter alia*, establishment of special courts to deal with corruption cases, this should go along way in expediting the hearing of corruption cases. Tied to this condition is the requirement that judicial officers to preside over these courts should be persons of reputation.<sup>47</sup> The IMF has also put pressure against the implementation of the Central Bank (Amendment) Act 2000, popularly known as the “Donde Act”.<sup>48</sup>

### **3.3.2 Conditionalties Versus State Sovereignty**

The first chapter of this dissertation gave a detailed exposition of what constitutes state sovereignty, the essence of the doctrine, how the doctrine has gradually transformed from its absolute to the current status of the doctrine, it therefore goes without saying that, it needless to re-emphasize the same here.

A prudent examination of the conditionalities as described above one does not fail to notice how the sovereignty of Kenya is challenged. The IMF conditions imposed on Kenya have been described as the toughest ever imposed by the Fund on any

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<sup>47</sup> “Business Week”, DAILY NATION, April 23,2002 p. 1

<sup>48</sup> “MPs Warned on Donde Act” E. A. STANDARD April 29 p.5 An IMF official Mr. Mauro Mecaghi, who is in-charge of the IMF’s Monetary and Exchange Affairs Department while addressing MPs in a seminar warned that resurrecting the “Donde Act” will have devastating effects in the already fragile economy.

government. The tough terms imposed on Kenya disclose unprecedented foreign supervision.<sup>49</sup> **Adede A.O.** shrewdly observes: -

*'There is need for doctrinal guidance for African states in assessing the lending trends of the international lending institutions in the new millennium. In particular states should focus on the International Monetary Fund and The World Bank which have implemented policies and practices that clearly tend to disregard the sovereignty (piercing the sovereignty veil) of the states to which they gave financial assistance. They seek increasing control over the performance of the internal organs or instrumentalities of the states, particularly African states, which seek access to financing under the various funding facilities of the institutions (emphasis added)'<sup>50</sup>*

A sovereign state has an inherent and absolute right to freely determine its own legislative and economic agenda. Sovereignty is a legal absolute and unitary condition.<sup>51</sup>

The realisation of political and economic independence are inseparable segments of national sovereignty. The IMF imposed on Kenya a myriad of conditionalities as has been underscored in the above discussion. The Fund required that within 30 days of the discussion of the draft report of the Parliamentary Select Committee, the A. G. should draft an Economic Crimes Bill that would be the same or substantially similar to the one by the Select Committee.<sup>52</sup>

By virtue of section 24 constitution, the powers of abolishing and constituting offices shall vest in the president. This is unfettered power that ought to be exercised without any direction. Some of the conditionalities imposed on the government ministerial

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<sup>49</sup> "Dancing in Kenya to the Donors Tune" THE ECONOMIST, August 5, 2000 p. 39

<sup>50</sup> Supra note 43

<sup>51</sup> Allan, James, Sovereign Statehood. (London 1996) p. 39

<sup>52</sup> "WAKO BLAMES IMF OVER KACA", DAILY NATION, June 2, 2001 p.1 The Attorney General lamented that an IMF team pressured his office to draft the Prevention of Corruption Bill within one week. If he had failed to do so, negotiations for resumption of donor funding would have broken. The Attorney General was quoted saying that he appealed to the team to give him time, to come up with a comprehensive bill on fighting corruption but they adamantly refused that if he did not comply with the condition within one week negotiations were not to continue.

rationalization, reduction of the size of government and even demanded replacement or appointment of some ministers and public officials.

The conditionalities have also infringed the sovereignty as enshrined in section 30 of the constitution. A lot of IMF policies have been imposed in Kenya unilaterally without any decisive deliberation or approval by parliament which is composed of representatives of the people. This denies the citizens a right to shape their own destiny and such policies bereft of the will of the people.<sup>53</sup>

In 1974 UNGA gave a Declaration On The Establishment of A New World International Order.<sup>54</sup> Enshrined therein is right of independence of states and that every nation has the right to adopt the economic and social system that it deems most appropriate for its own development and should not be subjected to discrimination of any kind as a result. Another *in pari materia* declaration of UNGA is the Charter of Economic Rights and Duties of States<sup>55</sup> declared the same year decries that every state has a sovereign inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.

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<sup>53</sup> While in a seminar MPs said that they should be fully consulted on economic reforms engineered by the IMF and people should be involved as they are the ones affected by policies.

