"APPLICATION OF THE LEGAL DOCTRINE OF PACTA SUNT SERVANDA ON KENYA'S INTERNATIONAL RELATIONS"

NAME: LEAH ALUOCH ODHIAMBO

REGISTRATION NUMBER: R50/75927/2014

COURSE CODE: DIS554

A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTERS OF ARTS IN INTERNATIONAL STUDIES

THE UNIVERSITY OF NAIROBI

NOVERMBER, 2016

DECLARATION

I, the undersigned, declare that this research project is my own work and has never been presented in any other university or college for a degree or any other award.

Signed: _____ Date _____

NAME: LEAH ALUOCH ODHIAMBO

R50/75927/2014

This research project has been submitted for examination with my approval as the University Supervisor.

Signed: _____ Date _____

DEDICATION

I dedicate project to my Late Dad Joseph Stanley Odhiambo Odiege, my mother Mary Odiege, and my sisters for their continued support. It is also dedicated to my lecturer and supervisor whose cooperation has aided in the completion and compilation of this research.

ACKNOWLEDGEMENT

I am greatly indebted to my resourceful lecturers who have ensured, thorough, meticulous and relentless effort in the full realization of my academic dream in the profession. To my supervisor, Mr. Odimmasi for his wealth of direction, reliability and promptness in achievement of this final compilation of this research paper.

ABSTRACT

The principal of *pacta sunt servanda* means contracts and their clauses are laws which bring binding force between parties. Every party to a contract must keep his promise and fulfil his obligation. Under the Vienna Convention on the Law of Treaties every state has a duty to abide by its treaty obligations hence under the *pacta sunt servanda* rule: every treaty in force is binding upon the parties to it and must be performed by the parties in good faith.

Article 2 (6) of the Constitution of Kenya 2010 provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the constitution, further Article 2(5) provides that the general rules of international Law shall form part of the Law of Kenya.

This research intends to look at the legal doctrine of *pacta sunt servanda*; enforcement of treaty in Kenya and its implication in Kenya's International Relations. This will be achieved by analyzing the doctrine of *pacta sunt servanda,* treaty enforcement in Kenya and how Kenya's International Relations is affected.

ABBREVIATIONS

AU	AFRICAN UNION
EAC	EAST AFRICA COMMUNITY
VCLT	VIENNA CONVENTION ON THE LAWS OF TREATIES
ICC	INTERNATIONAL CRIMINAL COURT
ICJ	INTERNATIONAL COURT OF JUSTICE
UN	UNITED NATIONS
CAADP	COMPREHENSIVE AFRICA AGRICULTURE DEVELOPMENT PROGRAMME

TABLE OF CONTENTS

CHAPTER ONE

1.0 Introduction and Background of the Research

1.1 Introduction

Chapter one is a detail of what this paper intends to achieve, which includes the background of the study, literature review among others. The breakdown of chapters will give an overview of what each chapter of this research will contain.

1.2 Background of the study

Under the Vienna Convention on the Law of Treaties, every state has the duty to act properly in the performance of its treaty obligations. The *pacta sunt servanda* rule demands that every party to a treaty is expected to observe its treaty obligations in good faith and have the intention to honour their responsibilities; which means proper enforcement of treaties is expected of a signatory state.[1]

The back ground rule by the Vienna Convention on the Laws of Treaties (VCLT) which was entered in to force on January 27th 1980 covers situations where a state would wish to withdraw from a treaty to which it had earlier ratified.[2] Kenya was one of the original signatories of the VCLT on 23rd May 1969 but much like the United States, Kenya had not ratified it. Many aspects of the VCLT treaty are now widely considered as customary International Law.

1 Charles C. Jalloh "Kenya Should reconsider proposed withdrawal from ICC"

2"Maurice Oduor "*The status of International Law in Kenya*" African Nazarene University Law journal; annual 2014, Volume 2 part 2

Kenya has ratified a number of both Bilateral and Multi-lateral treaties; being a signatory of multiple treaties Kenya has fallen prey to violating some of the treaties whereas on the other hand it has also conformed to the principle of *pacta sunt servanda* which in turn affects its international relations.

Kenya's international relations is currently at a special place since the Jubilee government came in to power in 2013. Kenya has been on the international limelight and its commitment to international treaty has been questioned even with the new constitution in place. Resulting to an unstable international relations.

The lack of affirmation of the place of International Law in the normative rank has spouted judicial interpretation that has accorded International Law the same status as statute laws which diminishes the weight that courts place on International Law.[3]

1.3 Problem statement

Kenya's international relations appear to be insecure from the regional level to the international level. Kenya's foreign policy since independence is influenced by circumstances at hand and the Government of the day. Kenya's international obligations seem optional from its commitment to international treaties and the doctrine of *Pacta sunt servanda.*

[3] ibid

The constitution of Kenya 2010[4] recognizes international law as part of Kenya's Law of which Kenya as a country is expected to honour and enforce its international responsibilities especially through international treaties and agreements.[5] However, Kenya does not give the impression to abide by the doctrine of *pacta sunt servanda* which in turn affects its international relations.

1.4The Objectives of the Research

The Main objective

The main objective of this research is to examine the implications of the legal doctrine of *pacta sunt servanda* on Kenya's International Relations.

1.4.2 The specific objectives

This research will establish the following objectives;

1. Explore the Doctrine of *pacta sunt servanda* and its application;
2. Discuss how international treaties are enforced in Kenya;
3. Examine Kenya's Foreign Policy and how foreign relation is affected by its enforcement of Treaties.

[4] Article 2(6) of The Constitution of Kenya 2010
5 Ibid

1.4.2 Research Questions

To address the statement of the problem and the objective of this study the following research questions shall be used: -

1. What is the meaning of the doctrine of *pacta sunt servanda* and what are some of its applications?
2. In what ways may treaties be enforced in Kenya
3. To what extent is Kenya's foreign relations affected by its enforcement of treaties?

1.5 Justification

Pacta sunt servanda is a doctrine that is not well understood and appreciated in the relevant field of treaty enforcement. Its application is not well enforced with various states as parties to international treaties and agreements. This research will give information on the doctrine of *pacta sunt servanda* its effect on Kenya's International Relations. It will also provide knowledge on Kenya's enforcement of international treaties and agreements.

A state cannot exist independently without associating and or depending on others states; states are forced to coexist for mutual economical, political and social benefit. States relates through international agreements and treaties which according to international law is out of good faith; and the doctrine of *pacta sunt servanda*. Kenya as a state recognizes international law through its constitution however Kenya's international relations has been questioned especially with its obedience and commitment to observe ratified treaties and agreements with other states.

How Kenya's international relations and association with other states has been affected by its commitment and observation of international agreements.[6] International treaties is an area that has not been explored, this research will be an eye opener to Kenya's international relations stake holders and especially the Government of Kenya particularly the Ministry of Foreign Affairs and the State law Office.

1.6 Research Methodology

This study is intended to be an exploratory research predominantly based on the review of international conventions, Treaties memorandum of understanding official reports and national Law. The study intends to use the library services where relevant materials from textbooks, scholarly articles and reports on the subject will be used to support the arguments made in the study. These literature materials will be majorly sourced from the University of Nairobi Campus library. Taking cognisance that the University might not be able to stock all the recent publications touching on the subject of this study, we shall resort to the internet journals.

1.7Theoretical Framework

According to International Law a state is sovereign and all states are equal.[7] However, the concept of interdependence and character of contemporary international commercial and political affairs, no state can afford to act in isolation hence the call in to play of international law to regulate global affairs.[8] There is a clash between the international legal system and the

6Supra note 4
7Brownlie, I. 2008. *Principles of Public International Law.* 7th ed. Oxford: Clarendon Press at p. 31.
8 Jennings, R. and A. Watts. eds. 2008. *Oppenheim's International Law*. 9th ed. London: Longmans,at p. 52.

International legal order of various states thus this clash is presented as a clash between dualism and monism; dualism is positivist and monist is naturalist.[9]

The Natural law theory has always emphasized that laws are grounded in justice and common good[10] amongst whose principal proponent was John Finnis; he stemmed from Aristotle and developed through the writings of Cicero, Thomas Aquinas, Thomas Hobbes and Lon Fuller.[11] According to the positivist, the law is separate and distinct from morality.[12]The positivist accept law as it is without passing judgment upon its ethical value or questioning its practical appropriateness, they believe that law is logically coherent system which virtually produce all rules necessary for the decision of all possible cases[13]

The other applicable theory is legal realism[14] this is a theory that believes that law is based on judicial decisions and not formal rules and principles. Legal realism is derived from scholars such as John Chipman Gray, Oliver Windell Homels and Karl Llewelly who holds the view that law is a set of clear rules fair procedures and principles independent of other political and social institutions[15]

9 Ibid pg 62
10 Simmonds, N. 2008. *Central Issues in Jurisprudence*. 3rd ed. London: Sweet & Maxwell at p.146.
11 Ibid at p. 146-7.
12Ibid at 146
13 Hans J. Morgenthau "Positivism, Functionalism, and International Law" The American Journal of International Law, Vol 34, No. 2 Apr 1940) pp 260- 284 : American Society of International law available at 1http://www.jstor.org/stable/2192998 on(12th May 2016)
14 Legal Freedman, M. 2008. *Lloyd's Introduction to Jurisprudence*. 8th ed. London: Sweet & Maxwell at pp. 985, 1015 and 1029.
15Cole, D. 2001. *Formalism, Realism and the War on Drugs*. Available at http://scholarship.law.georgetown.edu/facpub/71 at p. 242.

The realists do not deny the normative character of legal rules they however contend that legal norms don't completely answer the actual behaviour of courts or lawyers engaged in legal transactions. The realist argue that if the actual working of law in society is to be understood it is not enough to just pursue a collection of the relevant legal norms for such tell us little about actual legal behaviour[16] thus the realist movement represents a sociological trend in jurisprudence in support of new version of Positivism known as pragmatism[17] that seeks to see what law as a means to an end really is and how the rules of law work and not what they are on paper.[18]

Pragmatism is another theory that is relevant to the doctrine of *pacta sunt servanda*. It is a theory that state that the truth of a statement consists of consequences especially in its agreement with subsequent experience. Pragmatism never developed into a coherent, easily digestible and structured theoretical theory and never became a school.[19] It was William James of 1842, a prominent American philosopher who introduced pragmatism to a wider public and made it popular at the turn of century. According to pierce, every activity rests in a large number of assumed conditions thus to cast doubt at once would lead to ultimate paralysis.[20] However, inquiry should not simply take all assumptions uncritically rather inquiry should always start from real doubt namely; drought that arises out of concrete situations that cannot be squared with previous assumptions. [21]Pragmatism is a method of reflection which is guided by constantly

16 Freedman, M. 2008. *Lloyd's Introduction to Jurisprudence*. 8th ed. London: Sweet & Maxwell at p.996-7.
17Katju, M. 2001. The Hart-Fuller Debate. Available at: http://www.ebcindia. com/lawyer/articles/496_1.htm [Accessed September 20, 2012].
18Friedmann, W. 2003. *Legal Theory*, 5th ed. Delhi: Universal Law Publishing at p. 294.
19Pragmatisim in International Relations by Harry Baver& Elizabeth bright published by Roult edge 2009
20 Anne Marie Slaughter "International Relations, Principal Theories" available at http://.princeton.edu/slaughtr/Articles/722
21 ibid

holding in view its purpose and the purpose of the ideas it analyzes whether these ends be of the nature use of action or of thought.[22]

John Dewey of 1859 to 1952 shared Pierce critique of cartesianism and was deeply skeptical of traditional philosophical dualism such as mind and body, theory and practice, reason and experience, fact and value.[23] Optimistic about the potential of the social sciences to provide guidance for Device democracy was a kind of exercise in collective inquiry about the future trajectory of communities with concern for political and social issues and the versatility of his work.[24]

In the past three decades, pragmatist thinking has undergone a remarkable renaissance. The appeal of pragmatism through for social science certainly stems from the fact that it offers arguments covering epistemology and methodology as well as accounts of ethics and justification at the turn of century.[25]

1.8 Literature Review

In an article by Daniella Nicoletta on the doctrine and practice of *pacta sunt servanda* [26] according to Nicoletta[27]a treaty is a privileged instrument of international relations, which states use to create juridical relations. Treaties are instrument of relations between states, they record understandings agreed upon through a freely expressed agreement of will, thus sanctioning the

22Pragmatisim in International Relations by Harry Baver& Elizabeth bright published by Roult edge 2009
23 Maurice Oduor "*The status of International Law in Kenya*" African Nazarene University Law journal; annual 2014, Volume 2 part 2
24 Ibid
25 Ibid
[26] Daniella Nicoletta "The principle pactasuntservanda Doctrine and Practice''**LESIJ NR. XVI, VOL. 1/2009**
[27]Lecturer, Ph.D., Law Faculty, "Gheorghe Cristea" Romanian University of Science and Arts, Bucharest.

guarantee of its applicability by the signing states in good faith.[28]According to the Vienna convention, states that became party to a treaty are obliged to put into application and to fulfil in good faith the obligations assumed and juridical norms endorsed, thus constituting the most important principle of international law, yet formulated since antiquity through the expression ***"pacta sunt servanda"*** (treaties should be respected)[29].

Nicoletta highlights various theories that influence the concept of good faith in treaty formation and practice; she posits that classic positivism faced after the First World War when some authors argued that the pre-war interstate system and the positive international law based on treaties created by the states failed in their finality for failing to prevent the war. The *neo-positivist doctrine* has constituted an important critical reaction against the traditional positivism.

The doctrine of international law in the 21stcentury, as also in continuation, in the 20thcentury, affirms the principle *pacta sunt servanda*. This principle has found devotion ever larger and repeated mostly in international documents adopted after the first and the second world wars, with general or special character with respect to international treaty. The contents of *pacta sunt servanda* is interpreted and emphasized in the Declaration of the UNO General Assembly of 1970 in relation to principles of international right of friendly relations and of cooperation between states.

[28] Ibid
[29] Vienna convention on treaties 1969

The concept of good faith refers, in other words, to the manner or spirit in which conventional obligations should be fulfilled, to the degree of consciousness and of strictness with which these are respected. This also means that the execution of the treaty must be made correctly, without subterfuges and accurate in relation with the possibilities of the contracting party. From this point of view it is not permitted that a state contributes through its action or abstention to the delay of fulfilment the treaty's purpose and object. Article 18: "*a state should refrain from developing some acts that would lack a treaty of its object and purpose".*[30]

Both the doctrine and the practice in the international right have demonstrated that this principle *pacta sunt servanda* should be applied by every state separately, with the obligation to be fully respected and in good faith in all international engagements. The importance of the principle *pacta sunt servanda* is that it forms a foundation stone in peaceful life at all times at international level between states mostly in the context of the present international situation. The stability of international relations depends on respecting in good faith of the principle *pacta sunt servanda* sole guarantor of the international peace and security.

In a book the "The Principal of *pacta sunt servanda* and The Nature of Obligation under International Law" J.I Lukashuk posits that like all other rules of international Law, the principal of good faith is kept in force by the general consent of states. The detailed content of the principal can also be seen to be developing on a consequential basis. Consent is the only way to establish rules that legally bind sovereign states.

[30] The Vienna Convention of 1969

According to J.I Lukashuk, international behaviours reveal a fairly high level of compliance with the norms of international law. However, inquiry should not take all assumptions uncritically, rather inquiry should always start from real doubt namely drought that arises out of concrete situations that cannot be squared with previous assumptions. Knowledge for instance in the form of scientific theory thus understood as the answer to some problematic situation. Lukashuk argue that pragmatism is that method of reflection which is guided by constantly holding in view its purpose and the purpose of the idea it analyzes whether these ends be of nature and use of action or of thought.[31]

In an article by Lukashuk on the Principle of *pacta sunt servanda* and The nature of obligation under International Law according to him the principle that treaty obligations must be fulfilled in good faith is one aspect of the fundamental rules that require all subjects of international law; which include international treaties and agreements should be exercised in good faith and their rights and duties should be observed.[32] According to Lukashuk, the accepted formulation in International Law is Obligation yet in Jurisprudence the term obligation is not equivalent to the term duty since the former includes not only duties but also relevant rights.[33] According to him states must conform to their obligations under international Law in that municipal legal rules should give effect to international obligations. The principle *pacta sunt servanda* applies to the rules in force which is those which have been entered in to and remain in force this provision is confirmed by Article 26 of the Vienna Convention on the law of Treaties.[34] Article 18 of the Vienna Convention the effects of principle extend to a limited degree to treaties that have been

[31] Harry Baver & Elisabetta Brighi "pragmatism in International Relations" routedge London & New york
[32] I I Lukashuk " The Principle of Pacta suntservanda and the nature of obligation under international law" American Society of International Law, the American Journal of international law.
[33] Ibid
[34] Opened for signature May 23, 1969 1155 UNTS 331

signed but not yet ratified or approved. The parties are refrained from acts that would defeat the objective and purpose of the treaties.[35]

Further according to this article it's argued that the content principle of *pacta sunt servanda* is determined to a considerable extent by its interaction with other main principles of international law.[36] That obligation should be fulfilled without any threats or use of force when such force is exerted inconsistently with the UN charter; disputes that arise should be settled in a peaceful manner.

In an article by Maurice Oduor[37]on the status of International laws in Kenya Oduor writes that there is lack of affirmation of the place of International Law in the normative rank which has spawned judicial interpretation that has accorded international law the same status as municipal law. The article considers the textual and contextual statutory international law in Kenya; where Textual status refers to formal legal provisions in the constitution and statutes, in this case the treaty making process and Ratification act whereas the contextual status is the manner in which courts have characterized the place of International Law within the normative framework. The article analyzes the meaning of article 2(6) of the constitution of Kenya how ratification not only creates legal relations between Kenya and other states parties to the particular treaty but it also and more significantly so binds the state at the domestic level hence the process by which a treaty becomes ratified under Kenyan law is significant. The Key Point according to Maurice Oduor is that Ratification is a one off process that has dual effect if not only binds Kenya in her

[35] Supra note 6
[36] Ibid
[37] Maurice Oduor "*The status of International Law in Kenya*" African Nazarene University Law journal; annual 2014, Volume 2 part 2

relationship with other states on the basis of *pacta sunt servanda* but also and more importantly has an effect within the domestic framework of law. According to Maurice Oduor, article 2(6) of the Constitution of Kenya can only mean that if the state is required under the relevant regime to enact law or do something in order to implement international law that is already binding on it should do so otherwise it would be violating the Constitution and any other interpretation would contradict both the text and intentions of article 2(6) of the constitution of Kenya for example to suggest that article 2(4) means that the state must pass implementation legislation for every respective treaty would be to contradict article 2(6) of the constitution.[38]

According to his article, Oduor has discussed the hierarchy of legal norms; that the municipal courts of Kenya merely agree that treaties and conventions were part of Kenyan Law but did not engage in a thorough analysis of the relationship between International Law and local law. Whichever law is superior to the other. Oduor in his article has failed to discuss the implication and effects of the status of international law on Kenya's international relations with other states.

In an article by Mukami Mwagiru "From Dualism to Monism: The structure of revolution in Kenya's Constitutional Treaty Practice" the article has surveyed the implications of the new treaty practice of Kenya that was established by the 2010 constitution.[39] It has examined the treaty practices that have endured in Kenya since independence, and pointed out some of the problems that it has spawned. In particular, it has been argued that the dualist perspective that has been in force in Kenya has encouraged the politicization of the treaty making process in the

[38] The Constitution of Kenya 2010
[39] Makumi Mwagiru "From Dualism to Monist: The structure of Kenya's Constitutional Treaty practice" Journal of language, Technology & Entrepreneurship in Africa Vol 3 No. 1 of 2011 available at www.Ojal.info/index.phd/jolle/artcle/view/66714/54979

country. It has been noted that the treaty practice that has been practiced since independence has been held hostage by the reality that the other two arms of government have been overshadowed by the executive in the treaty making process. This overpowering by an imperial executive in turn generated rationales such as the domestication of treaties, as the basis on which treaties can be applied in municipal law.