<sup>54</sup> Resolution 2625 (XXV) of 24 Oct 1976

<sup>55</sup> Resolution 3201 (SVI) of the Special Session of General Assembly of 1<sup>st</sup> may 1974

The aforementioned declaration of the General Assembly of the United Nations read together with the charter of the UN in **Article 2(1)** support the view that nations should be left to pursue policies of their choice without interference or pressure from outside. The conditionalities of the Fund imposed mandatory policies as privatisation and liberalisation which policies have never been popular in the third world but have been implemented grudgingly due to need for aid.<sup>56</sup> **J. E. Campos** and **H.S. Esfahani** argue that the decision to initiate reforms is a complex one that considers factors that include politics, economics, ideological biases and personalities of a political leader. They proceed to argue that if states are to change policies for the better of their own accord, they must suffer the effects of catastrophic economic misadventure. **Adede A. O.** opines:-

*“The lending practices of the IMF and World Bank are thus intrusive to be evaluated. The evaluation should be based on a common understanding of what the development requires, without affirming the dignity of the nation state. We agree that focus should be on the following elements to bring about orderly development with the necessary legal attributes: profound institutional change that empowers the poor to contribute to and to benefit from the economy...”*<sup>57</sup>

According to a Soviet jurist **V. V. Evgenyev**, sovereignty is the possession of the supreme power unlimited by any other state or organisation, resulting in authority within a state and independence in relation with other states.<sup>58</sup> The right to independence encompasses the competence of a state to participate in international agreement and to join international organization dealing with matters affecting their interests without

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<sup>56</sup> “Moi: We Can’t Meet Aid Terms,” THE DAILY NATION” Oct 11, 2000 p. 1

<sup>57</sup> Supra note 43 p. 360

<sup>58</sup> Evgenyev, V. V. Subjects of Law, Sovereignty and Non Intervention in International law, No. 2 of 1955 p. 77

coercion.<sup>59</sup> It is arguable a *fortiori* that the ability of debtor countries to reject conditionalities is severely constrained. There has been widespread exasperation over the high handedness, outright coercion and undue lack of respect for the Kenyan sovereignty. This can be captured from the speech of a former Minister for Finance.<sup>60</sup>

Argument have been advanced as a rejoinder, that conditionalities do not infringe the sovereignty of states. It has been argued that states bind themselves voluntarily to carry out the obligations and they should not be heard to claim that their sovereignty has been impinged upon. It was stated in the *Island of Palmas case*<sup>61</sup> that one way of a state limiting its sovereignty is by entering into a treaty. That country that enters into an agreement is bound to carry the burdens under such agreement. However, in the *Wembledon case*,<sup>62</sup> the court rejected an argument that if a state undertakes to perform or refrain from performing a particular act is in itself and an abridgment of its sovereignty.

### 3.4 CRITICISMS AGAINST CONDITIONALITIES

Adjustment programmes form the IMF and conditionalities imposed on aid has elucidated a lot of criticisms. It is generally agreed by knowledgeable that adjustment

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<sup>59</sup> Ibid

<sup>60</sup> "OKEMO'S OUTBURST ON AID CONDITIONS". DAILY NATION, October 26, 2001 p. 1-2 The minister complained that the IMF was setting unrealistic conditions. He revealed that letter confirming Kenyan's commitment to reform supposedly written by top government officials were actually drafted by donors and then handed to him to sign. He said that it was an "open secret" that he was asked to sign along a dotted line as an ultimatum. He wondered aloud whether it wasn't coercion and how the government was to implement polices designed from elsewhere.

<sup>61</sup> AJIL (1928) P. 875

<sup>62</sup> 1949 ICJ Rep 35

programmes that many African countries have embarked on are unlikely to be sustainable.<sup>63</sup>

It has been argued that donor institution macro-manage the economies of African countries from Washington.<sup>64</sup> Others have juxtaposed the conditionalities to slavery.

**Sutcliffe** aptly puts it;

*“If slavery is the state of having someone else take important decisions about your life, owing to obligations that you can never hope to pay off, working for others without recompense and with no end in sight and being in danger of severe punishment if you try to escape, then external debt of poor countries is slavery.”<sup>65</sup>*

The argument goes that citizens of debtor countries are deprived the right to shape their own destiny. The reform generated from within Africa will be more sustainable than externally directed reforms or solutions as the solutions to Africa’s crisis lie in Africa itself.

Scholars have also questioned the propriety of the policies prescribed by IMF. Prof. **John Stilglitz** has utter contempt for the IMF remedies, he not only says that quite often the policies make things worse by turning slow-downs into recessions and recessions into depressions, but also questions the attitude of the IMF experts who believe that they are more brighter, and more educated than economist in the countries they visit. He asserts that in fact leaders from those countries are pretty good and in many cases are brighter and more educated than the IMF staff- who are third rank students from first rate

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<sup>63</sup> Supra note 3 p. 786

<sup>64</sup> Clerk, J, *et al* “Zambia: Debt and poverty” (Oxfam Oxford 1989) – They argue IMF becomes *de facto* Minister for finance. That IMF becomes an acronym for International Minister of Finance

<sup>65</sup> Hinsley, F. *Sovereignty* (Cambridge press) p. 51

universities.<sup>66</sup> This sentiments are shared with Prof. **B. N. Ayittey**, who complains that by 1989 expatriate consultants employed by World Bank had reached a staggering 80,000 that cost cash strapped Africans governments US\$ 45b in annual fees and compensation of whom less than one percent were native Africans. He also decries the quality of work done;

*“There is increasing concern about that the advice is often overpriced poorly researched and irrelevant. Although some management consultants give value for money, many simply recycle standard off-the-shelf reports. ...Frequently, management firms send rookie staffers with little experience of Africa ... or they provide theoretical studies, full of high school economics, but with no practical application.”<sup>67</sup>*

Criticism also flows from the fact that the IMF does not examine the conditionalities and policies sufficiently before imposing. The have little knowledge of the realities of the countries they are dealing with and seem to have the idea that recipes applying in industrialized countries can easily be applied elsewhere.<sup>68</sup> Policies as privatization do not auger when internal efficiency of the private sector and local entrepreneurship is non-existent.