The doctrine of domestication has certain effects jurisprudential, philosophical, and political and it is these that have rendered the erstwhile treaty practice ineffective as a means of solving pressing treaty puzzles of the day in Kenya. The thrust of the arguments made in this article is that dualist treaty practice developed significant anomalies over time, and has hence consequently rendered it unable even unwilling to solve the important treaty and international law problems of the day. In consequence, the dualist paradigm has now eventually been overthrown in a scientific constitutional revolution. This scientific revolution was long overdue in Kenya's treaty practice. However, it raises an interesting problem of the fate of the overthrown treaty practice paradigm in Kenya.

While some, like Kuhn have argued that an overthrown paradigm should stay that way and remain in operational, others have made the more interesting point that even an overthrown paradigm should not be discarded because in the future, it may regenerate and help to solve future problems of the day. This is as it should be. In the international relations, international legal and diplomatic environment, and in the domestic one, which are all volatile, tools that

might be engaged in future problem solving should be shelved but not discarded, because after all, they may yet live and fight another day.[40]

Abdul Ghafur Hamid, in his article, "Judicial Application of International Law in Malaysia: A critical Analysis"[41] makes a clear distinction between the doctrines of incorporation and transformation while contrasting the theories of monism and dualism.[42] He states that while the Malaysian Constitution is silent on the primacy of international law over the municipal law and vice versa, the country follows a dualist approach. His article however is not on Kenya but it describes monism and dualism well.

In an article "Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya" by E. Oluoch Asher[43]Asher writes that the face of international law has been changing. Historically, international law largely provided a mechanism through which states could preserve their sovereignty from external interference. More recently however, international law has tended towards a more co-operative engagement among states, through treaties and other international agreements. The result of this process has been the transference of norms by and among states, thereby increasing the range of shared transnational norms among the nations of the world. One result of this process has been the

[40] Makumi Mwagiru "From Dualism to Monist: The structure of Kenya's Constitutional Treaty practice" Journal of language, Technology & Entrepreneurship in Africa Vol 3 No. 1 of 2011 available at www.Ojal.info/index.phd/jolle/artcle/view/66714/54979
[41]Hamid, A. 2005. Judicial Application of International Law in Malaysia: A Critical Analysis. *Asia Pacific Yearbook of International Humanitarian Law*, 1, pp. 196-214.
[42]Ibid
[43] LL.B (UON), LL.M (UON), LL.M (UNISA).

emergence of certain international minimum standards of conduct expected of individuals and states.[44]

She discusses the theoretical bases for application of international law in states where she brings out the concept of dualism and monism. She also analyses the nature of general rules of International law that article 2(5) of the constitution of Kenya 2010 and that there are various schools of thought regarding the nature of the general rules of International Law as per section 2(5) of the constitution of Kenya 2010. One of the schools of thoughts according to her is the specific character of the International community that is the principles necessary for International co existence which includes *pacta sunt servanda,* territorial integrity, self defense and the legal equality of states. She also discuss the application of the general rule of International law that Article 2(5) of the constitution envisages the direct and automatic application of general rules of International Law within the municipal law of Kenya without further legislative intervention in essence the rules would apply in their own right and the article therefore the application of the English law doctrine of incorporation and transformation e traditionally defined the application of customary international Law in the United Kingdom.

In conclusion Asher sates that The Constitution of Kenya has accorded international law a new and important role in Kenya. The application of international law provides an opportunity for Kenya to effectively incorporate supranational standards in the conduct of its affairs, and thereby to fully play its role as a member of the community of nations. This is only possible if

[44] E. OluochAsher "Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya" International Journal of Humanities and Social Science Vol 3 No. 11; June 2013

international law is accorded its due status as law in its own right, both in interpretation and application, without modification aimed at suiting the restricted national objectives.

In an article by Luke Obala "Kenya's Elections and Emerging Foreign Policy" Luke discussed Kenya's foreign policy following the 2013 elections. According to Mr Luke following the 2013 Kenya's elections, both Kenya and the world expected changes in the country's policies and especially foreign policy.[45]According to Luke, Uhuru's regime is unlikely to make major policy shifts. Although Uhuru's government is made of young leaders it represents the old order; and that it came into government with the ICC issue as a major problem which influenced the direction of Kenya's foreign Policy. That since the current regime represents the old regime the direction of its foreign policy is based on the old order as the Uhuru-Ruto government remains rooted in the old ways.[46]

According to Luke it was assumed that the new Kenyan government in 2013 had a plan to unveil a policy focused on East African integration, Pan-African cooperation and trade, with a smattering of anti western rhetoric and hostility towards the ICC process. Which approach would definitely lead to tension and contradictions in the foreign policy. Principally the plank predicted on East African integration will meet its first hurdle as Kenya's attempt to join South Africa, Nigeria, Brazil, India and china as one of the sub-imperialist hubs in the African continent because Kenya can only achieve its regional hegemonic goals by undermining the interest of its

[45] Luke Obala "Kenya's 2013 Elections and Emerging Foreign Policy" Aljazeera Center for Studies, http://studies.aljazeera.net/en/
[46] Ibid

neighbors in consolidating their own economies and the extension, their internal stability, security and sovereignty.[47]

According to Mr. Luke obala it was at that time early to tell if with certainty the direction Kenyan Foreign policy will go because of the ICC case then. It was clear that there was going to be an attempt to use regional and Africa bodies to rally support for the regime. In this respect the regime had the capacity to twist her neighbors arm given its economic muscle. That the emphasis of foreign policy was likely to change based on any key principles until the case is dispensed with either way. Luke discusses the focus of the jubilee government with regards to foreign policy. However, he fails to bring out the concept that Kenya was a party to the Rome Statute hence had a responsibility as a member state to submit to ICC as a court hence the concept of *pacta sunt servanda.*

In an article by Andrew Tyrus Maina "Studying Kenya's Foreign policy: Seminal Events that shaped Kenya's Foreign Policy, 163-66" according to the article Kenya's foreign policy has not changed much from its independence. From his article Kenyans foreign policy is shaped by its past experiences with various nations and international organizations. He analyses the shifta war; where he claims that from the shiftar war Kenya has maintained territorial integrity as part and parcel of its foreign policy.[48] He also looks at the colonial and post colonial economy in Kenya: at independence Kenya's economy was tied to Britain, the effects of colonial investment in Kenya was too great for Kenya to discard the services of the British crown which lead to Kenya having strong ties with Britain which has only in the recent past been shaken. He further

[47] Supra Note 32
[48] Andrew Tyrus Maina "Studying Kenya's Foreign policy: Seminal Events that shaped Kenya's Foreign Policy, 163-66" https://theforeignpolicyanalyst.wordpress.com/tag/kenya-foreign-policy/

examines the domestic rifts in Kenya; internally there was some tension that had a bearing on what foreign policy approach Kenya took. It is the source of confusion as to whether Kenya adopted a truly non alignment policy. This was the ideological battle between the radicals and the conservative/moderates in Government.[49]

In an article by Emmanuel Kisiangani[50]on Kenya's regional relations between principle and practice, Kisiangani claims that Kenya has a long cast as a reluctant regional actor. That Kenya is viewed as having a strong economy but lacks political leverage in its region.[51] In his paper he discusses Kenya's regional relations in context by looking at Kenya's relations with Somalia and compares it with Kenya's relations with South Africa.[52] In his finding Kenya's regional diplomacy has been characterized by a strong sense of morality and conservatism. Kenya's overriding concern has been to develop and maintain friendly relations with other regional entities and foster cooperation with the rest of the international community. He recommends that if Kenya's wants to overcome the label of punching below its weight it needs to respond to the ever changing regional dynamics by adopting new approaches to strengthen bilateral relations and foster regional integration and support strategic partnership.[53]

[49] Ibid
[50] Emmanuel Kisiangani is a Senior Researcher at the Institute for Security Studies, based in the Nairobi office.

[52] Emmanuel Kisiangani "Kenyas Regional relations between principle and practice" Policy Briefing 113, October 2014; South African Foreign policy and African drives program.
[53] Ibid

1.9 Chapter Outline

This thesis comprises of five chapters, Chapter one covers the introduction; Chapter two is on the doctrine of *pacta sunt servanda*, its application and challenges of *pacta sunt servanda*; Chapter Three examines enforcement of international treaties and agreements in Kenya by looking at how various government institutions enforce international Treaty and agreement; Chapter Four is on the effects of Enforcement of treaty in Kenya's International Relations by looking at Kenya's relations with regional organisation and nations which covers bilateral and multilateral relations. Chapter five is a summary, conclusion and recommendations of the findings of this paper and research.

CHAPTER TWO

2.0 The doctrine of *pacta sunt servanda* and its application

2.1 What is *pacta sunt servanda*?

The principle *pacta sunt servanda* is a Latin word meaning agreements are to be kept. It means that treaties are biding assets. When treaties are properly concluded, they are binding on the parties and must be performed by the parties in good faith.[54] The obligations created by a treaty are binding in respect of a state entire territory thus a state cannot use inconsistency with domestic law as an excuse for failing to comply with the terms of a treaty.

Pacta sunt servanda is a positive norm of general International Law. It's a constitutional norm of superior rank which institutes a particular procedure for creation of international law.[55] It is an institution by general international law of a special procedure for creation of international norms. International norm thus created are valid and must be kept as long as no norm abolishing fact as laid down by norms of international law has occurred.[56]

2.2 The origin of *pacta sunt servanda*

Most rules that are set to govern society have such a deep moral and religious influence as the principle of the sanctity of contracts.[57] The principle of *pacta sunt servanda* was developed in the East by the Chaldeans, the Egyptians and the Chinese. According to their belief, the national gods of each party took part in the formation process of a contract. The gods would appoint

---

[54] Josef L. Kunz. The Meaning and the Range of the Norm Pacta Sunt Servanda *The American Journal of International Law* Vol. 39, No. 2 (Apr., 1945), pp. 180-197

55 Hans Wehberg. Pacta Sunt Servanda .*The American Journal of International Law* .Vol. 53, No. 4 (Oct., 1959), pp. 775-786

[56] Ibid p.782

57 Hans Wehberg "pacta Sunt servanda" available at www.jstor.org on 12th July 2016

guarantors of the contract and they threaten to take drastic actions against the party guilty of the breach of contract. As a result of involvement of national gods in the contract making process of a contract the parties were bound up in solemn religious formulas[58] and a cult of contracts developed.[59]

After the empire of Charles the great was dissolved and the unity of the will of the state was broken, the principle of vassalage acquired a decisive meaning. The feudal system involved a chain of contract voluntarily entered into by lords and vassals and the existence of such contracts alone prevented anarchy. The moral basis of feudalism may be found in the mile Christians. The Christian knight was required above all to be true to his given word.[60]At the same time the study of Roman law strengthened the concept of an obligation to perform the contract.

The fresh start and the Reformation followed. The idea of the "Reason of State" which was a simple was a basic one in the theories of Machiavelli[61] It is true that he adhered unreservedly to the general value of religion, morality and law.[62] He asserted that the Prince could put himself above law and justice, should this be necessary for the state. To be sure, Machiavelli said that the Prince ought, if he could, to follow the paths of goodness; but he was justified in doing wrong in cases of necessity. In order to protect the interests of the state, explained Machiavelli, the Prince must be ready to act "against loyalty, against charity, against humanity and against religion."[63]

58Cf baron Michel De Taube "L,inviolabilite des traites" 32 Hahue academy recuel des cours 299 et seq (1930II)
59 Robert Redslob "Histel des Grand principles Droit des gens 107" (paris 1923)
60 Cf. Michel de Taube, loc. cit. 337 et seq
61 Machiavelli (1469-1527)
62 Friedrich Meineeke, Die Idee der Staatsriison 31 if., especially 50 if. (Munich- Berlin, 1924); Ernst Reibstein, Volkerrecht. EineGesehichte seiner Ideen in Lehre und Praxis, Vol. I, p. 241 if. (Freiburg-Munich, 1958).
63 Robert Redslob, Histoire des Grands Principes du Droit des Gens 107 (Paris, 1923).

It's crucial to note that Machiavelli's views were helpful to those who admitted exceptions to the sanctity of contracts. Thomas Aquinas, who on principle demanded that contracts be performed even with regard to enemies, that, if the circumstances existing in reference to persons or objects at the time of making the contract had changed, non-performance of the contract was excusable.[64] It is from this doctrine of "***clausula rebus sic stantibus"*** developed. This doctrine is regarded as justifiable today but not in all circumstances, it is only justifiable in circumstances existing at the time of entering in to contracts have changed to such an extent that either the contacting party has the right to demand the revision of the contract of which the right must be excised in good faith. On the other hand, a unilateral right of termination or alteration does not exist.

Even before Gorotius Jean Bodin developed his famous theory of sovereignty he defined national sovereignty as the highest authority, independent of state laws with respect to the citizens and subjects of the state. According Gorotius Jean Bodin a state could not bind itself through its own laws and that no law was scared that it would not be changed under pressure of necessity. From his theory one can conclude that International Law agreement need not be kept if their performance is no longer in the interest of the state.[65]

In the 17th century a new danger emerged on the principle of sanctity of contracts from the two great philosophers: Hobbes and Spinazo the exponent of the doctrine of "***raison d' etat.***" According to Hobbes, agreements are to be kept and the concept of wrong arises out of non-performance of a contract. The promising state in such a contract is therefore in contradiction

[64] Thomas Aquinas (1225-1274)
[65] Gorotius Jean Bodin (1530-1596)

with itself. According to him, the exception to this rule is when an agreement by a state cannot only be kept by a party if the security of a state shall be compromised.[66]On the other hand the Dutch philosopher Spinoza[67]stated that no holder of a state power can adhere to the sanctity of contracts to the detriment of his own country without committing a crime. According to him sanctity of contract depends on whether the contract is beneficial to one's own state.[68]Spinazo was defiantly not a believer of the doctrine of *pacta sunt servanda.*

The principles of sanity of contract was brought out in strong relief of "***Emer de Vattle"*** of 1714 to 1767 he pointed out that nations and their leaders must hold fast to their oaths and their contracts since no security and no commerce would otherwise be possible between nations.[69]

Writers of international law could not for long fail to preserve that International Law was being undermined if one passed contracts on the will of the state. They therefore tried to find a basis which would have altered the principle of sanity of contracts in spite of continued adherence to the will of the state as a foundation of international law. [70]

The objectionable manner in which the German scholar, August Wilhelm Heffter (1796-1880), expressed himself on the sanctity of contracts in his book, *Das Europaische Vilkerrecht der Gegenwcart* (1844), a book which was translated into many languages and had eight editions, is worth noting. While pointing out that the expression, *pacta sunt servanda* was an important principle of international law, he limited the scope of the principle as follows: one can scarcely

66Compare especially Friedrich Meineeke, op. cit. 273.
67 The Tractatus theological politics by Spinazo (1670)
68 Ibid
69Emer de Vattel, Droit des Gens, Book II, chap. XII, ? 163.
70 Ibid

disagree with the view that a contract in itself creates a right only through the union of wills (*duorumvelplurium in idem consensus*) and thus only for so long as this union exists.[71]

The newer theory of international law, whether it is regarded as positivist or not, adheres to the validity of the phrase *pacta sunt servanda*. This is hardly surprising, since any other view would amount to denying the existence of international law in general. However, the law of nations is built less upon customary law than upon contracts. If a contract validly concluded were not binding, then international law would be deprived of a decisive foundation and a society of states would no-longer be possible. International law and sanctity of contracts is a result of natural necessity from the inevitability of social relationships. The binding force of contracts is an obligation which exists, not only vis-a-vis the contracting parties, but also vis-a-vis the international community as a whole.[72]

In the system of international law, which stands over states, the sanctity of contracts is not to be rationalized away. It is important to ascertain upon what legal sources the maxim *pacta sunt servanda* rests. For those who believe that the "general principles of law" form a third source of international law, which is not limited to the jurisdictional system of the International Court of Justice in The Hague, the principle of the sanctity of contracts is a general legal principle.[73] It is one of the most important general principles of law for the relations between nations. Without the powerful instrument of the contract, it's impossible to have international law.[74]

71 August Wilhelm Heffter, Das EuropaiseheVolkerreeht der Gegenwart 144 (Berlin, 1844).
72 See *jules Basdevant,* 58 Hague Academy *recvel des cour*
73Bin Cheng, "General Principles of Law as applied by International Courts and Tribunals" pg. 105 to 112 (London, 1953)
74Cfcharles De Visscher "Theories of et Realitesen Droit International public 324 (Paris 1953)

The phrase *pacta sunt servanda*, in the first instance, had a religious origin and governments have always taken the view that the principle corresponded to their conviction. No one will deny that many breaches of contract have taken place in the course of history. The fact that, in spite of this, the principle of the sanctity of international contracts preserved its validity is indeed remarkable. Its breach has always been regarded as a wrong which entitles the wronged party to demand compensation. It must be admitted, in this connection, that the reparation can only be viewed as an incomplete compensation for the wrong. For the moral wrong in a breach of contract is so immense that the material amends cannot possibly give the wronged party good reparation.[75]

Numerous declarations have been made by statesmen, in the course of centuries, to emphasize the obligation to observe the sanctity of contracts. For example: Lord Russell, British Foreign Minister, in a letter dated December 23, 1860, to the British Ambassador in China, Earl James Bruce Elgin, stated that the universal notions of justice and humanity teach even the worst barbarians among human beings, that, if an agreement has been made, the law demands its observance.[76] Later the American Secretary of State, Cordell Hull, on July 16, 1937, in a speech on international affairs, stated that the American foreign policy advocates for faithful observance of international agreements. That America up-holding the principle of the sanctity of treaties, and as a state America believed in modification of provisions of treaties, when need arises, by orderly processes carried out in a spirit of mutual assistance and accommodation. In addition,

[75] Ibid

76 A F frangules, op Cut 94 also quated by Jules Basdivant page 641 note 2

America believed in respect for states' rights and performance by all nations of established obligations.[77]

There are many General declarations by states in favor of the sanctity of contract; One of the most famous one is the statement made in the case of neutralization of the Black Sea, when Russia, on October 19-31, 1870, suddenly repudiated her obligation, under the Paris Peace of 1856, to keep in the neutralized Black Sea henceforth only a fixed number of warships of a fixed tonnage. In the London Protocol of January 17, 1871, it was said that the representatives of North Germany, Austro-Hungary, Great Britain, Italy, Russia and Turkey, having met in a conference, recognized as a necessary principle of international law that no power can repudiate the obligations of a contract nor change its provisions without having obtained first the consent of the other contracting parties by a peaceful understanding.

Further, *communiqué of the Atlantic Council* of December 16, 1958, in response to the Russian withdrawal from the provisions of the Inter-Allied Agreement Berlin, which stated that no State has the right, by itself, to free itself unilaterally from its contractual obligations. The Council declared that such a procedure destroys the mutual trust between nations which represents one of the foundations of peace.[78] Moreover, the treaties which emphasize the sanctity of contracts are extraordinarily numerous.

[77] A F frangules, op Cut 94 also quated by Jules Basdivant page 641 note 2

78 Moore, "History and digest of the International Arbitrations to which the United States has been a party" 1807-1849-1850 (Washington 1898)

At this juncture a few examples will suffice. The preamble of the Covenant of the League of Nations characterizes as an important fundamental principle, in order to promote international cooperation and to achieve international peace and security, the rule of "scrupulous respect for all treaty obligations in the dealings of organized peoples with one another." In the preamble of the Charter of the United Nations one finds likewise, "respect for the obligations arising from treaties and other sources of international law." Not less important is the reference in Article 5 of the Charter of the Organization of American States that international order is based, among other things, on the faithful fulfilment of the obligations arising from treaties and from other sources of international law.[79]

It is easily understandable that no arbitral tribunal has ever rejected the rule or cast doubt on the principle of *pacta sunt servanda*.[80] On the other hand, cases are numerous in which international arbitration tribunals have expressly emphasized and recognized the principle of *pacta sunt servanda*.[81] Such cases include: In a decision of April 7, 1875, the U. S. Ambassador in Santiago, as sole arbitrator in the dispute between Chile and Peru, held that it is a principle well established in international law that a treaty containing all elements of validity cannot be modified except by the same authority and according to the same procedure as those which have given birth to it.[82]

79 United Nations Chatter 1945
80 Law of Treaties draft Convention with the comment prepared by the Research in International law of Harvard law school, 1935
81 Ibid
82 Supra note 40

In the case of Van Bokkelen, between the United States and Haiti, the arbitrator, A. Porter Morse, in his decision of December 4, 1888, stated that Treaties of every kind, when made by the competent authority are as obligatory upon nations as private contracts and are binding upon individuals and should be kept with the most scrupulous good faith.[83]

In the United States versus Great Britain,[84] the Permanent Court of Arbitration in the Hague held that every state has to execute the obligations incurred by treaty *bona-fide*, and is urged thereto by the ordinary sanctions of international law in regard to observance of treaty obligations.[85] Soviet Judge Mr. Kojevnikov following the Judgment of the International Court of Justice of November 28, 1958, in the case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants,[86] the Judge based his opinion on the principle, *pacta sunt servanda*;[87] the Mexican Judge, Mr. Cordova, in his dissenting opinion, referred to the rule as a time honoured and basic principle,[88] and he was obviously, on this point, in agreement with the Judgment of the majority of the Court.