Critics also argue that policies like superstructure liberalisation without operational content hurts the poor, as it raises external deficits and obstructs rational allocation of foreign exchange between the North and the south. Thus as it insists on liberalisation in the South it is silent on destructive agricultural policies of the US, Europe and Japan that exercise protectionism and discriminate against imports from the south. The developed

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<sup>66</sup> Stilglitz, J. IMF and World bank Accountability Closing Gap Between Rhetoric and Reality.( Sponsored by Hernich Foundation June 2000)

<sup>67</sup> Supra note 6 p 588

<sup>68</sup> “Indictment of the IMF and World bank”, IFDA dossier 79 October – December 1990 p. 87



countries continue to pay lip service to the Uruguay round where negotiation is supposed to be on *quid pro quo* basis, while on the other hand IMF conditionalities forces the South to open up their markets.<sup>69</sup> The IMF package on privatisation is imperative yet mixed economies of Europe and Japan have allowed public intervention into the economy.

Sceptics of the IMF policies argue that the policies have never succeeded elsewhere and if anything they make things even worse as claims for success stories of economic model have become hoaxes. It has been argued that IMF advocated policy of globalization, its monetary policies exacerbated the Asian Economic crisis.<sup>70</sup> While a country that violates IMF prescription like China which maintains a non convertible currency and state control over its banking system still enjoys a robust economy.

In view of the highlighted criticism against the Fund it is conspicuously evident that the Fund while is not a research institution, the errors that stem from its policies and conditionalities are borne by citizens of debtor nations upon implementation hence therefore a strong need for policies, to be not only intellectually sound, but also realistic and implementable with positive results.

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<sup>69</sup> Ibid

<sup>70</sup> Supra note 24 p. 22

### 3.5 EFFECTS OF CONDITIONALITIES

Some of the conditionalities imposed on debtor countries by the IMF have caused immense hardship to such countries. Some of the conditionalities have been detrimental to the interests of and general welfare of debtor nations. **Adede A. O.** observes;

*“It is also true that some of the medicine which the IMF had prescribed for members borrowing on their credit tranches, especially the latter tranches, has been in the form of pills too bitter to swallow. Certainly some of the economic adjustments developing countries been asked to make, such as devaluation, cutting down on public expenditure on social programmes and government subsidies; restrictions on imports; and raising the prices of certain commodities, have caused hardships on countries concerned. Instances of riots and political unrest have been the side effects of the IMF medicine, administered under the conditionality policy. Indeed in some cases, a developing country may be asked by the IMF to tighten its belt even to the extent of cutting its waist under the euphemism of economic adjustment”.*<sup>71</sup>

A great deal of energy has been devoted to the assessment of the effects of IMF's stabilization and adjustment lending activity and by implication the efficacy of the conditionalities.<sup>72</sup> The IMF has insisted on civil service reform and privatisation of parastatals. This has seen massive lay off of employees, leading to the increase in the number of the unemployed. The government retrenched 22,190 civil servants.<sup>73</sup> Additional retrenchments were effected by the Kenya Revenue Authority, public universities and some parastatal bodies.

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<sup>71</sup> This was evident in the riots that rocked Argentina. In late December 2001 that saw the country have three presidents in four days. See “Chaos as leader is forced out; SATURDAY NATION December 22, 2001

Argentina president Fernando De. La Rúa was forced out amid the worst civil unrest in more than one decade. President de La Rúa became more unpopular after maintaining positive public spending cuts. Also see “New Argentina Leader suspends debt payment,” DAILY NATION, December 24, 2001. Mr Adolfo Rodríguez Saa was sworn as the third president in four days announcing that he will suspend payment of US\$ 132b foreign debt. The former president was replaced after riots against the government's austerity policies and a four year period in which 19 97, 28 people were killed, hundred of shops and markets ransacked.

<sup>72</sup> Supra note 3

<sup>73</sup> POVERTY REDUCTION STRATEGY PAPER for period 2001-2000 prepared by the Ministry for Finance and Planning p. 8s

The IMF conditionalities recipe of trade liberalisation has brought unprecedented consequences on the economies of debtor countries. These policies require the removal of quantitative controls, import quotas and foreign exchange restrictions on virtually all imports. This has seen an influx of cheap imports and subsidised products from industrialized countries that have proved a threat to the local industries. The intensely affected industries have been the textile industry, footwear and the motor vehicle assembly.