"We have described above the rule of *pacta sunt servanda* as a general principle of law that is found in all nations. It follows, therefore, that the principle is valid exactly in the same manner, whether it is in respect of contracts between states or in respect of contracts between states and private companies. Whether one agrees, with Vendors,[89] a contract of a state with a foreign

83 Supra Note 49
84 (*United States* of *America* v *Great Britain*) (Award) (1871)
85 See the decision in James Brown scott Argument of the Honorable Elihu Root on behalf of the United States of America before the North Atlantic coast fisheries Arbitration at the Hague 500 (Boston 1921)
86 Netherlands Vs. Sweden
87 Publication of the permanent Court of International Justice, ser B No. 1 pg 72
88 ibid
89 Zectschrif, fur austsandrsetresoffentilichesrecht u volkerrech 638 ff 1958

company for the purpose of granting a concession as being quasi-international law agreements, or whether one ascribes to them another character, the principle of the sanctity of contracts must always be applied. As has been pointed above, the principle of sanctity of contracts is an essential condition of the life of any social community.

The life of the international community is based not only on relations between states, but also, to an ever increasing degree, on relations between states and foreign corporations or foreign individuals. No economic relations between states and foreign corporations can exist without the principle *pacta sunt servanda*.[90] This has never been disputed in practice. The best proof that the principle also applies in such a case is best illustrated by the following example: it has long been suggested that disputes between states and foreign companies (or foreign individuals) should be submitted to international adjudication. Such a course would be meaningless if the principle *pacta sunt servanda* were not applicable.

How would it be possible to suggest the creation of such an International Court of Justice if contracts between a state and a foreign company were not binding? The conclusion is thus inescapable that in each case, as Vendors has shown,[91] such contracts are subject to the general principle of law *pacta sunt servanda"*

[90] Hans Wehberg. Pacta Sunt Servanda .*The American Journal of International Law* .Vol. 53, No. 4 (Oct., 1959), pp. 775-786

91 "The Principle ***pactasuntservanda*** and the nature of obligation under International Law" by I. I Lukashu, The American Journal of International Law; Vol 83 No. (3 July 1987) pp 513-518, American Society of International law. Available at :http//www.jstor.org/stable/2203309 acced on 15th June 2016 at 11:23 UTC

2.3 Interpretation and application of the doctrine of *pacta sunt servanda*

The principle that treaty obligations must be fulfilled in good faith is one aspect of the fundamental rules that require all subjects of international law to be exercise in good faith their rights and duties under the law. In social political sphere this fundamental principle may be seen as manifesting the need perceived by states for an international legal system that can ensure international order and prevent arbitrary behaviour and chaos. In the legal sphere the principle is confirmation of the character of International law as law subjects of international law are legally bound under the principle to implement what the law prescribes.[92]

The evolution of the content of the principle *pacta sunt servanda* has moved towards diverting the principle to its formal and abstract nature and transforming it into a specific set of rules governing the process by which norms of international law are to be given effect including their interaction with municipal laws. The evolution does not however lead to intervention into domestic sphere to the discretion of each individual state.[93]

The principle *pactsa sunt servanda* applies to the rules that are in force; those rules which have been entered in to and remain in force. This is provided for in Article 26 of the Vienna convention on the law of treaties[94] this is also provided for under Article 18 of the Vienna Convention. The effect of the principal extends also to a limited degree to treaties that have been signed but not yet ratified or approved by the party state. The parties in such circumstances are obliged to refrain from acts that would defeat the objective and purpose of such treaties. The principle covers cases where there is provisional application of treaties pending their entry into

92 Ibid pg 640-649
93 voelkerrecht.lehrbush 129 (1981)
94 Vienna Convention on the Law of T reaties Opened for signature May 23/1969,1155 UNITS 331

force.[95] If the operation of a rule is suspended the principle ceases to apply to it but not entirely. The parties in question are obliged to refrain from acts that could prevent their presumption of the rules of the treaty.

Good faith as an element of the principal of *pacta sunt servanda* binds subjects of international law. The interest of states within the scope of a rule is to select the applicable rules in good faith to ensure that the application of these rules is truly compatible with what is written. Good faith limits the rules so that they do not contravene the right and legitimate interest of the subject and prevent abuse of rights.[96]The principle of good faith fulfilment of obligations prescribes a rule of fairness which governs the ways and means of implementing international legal norms. Good faith fulfilment is further based on reciprocity this is well attained in domestic legislations.[97]

All international obligations should be fulfilled in good faith at the same time. The requirement of good faith introduces into *pacta sunt servanda* certain elements that are not only legal but are also moral and political. International practices demonstrate that the most important rules especially those regulating peace and security must be fulfilled in good faith.[98]

The doctrine of *pacta sunt servanda* has no exception which is contrary to the opinion of many writers. One of the major challenges of the doctrine of *pacta sunt servanda* is revision of treaties. Revision of treaties presupposes valid treaties and brings up purely political problem of a change or termination of valid treaty norms recognized as valid in positive law by the conflicting parties.

[95] Article 25 of the Vienna Convention
96 Supra Note 60
[97] Hans Wehberg. Pacta Sunt Servanda .*The American Journal of International Law* .Vol. 53, No. 4 (Oct., 1959), pp. 775-786
[98] Ibid pp. 777-780

Valid treaty norms must be kept, but they can be revised by using appropriate procedures. The revision of treaties is neither an exception to, nor in contradiction with, the norm *pacta sunt servanda*. [99]

In conclusion the doctrine of *pacta sunt servanda* is a Latin word meaning agreements should be kept. The doctrine originates from religion like most rules and regulations; it was developed in the east. With sovereignty of states it brings about accountability on states when it comes to international agreements and treaties. Its application is that states should abide by the international agreements and treaties they are signatories to. It applies to treaties and agreements that have been ratified by a state. Its major challenges are when a state decides to withdraw form a treaty it was a party to.

99 Ibid

CHAPTER THREE

3.0 Enforcement of International Treaties and Agreements in Kenya

3.1 Introduction

Constitution of Kenya 2010 introduced a shift from the old dualism practice to monism. Article 2(5) of the Constitution stipulates that the general rules of international law forms part of the laws of Kenya and Article 2(6) provides that any treaty or convention ratified by Kenya forms part of law of Kenya.[100] The implication of this is that treaty law and customary law though not expressly stated form part of the Kenyan Law. It is always stated that domestic courts are the most appropriate institutions with means of implementing rules of international law hence analyzing enforcement of International Law by Kenya's judicial institutions.

3.2 Enforcement of International Law by Kenya's Judicial Institutions

The Kenyan courts have not hesitated to make use of Articles 2(5) and 2(6) of the Constitution. In ***Kenya Section of the International Commission of Jurist v Attorney General & Another [2011] eKLR*** a High Court Judge issued warrants of arrest against Omar Al Bashir the then president of Sudan.[101] The warrants of arrest were issued after the ICJ Kenya chapter moved to court seeking warrants of arrest against Omar Al Bashir on grounds that there were warrants of arrest issued against Al Bashir by the International Criminal Court. Despite the existence of the Warrants by the ICC the Kenya Police and Government had failed to effect the warrants despite being that Kenya had ratified the Rome statute on 15th March 2010 and followed up by domesticating the statute via the Crimes Act 2008. The ICJ based their application on Article

[100] The Constitution of Kenya 2010

101 Kenya Section of International Commission of Jursist Vs. Attorney General [2011] eKLR

2(5) of the constitution of Kenya which makes all treaties and conventions ratified by Kenya part of Kenya's law.

The decision by the judge brought about issues of justifiability and a question as to how far the Kenyan executive directs the Judiciary on application of international laws. The Kenyan Government appealed against this decision on grounds that it was not in the public interest for the decision to remain in force as it would negatively affect bilateral relationship between Kenya and Sudan. Sudan had threatened to close its airspace to Kenyan flights and throw out about 1500 Kenyans living in Sudan among other things that would affect the bilateral relationship between Kenya and Sudan. The government in its appeal also claimed that the judge had misinterpreted the role of the role of the High Court vis-à-vis the International Court of crime in applying Article 2(5) and 2(6) of the Constitution and the International Crimes Act. The appeal was however dismissed.[102]

In Republic Versus Mohamud Mohamed Mashi alias Dhodu and eight others[103] in this matter nine exparte applicants had been charged in the chief Magistrates Court at Mombasa on 11th March 2009 in a Criminal Case No. 840 of 2009 with the offence of piracy contrary to section 69(1) as read together with section 69(3) of the Penal code, chapter 63 of the laws of Kenya . It was alleged that on 3rd March 2009 the 9 accused were on the high seas of the Indian Ocean jointly and armed with AK47 rifles; attacked a sailing MV Courier and put in danger the lives of the crew men of the said vessel. During plea taking the accused pleaded not guilty to the criminal charges and their application for bail was also rejected on the grounds that their nationalities

[102]Ibid
[103] High Court Misc. Application No. 434 of 2009 Mombasa

were not known hence their likelihood of escaping was high. As the matter proceeded for hearing the accused made a judicial review application for orders of prohibition in the High Court of Mombasa challenged the jurisdiction of the Magistrates' court handling the matter. The main ground of the said application was that the crime was committed at the high seas and therefore outside the territorial waters of Kenya. The High Court Judge decided in favor of the Applicants; and the accused in the criminal court. That the Kenyan courts had no jurisdiction to try the nine accused. The judge argued that section 69 of the penal code was repealed by section 454 of the Merchant Shipping Act 2009.