The debtor countries have been urged to cut their expenditure in even the most essential social and welfare services. This has seen the introduction of cost sharing programmes in public hospitals and other institutions such as universities. This has had a negative implication on the most vulnerable groups in terms of access to quality health care and education. In Kenya for instance the introduction of a 33 per cent fee for visits to the out patient health centres led to a 52 per cent reduction in out patient visits.<sup>74</sup> This has also led to an increase in infant mortality rate and high death rate. This criticism has struck a responsive chord not only in Africa but also in America; voluntary organizations and congressmen concurring that IMF policies represent 'a trickle down' model that neglects or hurts the poor.<sup>75</sup>

The IMF policy of devaluation has also had a negative repercussion on the economies of developing countries. Devaluation relies on the old Ricardo model of trade between

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<sup>74</sup> "SAP's Hit Health Sector", DAILY NATION March 19, 1993

<sup>75</sup> *Supra* note 18.

different firms and different countries. Devaluation is tailored at making imports more expensive and exports more cheaper the overall effect being that there would be more exports and less imports. This is bound to increase the foreign exchange of a country. That it earns from exports. This has however, not been the case in the developing countries where there is a lot of import dependency. Heavy generalized currency devaluation makes it expensive in the importation of goods needed for industries. This model is ignorant of the overwhelming degree which the South's trade is dominated by transnational corporations which command 75 per cent of exports from the south.<sup>76</sup>

From the foregoing, there is consensus that the IMF therapy has not worked and even aggravates the problem. Some of the policies advocated by the Fund have been self defeating. The damage has been amply underscored. The policy that puts debts far before the people of a debtor country is blind and should not be pursued blindly.

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<sup>76</sup> Supra note 2 p. 87

## CHAPTER 4

### CONCLUSION AND RECOMMENDATIONS

#### 4.1. CONCLUSION

This dissertation endeavoured to analyze the doctrine of state sovereignty vis-a -vis the IMF conditionality. Towards this end, we commenced in chapter 1 by giving an appraisal of the doctrine of state sovereignty by tracing its origin, and development and how it has gradually transformed with time. We then embarked on a discourse of analyzing the historical development of Bretton Wood institutions, the structure and operations of the IMF. We then juxtaposed conditionalities that obtain from the IMF with the sovereignty of nations. The crux of the present chapter is to give a conclusion and thereafter recommendations that will foster the sovereignty of states.

The principle of state sovereignty embraces the supremacy of the state to conduct its affairs in its territory without interference from other states and on the same token international organizations. From the study of the doctrine of sovereignty in chapter 1, it was evident that it dates back in pre-medieval times as transmitted to modern times through Roman scholasticism. The doctrine has been transformed from its absolute nature as posited by early scholars as **Jean Bodin** and it still undergoes metamorphosis through contemporary forces as globalisation.

Despite changes in the conception, of the doctrine of state sovereignty, it is our submission that it remains indispensable principle pillar upon which international

relations and the community of nations rests as contemplated by article 2(1) and (7) of the Charter of United Nations. The same position finds expression in various resolutions of the United Nations General Assembly that were elaborately underscored in the first chapter.

The IMF was formed at the Bretton Woods Conference in 1944 with the main objective of assisting member countries with balance of payment problems overcome them. It has since abandoned the original concern and engages in activities as financing economic growth and poverty reduction. The Fund has attached a wide menu of conditionalities against its clients who are desirous of obtaining credit. The measures are a myriad of reforms touching virtually all sectors of the economies of member states as well as general policies that are intended shun activities that are inimical to sound economic development of the member states. In so doing, however, the Fund has imposed conditionalities that have encroached on the sovereignty of member states. It was our argument in chapter one that sovereignty entails, the right and competence of a state to pursue economic, political social or cultural systems without interference or subordination from any external authority.

It must be admitted however, that there is need for reform to revamp the economies of third world states. But should this be done at the expense of the sovereignty of debtor nations? Multilateral donors must realize that the economies of African countries cannot be micro-managed from Washington. They have a task of helping debtor countries to surmise their economic problems, it must be realized that policy reforms generated within Africa itself will be more sustainable than externally directed reforms. Policies

generated from outside have hardly reflected the peculiar circumstances prevailing in the continent and are usually implemented grudgingly by most developing countries they are therefore untenable to bear any meaningful results.

Economic programmes advocated for by the IMF and other donor institutions have had devastating effects on the economies of many developing countries, this was amply underscored in the third chapter. This has evidently led to retrogression in economic growth trend even in countries that have faithfully implemented the requisite policies obtaining from multilateral donors. Most debtor countries are constrained to reject this alien policies and conditional financing due to fear of isolation and consequently choose to implement them even at the cost of their sovereignty. This evidently, is a precursor of doom to the doctrine.

Sovereign equality of nations is a corollary to sovereignty of nations, as we discussed in the first chapter. Sovereign equality constitutes the linchpin of the whole body of international legal system and a corner stone upon which international relations rests. We also had a chance to examine the structure and operations of the IMF. The voting strength is predicated upon the shares held by the member countries. In a nutshell the powers of the purse carry the day, in tandem with the principle of weighted voting. The developed countries holding the majority of shares have a higher leverage in decision making in the IMF and may even abuse this powers for their own interest. This paradoxical as obtains the principle of sovereign equality which underscores the fact that all states are equal regardless of the actual stature in geographical size, economic or military might.

The IMF may be justified into impose some of the conditionalities against practices that are inimical to sound economic development. The sovereignty of client states must be given cardinal consideration. Unilateral decisions imposed on debtor nations undermine their sovereignty, as it was noted in the third chapter, a country that cannot determine its own destiny is in the least tottering brink of non-existence. The sovereignty of the debtor nations should not be sacrificed under the euphemism of economic adjustment.

#### **4.1 RECOMMENDATIONS**

It flows from this dissertation that, the doctrine of state sovereignty remains an essential pillar in international relations. It has been amply underscored that each state has an inalienable right to choose its political, economic, social and cultural systems without external interference. We have also emphasized that reforms are inevitable for any meaningful progression in economic spheres. However it is our argument that such reforms must be in tandem with the sovereignty of states.

For economic and institutional reforms pursued by any nation to succeed in implementation, they must stem from the people. A democratic system must be put in place that allows open participation of citizens and civil societies of debtor nations before any such policies of multilateral donor institutions are adopted. A system whereby one group monopolizes both economic and political power is untenable and ultimately explosive. The governments seeking external financing rarely assess the



effectiveness or propriety of the conditionalities neither do they question the validity of such conditionalities. We saw in chapter 3 that the conditionality menu is no longer argued on the basis of the need to secure repayment of the loan or grant advanced. This is likely to bring into play consideration of extraneous factors in the imposing of conditionalities.

Adjustment programme packages from donor institutions should be radically transformed to have 'a human face'. The policies should be designed to increase productivity capacity of the poor and lay emphasis on sustainable and equitable development. Such policies before implementation should be scrutinized and their effects on poverty evaluated before implementation. The conditionalities should not interfere with economic policy, which by their nature do not tolerate uniform ideology. The peculiar circumstances of each member state must be examined before imposing of economic reforms.

Developing countries should also endeavour to unchain themselves from the dependency on multilateral and bilateral donors for funding. Africa is endowed with plenty of natural resources that should be harnessed effectively and thereby minimising the prevalent dependence on donors. This can be done firstly, by inculcating principles of accountability and transparency in their institutions. Secondly, there is need to strengthen their industrial base to process or manufacture products from the available raw materials to increase their utility and therefore concomitantly increasing their prices at the world market.

There is need for bilateral and multilateral donors to cancel debts of the heavily indebted member states. The debt arrears of African countries in IMF repayment obligation poses little prospect for economic recovery in most of African countries especially in the wake of the dismal performance of their economies. Insistence on payment of the amounts borrowed with interest risks aborting the little recovery recorded by most developing countries. Past errors should not be permitted to cloud further what is evidently a precarious future. These arrears can be financed through the sale of the IMF gold reserve. The current initiative of debt relief to highly indebted countries that is being effected by the IMF and World Bank is too insignificant in addressing problems faced by the developing countries.

Developing countries should diversify the sources of credit financing. The best alternative would be borrowing directly from international commercial banks, though the interest rate chargeable may be prohibitive. Domestic borrowing has also been a major source of government funding but the bottleneck of this method of funding, is that it discourages investment in more productive sectors to stimulate the economy. The maturity time for treasury bonds and bills should be increased to at least 12 months encompass long term lending to the government.

Enough has been belabored in this dissertation of the salient international instruments that proclaim sovereignty of nations. That notwithstanding, the IMF has imposed conditionalities that continue to encroach on the sovereignty of nations unabated. It is our view that the international community ought to come up with a treaty or convention

enlisting what constitutes an abridgement of state sovereignty. An authority should be established thereunder to receive complaints against any infringement of state sovereignty by other nations or international institutions, it should be vested with powers to investigate such violations. This authority should also oversee the compliance of the international community with the salient provisions of the United Nations General Assembly Resolutions as obtains the principle of state sovereignty.

The development challenge facing Africa is tremendous. The economic development and political development are intertwined and inseparable attributes of the general development. The current reforms are only a start and can only succeed with the requisite political good will. To quote the famous words of **Sir Winston Churchill** of World War II, "...this is not the end. It is not even the beginning of the end. But perhaps the end beginning." On the same token Africa's reforms to date do not represent the end of the changes, or even the beginning of the end. As already underscored, there has been retrogression in the economies of most African nations after their independence in the 1960's and 1970's. The conditionalities imposed on them since the early 1980's have never been successful in restoring robust economic development, neither is there any cogent evidence that they will do so in the near future. Therefore donor institutions in coming up with the conditionality menu, should desist from imposing unrealistic and unattainable targets that are bereft of the peculiar circumstances prevailing in a member country.

The voting structure of the IMF as we have already seen herein before, depends squarely on the shareholding of members. The board of directors is appointed by

members in tandem with their clusters determined by shareholding. It is our view that, the principle of sovereign equality be observed as it is done in the United Nations General Assembly, where members will participate on equal basis in the appointment of directors and in voting during the IMF board meetings.