The Honourable Judge was criticized on the grounds that he ignored the express provisions of the constitution on application of international law and Kenya's obligation under International Law. Kenya as a state has international responsibility to prosecute pirates which the Judge failed to consider. From the above discussed cases, it is clear that enforcement of international laws in Kenya though Kenyan institutions and governments face a lot of challenges. We shall proceed to analyze the major challenges that undermine enforcement of treaties in Kenya.

3.2.1 Enforcement of International Law by the National Assembly

The national assembly is an arm of the Kenyan government commonly referred to as the legislature and its existence is enshrined in chapter 8 of the Kenyan Constitution. The national assembly is charged with the responsibility of enacting laws which means that the domestication of International, Bi-lateral and Multi-lateral treaties solely lies with the national assembly, it further means that parliament has the ability to pull Kenya out of a treaty thus defiance to the principle of *pacta sunt servanda.*

It is therefore important to note that Kenya's compliance to the principle of *pacta sunt servanda* is highly influenced by the national assembly. For instance, Kenya is a signatory of the treaty of Universal Declaration of Human Rights; the treaty requires that sovereign governments should create independent human rights institutions that safe guard and promotes compliance to human rights. To abide by the principle of *pacta sunt servanda*, the national assembly developed an institutional framework known as The Kenya National Human Rights Commission as an independent body that promotes human rights issues in Kenya. It is therefore evident that the national assembly determines adherence compliance to the principle of *pacta sunt servanda.*

3.2.2 Enforcement by the office of the Attorney General.

The office of the attorney general is the sole legal adviser to the Kenyan government which therefore means that the office of the attorney general interprets all international laws and treaties that Kenya enters into. Through interpretation a verdict is issued out, the verdict therefore determines compliance or defiance to the principle of *pacta sunt servanda*. A good case in point is the case between Kenya and Somalia over the Exclusive Economic Zone at the Indian Ocean that is being arbitrated upon at the International Court of Justice. The attorney general's office also acts as a custodian of all the international laws and treaties that Kenya accents too.

3.3 Challenges of Enforcement of International Law in Kenya

The example of cases discussed above indicate that determining the correct place of international law in Kenya has not been an easy task, the courts have sometimes reached contradictory positions this is as a result of various challenges which include the following:-

3.3.1 Dualist or Monois state

According to Kenya's constitution, Kenya moved from monism to dualism[104] however according to Ratification of Treaty Act 2012 any bill seeking to ratify a treaty or convention must be presented to parliament for consideration and where the parliament rejects such a bill then it cannot be ratified.[105] The presentation of a bill before parliament is simply to allow the law makers to scrutinize a treaty and decide on whether the executive should ratify the same or not.[106]

Ratification of treaty is very different form accession of a treaty[107]. Accession is concerned about those treaties that a state was not involved in the negotiation and drafting stage but would wish to become a party to it. It has been argued that Article 2(6) of the constitution excludes international agreements which Kenya has acceded to. However, The Ratification of Treaty Act seeks to settle this issue by defining ratification to mean the international act by which the state signifies its consent to be bound by a treaty and includes accession.[108]

3.3.2 Ratification of International Agreements and Treaties

The constitution of Kenya does not provide for procedure for ratification of treaties and conventions. In many states the executive has the power to ratify treaties and conventions however in Kenya this was challenged on the basis that this practice would deny Kenyans a chance to decide on which laws to abide to. Unfortunately, the Ratification of Treaty Act which

[104] D.Majanja, 'Embracing global treaties key to Kenya's legal progress'. *Nairobi law monthly September 2011* see also MMwagiru, ' From Dualism to Monism: The Structure of Revolutions in Kenya's Constitutional Treaty Practice'. (2011) 1 *Journal of Language Technology and Entrepreneurship in Africa*vol 3 p 144 – 155

105 Ibid

[106] Section 6(3) of the Ratification of Treaty Act 2012

107 See definition of ratification under the preamble of the Vienna Convention on the Law of Treaties

108 Section 2 of the Ratification of Treaty Act 2012

is the governing law on ratification of international instruments does not provide for the procedure for the ratification of treaties in Kenya. However, the Vienna Convention on the Law of treaties provides that where a country has no provision for procedure for ratification of treaties the executive shall be tasked with such responsibility[109]

3.3.3The Rank of International Law in Kenya

The constitution of Kenya sates that international law shall form part of Kenyan law but has no provision for a solution for when there is a contradiction of International Law and Municipal Law. The Judicature act has not included international law as one of the sources of law in Kenya which is the only legislation in Kenya that seeks to set out the hierarchy of law in Kenya.[110]

Kenya as a sovereign state has the prerogative to develop its own national policies and laws through the national assembly whereas the government has the right to enter into any international law and treaties that it deems fit for the countries national interest. In many at times national and municipal laws have always conflicted with international laws and treaties. The latter has always precipitated supremacy battle on whether national laws override international law and vice versa. Whenever Kenya defies international law, she always retracts back to cover herself within the principles of her national and municipal laws.

3.3.4Political and Economical factors

International and local politics can in certain circumstances influence a states enforcement of international law or its commitment to a treaty. A question was asked why Kenya initially joined

109 Article 7 of the Vienna Convention of the Laws of treaties
110 The Judicature Act Cap 8 Laws Of Kenya. Section 3 lists the sources of law in Kenya

the International Criminal Court (ICC) but then attempt to undermine it once the ICC began to investigate the 2007-08 post election violence and its six alleged masterminds.[111] Political economy theories of treaty ratification offered no adequate answer to this phenomenal.[112]

On 5th September 2013 just five days before the beginning of the Ruto and Sang trial Kenya's Parliament passed a motion to withdraw from the Hague as they had done in 2010 as much as this was not going to affect the then Kenya's ongoing case. Parliament also threatened to repeal the International Crimes Act of 2008 which domesticated the Rome statute in Kenya.[113]

The sequence of events raised questions about the fate of international human rights treaties and international criminal justice in Kenya where institutions and the rule of law were deemed to be week. This in some people's argument invoked the Douglas North's understanding of how politics work.[114] Which suggests that as informal enforcement mechanisms including sanctions and rewards; jeopardize compliance, formal legal institutions and instruments such as treaties can be undermined.[115] The ICC can be thwarted as member countries and individuals respond to changing political incentives that differ from those of the court and penalize cooperation with it. Changes in political risk and weakness in the rule of law turns out to be more important that legal ratifications in understanding compliance.[116]

111 Susanne D. Mueller (2014) "Kenya and the International Criminal Court (ICC): politics, the election and the law"Journal of Eastern African Studies, 8:1, 25-42, DOI: available at http://dx.doi.org/10.1080/17531055.2013.874142
112 Ibid
113Muasau and Mathenge " Transfer UhuruRuto ICC case"
114 North "Economic Change through time" pg 356-68
115 Susanne D. Mueller (2014) "Kenya and the International Criminal Court (ICC): politics, the election and the law"Journal of Eastern African Studies, 8:1, 25-42
116 Ibid

In Kenya as elsewhere in Africa, the rule of law is still weak, politicized, and hard to enforce; individuals are often sanctioned for trying, it is argued that such countries incur low cost in ratifying treaties.[117]This, in turn leads to non compliance of varying degrees and attempts to ignore or undermine the law and other formal rules both locally and internationally. Where defendants gain high level political power and control the arm of government, treaties such as the Rome Statute are condemned to follow and not supersede the diplomatic dictum.

Enforcement of treaties in Kenya face local, regional and international challenges which could in turn affect Kenya's foreign policy which is what we are going to look at in our next chapter.

3.4 National Interest

Sovereign states enter into international law and treaties with the sole purpose of protecting their national interest. It is good to take note that national interests are not static and are bound to change over time. When the national interest of a country change, then chances of defiance or non-compliance to the principle of *pacta sunt servanda* is high.

Terrorism has become a major threat in Kenya; constant attacks of Kenyans by terrorists have resulted in loss of life and property. Kenya's intelligence reports argue that refugee camps have been the biggest base of recruiting and planning for attacks. Thus Kenya has decided to suspend and repatriate refugees who live on the camps. By Kenya doing so, she has abandoned her global and continental obligations of protecting refugees. Both Universal Declaration and Continental declaration of Refugee's 1969 requires that repatriation of refugees should be done on a voluntary basis and not forceful. By Kenya repatriating refugee's forcefully she is contravening

117 Ibid

the principle of *pacta sunt servanda* because she is going against the international law on refugees.

Britain has been Kenya's longest trading partner, for reasons that the former colonized her. Well their relations led to the ratification of many treaties. Today Kenya feels that Britain does not serve her national interest and thus the need to find new allies. In short, Kenya's national interest is shifting from Britain to China. The shift has precipitated defiance to the principle of *pacta sunt servanda* on the earlier treaties that Kenya had ratified with Britain.

Kenya is today defying her bi-lateral agreements with Britain and making new ones with China. For Kenya to reaffirm their defiance and seriousness she has retracted from according British military personnel diplomatic immunity as earlier agreed.

3.5 Oral and Unilateral Statements

Kenya has in a number of occasions entered into treaties through oral statements as opposed to written treaties. Oral treaties are so challenging to implement and interpret because there is not enough content to digress upon. A case in point is when Kenya's President H.E Uhuru Muigai Kenyatta reiterated that Kenya will give visa incentives to those African countries that are ready to do the same to Kenya. The above statement is not easy to interpret and implement because it is a loose and open statement. A good number of African citizens have interpreted it that one does not require a visa to visit Kenya which is not so true.

In conclusion Kenya's enforcement of international treaties is frail. Various institutions tasked with such obligations seem not to oblige and ensure proper enforcement of international treaties and agreements. Kenyan government has also not ensured that institutional that draft and prepare treaties are well versed and well trained hence poor results. Kenya's enforcement of international treaties is poor based on the factors raised in this chapter.