There is a general consensus that there is need for reform in most of developing countries. Such reforms emanate from policy prescriptions of the IMF and World Bank, it must be realized that such reforms have to conform to general international law, otherwise they will be bereft of legality. It follows therefore that compliance with provisions of international law will be threatened. The doctrine of state sovereignty, aged as it may be, remains the central pillar of international law upon which international relations rest and therefore all policy prescriptions must be in tandem with it.

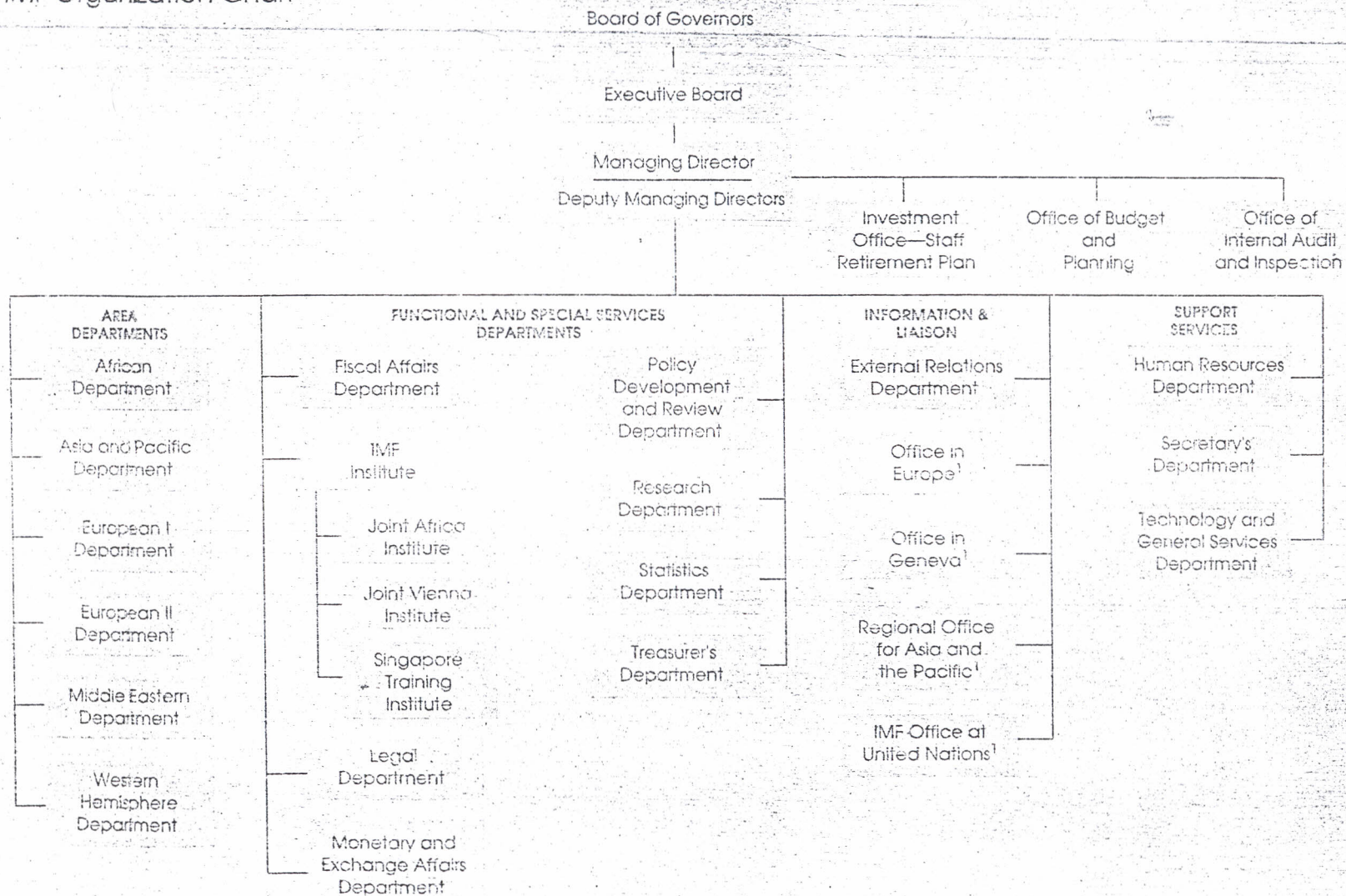
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Figure 8.1  
IMF Organization Chart



Note: Organization as of April 30, 2000.

<sup>1</sup> Attached to the Office of the Managing Director.

Table 5.3  
Countries Eligible for the Poverty Reduction and  
Growth Facility, as of April 30, 2000<sup>1</sup>

Afghanistan	Kyrgyz Republic
Albania	Lao P.D.R.
Angola	Lesotho
Armenia	Liberia
Azerbaijan	Macedonia, FYR
Bangladesh	Madagascar
Benin	Malawi
Bhutan	Maldives
Bolivia	Mali
Bosnia and Herzegovina	Mauritania
Burkina Faso	Moldova
Burundi	Mongolia
Cambodia	Mozambique
Cameroon	Myanmar
Cape Verde	Nepal
Central African Republic	Nicaragua
Chad	Niger
China, People's Republic of <sup>2</sup>	Nigeria
Comoros	Pakistan
Congo, Democratic Republic of the	Rwanda
Congo, Republic of	St. Lucia
Côte d'Ivoire	St. Vincent and the Grenadines
Djibouti	Samoa
Dominica	São Tomé and Príncipe
Egypt	Senegal
Equatorial Guinea	Sierra Leone
Eritrea	Solomon Islands
Ethiopia	Somalia
Gambia, The	Sri Lanka
Georgia	Sudan
Ghana	Tajikistan
Grenada	Tanzania
Guinea	Togo
Guinea-Bissau	Tonga
Guyana	Uganda
Haiti	Vanuatu
Honduras	Vietnam
India	Yemen, Republic of
Kenya	Zambia
Kiribati	Zimbabwe

<sup>1</sup>The Poverty Reduction and Growth Facility (PRGF) replaced the Enhanced Structural Adjustment Facility (ESAF) effective November 22, 1999.

<sup>2</sup>China has indicated that it does not intend to use ESAF (now PRGF) resources.



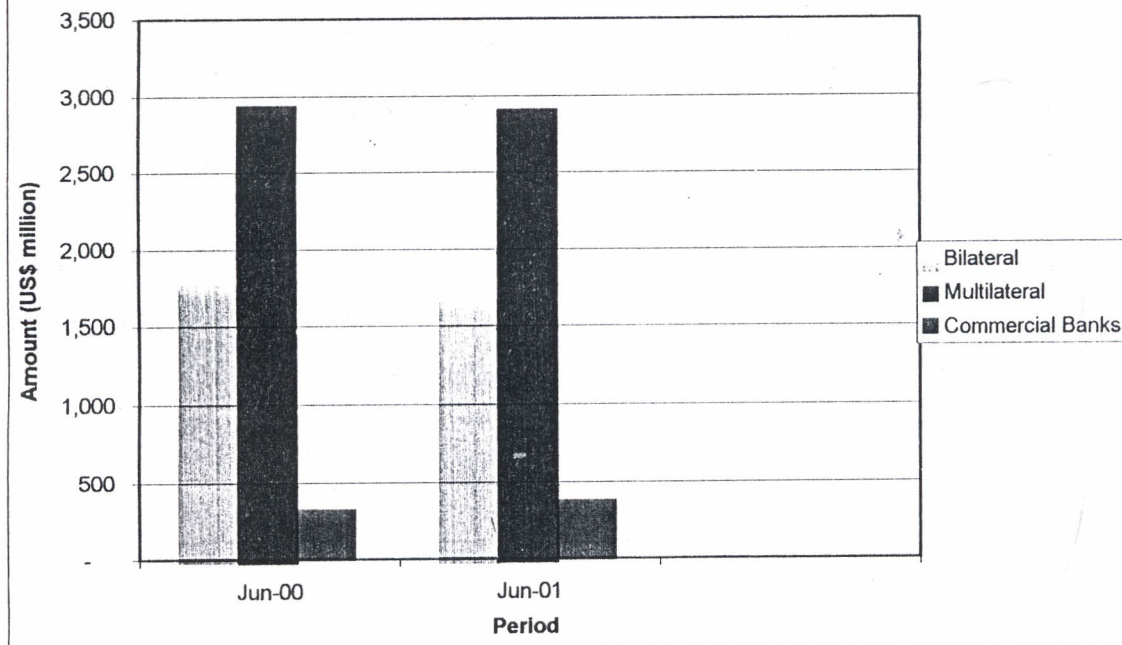
## 2.3 External Public Debt

External debt stock stood at approximately US \$ 5.0 billion at the end of June 2001 showing a decline of 0.63 percent from the June 2000 position. This decrease was due to a net repayment as Kenya continued to service its debt obligations while there were very few new loans contracted. However, a big portion of the Kenya's external debt still continues to be from multilateral agencies due to favourable lending terms of low interest rates and long-term repayment period. Overall external debt consists of 58% Multilateral, 34% Bilateral, 7% Commercial Banks and the remainder is Export or Suppliers Credits (*Table 11 and Chart 6*).