CHAPTER FOUR

4.0 Effects of Enforcement of Treaty on Kenya's International Relations

4.1 International Relations

A country's foreign policy is a set of goals outlining how a country will interact with other states economically, politically and socially. It also includes how a country interacts with non-state actors. Foreign policy is concerned with the boundaries between external and internal environment with its variety of sub sources of influence.[118] It is through foreign policy that a country attains its international relations. International Relations is how states associate and work together to co-exist and archive national interest. Kenya's international relations can be brought out well by examining its relations with various regional organizations and states.

4.2 Kenya Relation with Africa Union

Kenya became a member of the African Union in 2000; her membership to the Union obligates her to ratify AU treaties, protocols and conventions. So far there are about 45 treaties, protocols and conventions in African Union however Kenya has ratified an average of fifteen of them. Through ratification of treaties and protocols Kenya is thus bound to abide by the standard principles.[119]

Kenya has not in many ways complied and reaffirmed its commitment to the principles of the AU by ensuring that it has domesticated the standard codes that it has accented too. For instance, the Maputo declaration also known as the treaty on Comprehensive Agriculture Development Programme requires that African governments should allocate 10% of its budget

118 Webber and Smith, 2000
[119] Executive Council Report on the status of AU Treaties 2012

expenditure to Agriculture and rural development. The CAADP's primary goal is to assist countries to raise economic growth through agriculture led development under a common framework reflecting principles and targets defined by African governments to guide their agricultural strategies and investment. The four CAADP's pillars are land, water management, rural infrastructure for market access, increasing food supply to reduce hunger.[120]

So far Kenya has not deployed the principle of *pacta sunt servanda* on the above treaty. Kenya's Medium Term Investment Plan 2010-2015 had not incorporated most of the CAADP pillars and guidelines.[121] The Agriculture sector development strategy, the guiding policy document, seeks to increase agricultural growths to Seven percent, a percentage point lower than CAADP target. It has set a target of reducing the number of people living on less than a dollar a day from 36 per cent to 22 per cent and to reduce food insecurity however this does not seem to be effectively be implemented by Kenya.

The other AU treaty that Kenya is a signatory too is the Maputo Plan of Action on Sexual and Reproductive Health and Rights. The Abuja call for Universal Access to HIV/Aids, Tuberculosis and Malaria Services by United Action.[122]

The treaty requires that 15% of the annual budget allocation for health; Increase in government expenditure and external expenditure on health; Number of women living with HIV/Aids; HIV prevalence rate; Percentage of HIV/Aids related maternal deaths; Access to Preventive services; Contraceptive prevalence rate; Total fertility per woman; Number and proportion of people

[120] Hazell, Peter B. R., Slade, Roger. Taking stock: Impacts of 40 years of policy research at IFPRI
[121] Agriculture Sector Development Strategy. Medium Term Investment Plan 2010-2015
[122] The MAPUTO plan of action report 2015.

under the state of malnourishment; Number of laws, policies and institutions established to ensure sexual and reproductive health and rights; Number of laws, policies and institutions established to ensure universal access to HIV/Aids, tuberculosis and malaria services. Kenya demonstrated its commitment to the treaty by ensuring universal social insurance, low cost diagnostic centers for chronic diseases and terminal conditions and the above measures led to the reduction of HIV/AIDS from 7.1% in 2007 to 5.6% in 2012.[123] Kenya's International Relations with the East Africa Community

Kenya has always pushed for its national interest with the African union it is focused on enforcing that which is beneficial to it as a country by not cooperation with the rest of the members of the organization

4.3 The East African Community (EAC)

The East African Community (EAC) is the regional cooperation that comprises the Republic of Tanzania, Kenya, Uganda, Rwanda, Burundi and South Sudan. Prior to the re-launching of the East African Community in 1999, Kenya Tanzania and Uganda enjoyed a long history of cooperation under successive regional integration arrangement. These included the customs Union between Kenya and Uganda in 1917 which Tanganyika later joined in 1927; the East African High Commission 1948-1961), the East African Common services Organization 1961-1967), and the previous East African Community that lasted from1967 until collapse in 1977.[124] Reasons given for the collapse of the East African Community in 1977 were among many ideological differences, structural problems that impinged upon the management of common

[123] Kenya AIDS Response Progress Report 2013

[124] Diodorous Buberw Kamala "the achievements and challenges of the New East African Community Cooperation" open lecture May 3 2006 at the business school, university of Hull

services, limited participation by people in decision making and lack of compensatory mechanisms for addressing inequalities in the sharing of costs and benefits of integration.[125]

One issue that contributed to the collapse of the previous East African Community in 1977 was the perception of disproportionate sharing of economic benefits accruing from regional market and lack of a formula for dealing with the problem. It is a challenge to the community to address problems arising from the implementation of the treaty.[126]

Kenya is one of the countries of the East African community that its committed to promote trade and the regional integration of the East African Community not well reputable. Kenya is yet to fully utilize the EAC's integrated market, a problem that is highly associated with institutional and regulatory barriers to trade in the region. While performing their functions institutions and government agencies like the Kenya Bureau of Standards hinder the free and smooth flow of goods and services in the East African Community. Such occur due to standards set, technical regulations and conformity of assets procedures that constitutes technical barriers for Trade among the EAC states hence un-enforcement of EAC treaty and Agreements.

There is a disconnection between the officers at Kenya's border points and those at the Ministry in this case the Ministry of East African Community. Decisions and policies made at the headquarters are often not communicated at the borders leading to un-enforcement of the EAC treaty and Agreement.

125 Ibid
126 Ibid

Kenya has been said to be at the frontline of the East African community only when what is being agreed with at the community is beneficial to it as a state and nation. Kenya has had issue with Tanzania and its relation has been reported to be on un stable ground. Kenya is accused of not implementing all the agreements and memorandum of understanding entered in to with the rest of the nations.

4.4 Kenya's bilateral relationship with Somalia

The immediate post independence era Kenya outlined various basic norms and principles to guide its foreign relations which are:-

- Respect for sovereignty and territorial integrity of other states, and preservation of national security.
- Good neighbourliness and peaceful coexistence.
- Peaceful settlement of disputes.
- Non-interference in the internal affairs of other states.
- Non-alignment and national self-interest.
- Adherence to the Charters of the United Nations and the Organization of African(OAU) Unity/African Union (AU).[127]

The above principles emerged from the domestic circumstances that prevailed in Kenya at that time. There was insurrection (the shifta Wars) in North Eastern region. Somalia had attempted to create a Grater Somalia hence Kenya made the above principle to its regional relations. This also

127 Permanent missions of the Republic of Kenya to the UN in Geneva http://www.kenyamission-un.ch

made Kenya a leading support of OAU's principal of the non-violation of territorial borders inherited at independence.[128]

Presidents Moi's tenure in office as the President of Kenya had a regional approach shaped by the destabilizing effect of several wars in Kenya neighbouring countries and their spill over effect on the region. Some people view Moi's tenure in Office as Kenya's diplomatic golden age which is attributed to his peace brokering efforts in East Africa and Great Lake region.[129]

Daniel Arap Moi's successor, Mwai Kibaki made little impact on the resolution of conflict in the region. It is said Kibaki was more prominent in cultivating Kenya's economic diplomacy. He exposed policies that did little to ruffle feathers regionally and internationally. This however changed towards his second term when he authorized Kenya's incursion in to Somalia to wage war on Al-shabaab, marking an unprecedented use of Kenya's hard power for the protection of the country's security and economic interest.[130]

Kenya's intervention in Somalia marked a fundamental change from its traditional low risk regional engagement policy. The incursion was a counter to the Country's traditional core principles and policy of non-interference. However, Kenya was forced to act in pursuit of its

[128] Gachie J. " Kenya foreign policy and International Relations: Kenya and the world" softkenyahttp://softkenya.com/world/ accessed on 15th August 2016
129Gachie J. " Kenya foreign policy and International Relations: Kenya and the world" softkenyahttp://softkenya.com/world/ accessed on 15th August 2016
[130] Kisiangani Emmanuel. Kenya's Regional Relations: Between Principle and Practice 2014

national interest since its soft power means were ineffective in dealing with terror threats posed by al-shabaab.[131]

Kenya Somalia conflicts date back to the colonial times, according to History the Somali people were divided in to four countries that constituted the horn out of convenience.[132]Somali people spread across the borders of Ethiopia, Djibouti and Kenya.[133] The protest against the Somalis against this balkanization went unheeded despite consistent Somalia objections, British colonial authorities signed treaties with Ethiopia that transferred the Ogaden region occupied by Somalia to Ethiopia[134] and the same was also a district of Kenya to be unified with Somalia. Upon gaining its independence in 1960, Somalia called for self determination for Somalis in Kenya and Ethiopia and in 1964 Somali Nationals raided Ethiopian and Kenya Army and police posts.

Kenya and Somalia signed a memorandum of Agreement in Arusha, Tanzania on 28th October 1967 to end border hostilities between the two countries and to restore normal relations between the two countries.[135] This agreement was however dishonored by both Kenya and Somalia. Currently Kenya and Somalia are in dispute over a potentially lucrative, triangular stretch of 100,000 square kilometres of offshore territory believed to contain large oil and gas deposits. The case has been before the International court of Justice from August 2014. Somalia wants the international Court of Justice to determine the maritime boundary, and to determine the exact

131 Institute of Security, "Kenya Foreign policy and geostrategic interest"; ISS and HSF Seminar report, Semonor held on 10th May 2012. Pretoria. http://www.issafrica.org/event/iss and hsf-seminar-report-Kenya-foreign-policy and geostrategic interest , accessed on 20th August 2016
132 P. WwetiMunya "The organization of African Unity and its role in Regional Conflict Resolution & dispute settlement : A critical Evolution" Boston College Third world law journal Volume 18 issue 2
133NzangaloNtalaja " The Nation question and the crisis of instability in Africa in perspective of Peace"
134Tom J. Farer War clouds on the horn of Africa a crisis for defense
135Keesing's record of World event; Volume 13, November, 1967, Somalia, Ethiopia, Kenyan, Somali, Ethiopia page 22386

geographical coordinates as an extension of its southeastern land borders.[136] Kenya, on the other hand wants the border to run in parallel along the line of latitude on its eastern border. Kenya claims it has exercised uncontested jurisdiction in the sea area since its first proclaimed its exclusive economic Zone in 1979.[137]

Over the years, bilateral negotiations and diplomatic exchanges between Kenya and Somalia on the maritime dispute have failed. In 2009, Somalia and Kenya memorandum of understanding where the two countries agreed to work with the commission on the limits of the continental shelf, but Somalia Parliament later rejected the agreement and engaged the ICJ as recourse to negotiations. Somalia is claiming that all this year's Kenya has been scheming to take advantage of its neighbours to steal its sea and oil.[138]

Kenya's relations with Somali has not been rosy, Somali accuses Kenya of not having good faith on its agreements with Somalia.