**Table 11: Kenya's External Public and Publicly Guaranteed Debt  
1997-2001 US (\$ Million)**

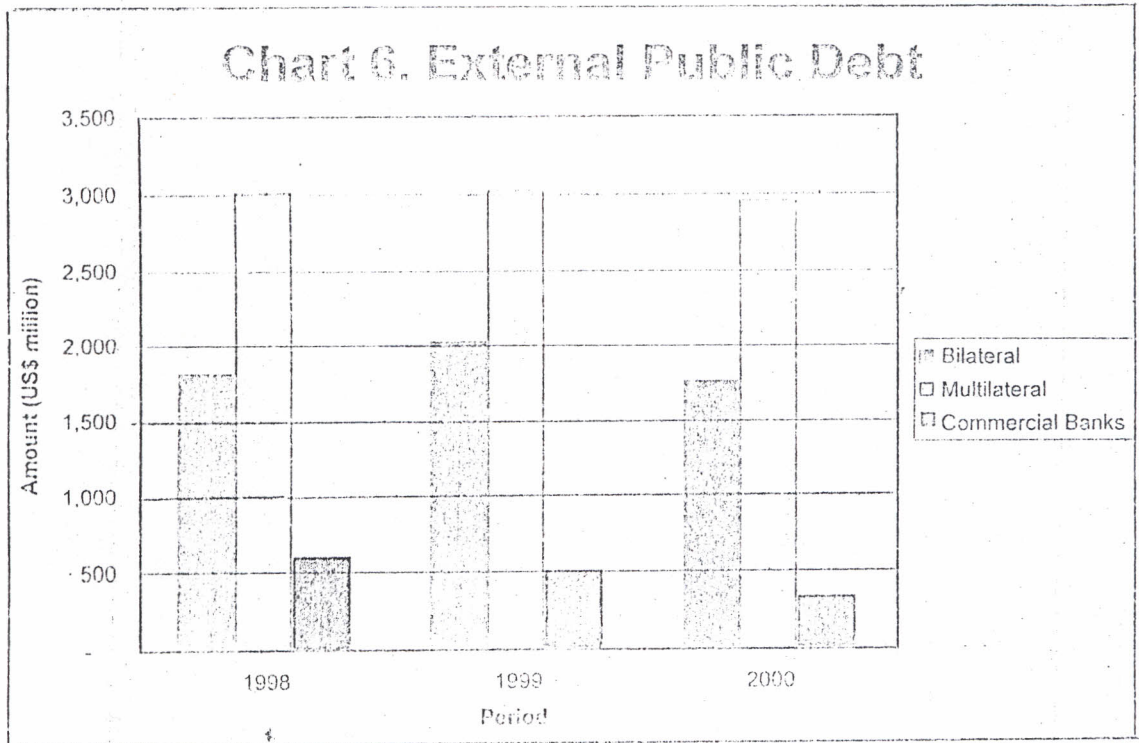
CREDITOR	June 1997	June 1998	June 1999	June 2000	June 2001
<b><u>BILATERAL</u></b>					
AUSTRIA	41	37	40	34	16.1
BELGIUM	8	7	25	38	30.6
CANADA	53	60	60	41	67.7
DENMARK	58	49	53	40	32.4
FINLAND	3	3	3	2	2.5
FRANCE	274	282	307	179	219.6
GERMANY	112	109	112	109	98.1
ITALY	124	125	120	82	125.8
JAPAN	1,089	825	984	1,031	922.2
NETHERLANDS	100	81	80	58	52.4
U.K.	74	66	66	37	35.8
USA	91	84	73	72	43.0
OTHERS	68	92	106	54	49.7
<b>SUBTOTAL</b>	<b>2,110</b>	<b>1,830</b>	<b>2,036</b>	<b>1,787</b>	<b>1,696</b>
<b><u>MULTILATERAL</u></b>					
ADB/ADF	322	308	333	308	328.4
EEC/EIB	163	149	138	115	156.7
IBRD	213	154	147	91	20.0
IDA	2,032	2,109	2,211	2,332	2,306.8
IMF	255	261	154	104	111.3
OTHERS	23	33	37	9	6.3
<b>SUBTOTAL</b>	<b>3,008</b>	<b>3,015</b>	<b>3,025</b>	<b>2,958</b>	<b>2,929.5</b>
COMMERCIAL BANKS	483	587	491	319	377.2
EXPORT CREDIT	65	15	53	19	48.6
<b>GRAND TOTAL</b>	<b>5,666</b>	<b>5,447</b>	<b>5,605</b>	<b>5,083</b>	<b>5,051</b>

Source: Ministry of Finance and Planning

**Chart 6. External Public Debt**

### 2.3.1 External Debt Service

The external debt service as at end June 2001 stood at Kshs 16,415 million. This is attributed to repayment of arrears, which had accumulated with all the creditors due to liquidity problems that the Government faced causing delays in payments. A number of loans also started attracting principal repayments during the same period. The distribution of the debt service was 28% Bilateral, 56% Multilateral and 16% Commercial Banks. The arrears for multilateral debt were minimal due to the terms of this debt, which does not allow for debt rescheduling (*Table 12*).



The decline in the external debt has however left the debt stock in shilling terms at a higher level since the Kenya shilling depreciated marginally during the period. Multilateral debt still accounts for the bulk of external debt, comprising about 58.3 percent, followed by bilateral debt consisting of approximately 35.0 percent and commercial banks had 6.7 percent of the total external debt.

### 2.3.2 External Debt Service

During the first quarter of 2000/2001, the central government external debt service due amounted to Kshs 14,906 million. This was slightly lower than the debt service due for the same period in 1999/2000, which totalled Kshs 15,753 million.

Foreign interest payments due in the first quarter of 2000/2001 was Kshs 3,218 million compared to Kshs 3,281 million for the same period the previous year. (Tables 13, 14, Chart 7 and Chart 8).

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