4.5 Kenya's Commitment to European Union.

Kenya is a member of the Cotonou Agreement which is a trading treaty between Africa Caribbean and Pacific countries with the European Union to help develop integration between different continents. Kenya therefore has a right of exporting her horticulture to the European markets, but in order to enjoy those rights then she is tasked with the responsibility of meeting some obligations. Key among the obligations is to ensure that Kenya uses certified agro chemicals and fertilizers. Unfortunately, in 2015 Kenyan farmers defied the obligations and used

136 "Kenya and Somalia are facing off in court over an oil-rich triangle of the Indian Ocean" Abdi Latif Dahir, Quartz Africa available on http://qz.com/785326/a-maritime-border-case-between-kenya-and-somalia-has-began-at-the-international-court-of-justice-in-the-hague/ accesed on 22nd October 2016
137 Ibid
138 Ibid

ordinary fertilizers that had not been approved by the European Union. The latter led to Kenyan products being sanctioned and burned into the European markets. In other words the Kenya had defied the principle of *pacta sunt servanda.*

In conclusion Kenya's International Relations is vacillating, its institutions do not seem to focus on enforcement of various international relations. Somalia accuses Kenya of not having good faith with it. Kenya as a county does not seem to have good international relations both at the regional and international level.

CHAPTER FIVE

5.0 Summary, Conclusion and Recommendations

5.1Conclusion

This paper has examined the doctrine of *Pacta Sunt Servanda* as a doctrine of international law, it has established its origin and application. It has also analyzed the challenges of the doctrine *pacta sunt servanda*. It is a doctrine that ensures that states and nations that enter in to treaties and agreements whether bilateral of multilateral should do so in good faith and oblige to their obligation as provided and agreed in an international treaty and Agreements. Signatories' states to a treaty have a responsibility to oblige to their agreement. This ensures international cohesion and peaceful relations between states as it brings about an enforcement principle to sovereign states. The focus of this paper is on Kenya and its international relations and how the doctrine of *Pacta sunt servanda* affects International relations.

The research further analyses the enforcement of international treaties in Kenya this is achieved by looking at enforcement of International Law in Kenyan institutions which includes the Judiciary, the legislature and the central government of which the Office of the Attorney General is the main actor in the central Government. The paper looks at the challenges of enforcement of international law in Kenya where it has established that various factors contribute to Kenya's poor international relations through poor enforcement of international Law and treaties such challenges include oral and unilateral statements made by government. National interest also contribute to Kenya's negative international relations

The paper further discuss Kenya's International Relations by looking at Kenya's implementing of various regional and international treaties the paper has looked at Kenya's relations at the African Union, The East African Community and further it has also looked at Kenya's bilateral relations with Somali. Kenya has always has poor relations with Somalia of which Somali accuses Kenya of not having good faith with its neighbours.

From this paper it is established that Kenya's does not fully adhere to the doctrine of Pacts *Sunt servanda* this results to Kenya having unstable international Relations. Kenya is not viewed as a country that seriously commits to its international agreements and treaties the paper has listed various incidences that Kenya has not committed to a treaty and agreement it has ratified.

In conclusion, the research reaffirms that the principle is important because it cements the relationship between sovereign states; it further provides cordial rules of engagement between sovereign states. The principle ensures that sovereign states live by and honour their commitments to the agreements that they enter with partner states. The principle of *pacta sunt servanda* provides a mechanism under which treaties can be interpreted when conflict arise.

Kenya does not abide to the principle it does not take up its responsibilities and commitment to treaties that she has ratified. Kenya has on various occasions abandoned this principle when unnecessary. This has resulted to Kenya having an unhinged international relation and not easily trusted by other states.

It's not clear how many treaties Kenya has entered into since independence, the Ministry of Foreign Affairs and office of the Attorney general are yet to produce a comprehensive statement on the total number of treaties that Kenya has ratified since 1963. Kenya as a sovereign state should therefore reaffirm its commitments to the Vienna Convention on the Law of Treaties 1969.

5.2 Policy Recommendations

For Kenya to fully honour and live by the principle of *pacta sunt servanda*, the following policy actions and strategies need to be considered and given attention;

1. Kenya should establish a comprehensive consultative mechanism before ratifying international law and treaties. In the past, Kenya has been consulting other stakeholders before ratifying treaties and international law, however the challenge is that the consultation has not been comprehensive and broad enough to accommodate other interest groups and stakeholders. Civil Society Organizations have been in many occasions locked out of the process.
2. There is also need for improved policy coordination among government arms and agencies that are charged with the responsibility of implementing policies formulated at the international level. The executive could, for instance, play a more proactive role in clarifying key concepts before forwarding treaties to the legislature for their domestication into national law.
3. Kenya should establish quality institutional frameworks at the national level for realizing policy objectives of international law and treaties. Institutions need to be empowered to have the ability to design, formulate and implement the treaties. The

empowerment of the institutions should have the ability to sanction or prosecute actions that contravene international law and principle of *pacta sunt servanda*.

4. Kenya should avoid engaging herself in oral and unilateral statements as a means of entering into treaties because interpreting them is not easy. Oral statements are subject to misinterpretations and sometimes they are never considered as to be binding according to the laws of treaties.
5. Kenya should embrace the culture of making reservation if a treaty is complex or does not conform to national laws. Reservations should also be made if the treaty does not serve Kenya's national interest.
6. Inconsistent treaties are equally challenging because in most cases they entail two treaties that are incompatible thus impossible to apply two treaties at the same time.
7. Kenya should avoid at all cost being a third party in the development of a treaty because she may end up not be conferred full rights to the treaty, but assigned obligations. As is the case of hosting refugee's through the UNHCR, Kenya is expected to bear the burden but her rights of territorial integrity and security are suppressed.
8. Kenya should embrace monism in that both international and national laws are both components of a single body of knowledge known as law. Law should be viewed as a single entity as opposed to dualism that promotes competition between international and national law.
9. Kenya should ensure that when it ratifies international treaty it incorporates the law into national law to ensure transformation and conformity.

10. All government officials charged with the responsibility of drafting and ratifying treaties on behalf of Kenya should be well versed with principles of the Vienna Convention on the law of Treaties 1969.

BIBILOGRAPHY

1. The Constitution of Kenya 2010
2. The Ratification of Treaty Act 2012
3. Judicature Act Cap 8 Laws of Kenya
4. United Nations Chatter 1945
5. Vienna Convention on Treaties 1969
6. www.jurist.org "Kenya Should reconsider proposed withdrawal from ICC" Charles C. Jalloh
7. Brownlie, I. 2008. *Principles of Public International Law.* 7th ed. Oxford: Clarendon Press at p. 31.
8. Jennings, R. and A. Watts. eds. 2008. *Oppenheim's International Law*. 9th ed. London: Longmans,at p. 52.
9. Simmonds, N. 2008. *Central Issues in Jurisprudence*. 3rd ed. London: Sweet & Maxwell at p.146.
10. Hans J. Morgenthau "*Positivism, Functionalism, and International Law*" The American Journal of International Law, Vol 34, No. 2 Apr 1940) pp 260- 284 : American Society of International law available at 1http://www.jstor.org/stable/2192998 on(12th May 2016)
11. Freedman, M. 2008. *Lloyd's Introduction to Jurisprudence*. 8th ed. London: Sweet & Maxwell at pp. 985, 1015 and 1029.
12. Cole, D. 2001. *Formalism, Realism and the War on Drugs*. Available at http://scholarship.law.georgetown.edu/facpub/71 at p. 242.
13. Freedman, M. 2008. *Lloyd's Introduction to Jurisprudence*. 8th ed. London: Sweet & Maxwell at p.996-7.

14. Katju, M. 2001. The Hart-Fuller Debate. Available at: http://www.ebcindia.com/lawyer/articles/496_1.htm [Accessed September 20, 2016].
15. Friedmann, W. 2003. *Legal Theory*, 5th ed. Delhi: Universal Law Publishing at p. 294.
16. Pragmatisim in International Relations by Harry Baver& Elizabeth bright published by Roult edge 2009
17. Anne Marie Slaughter " International Relations, Principal Theories" available at http://.princeton.edu/slaughtr/Articles/722
18. Daniella Nicoletta "The principle pactasuntservanda Doctrine and Practice''LESIJ NR. XVI, VOL. 1/2009
19. Lecturer, Ph.D., Law Faculty, "*Gheorghe Cristea*" Romanian University of Science and Arts, Bucharest.
20. J. Kunz, "*The Meaning and the Range of the Norm Pacta sunt Servanda*", AJIT, vol. 19, 1945M.
21. Harry Baver &E lisabettaBrighi "*pragmatism in International Relations*" routedge London & New york
22. Maurice Oduor "***The status of International Law in Kenya***" African Nazarene University Law journal; annual 2014, Volume 2 part 2
23. Hamid, A. 2005. "*Judicial Application of International Law in Malaysia*": A Critical Analysis. *Asia Pacific Yearbook of International Humanitarian Law*, 1, pp. 196-214.
24. E. Oluoch Asher "Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya" International Journal of Humanities and Social Science Vol 3 No. 11; June 2013

25. Luke Obala "Kenya's 2013 Elections and Emerging Foreign Policy" Aljazeera Center for Studies, http://studies.aljazeera.net/en/
26. Hans Wehberg "*Pacta Sunt servanda*" available at www.jstor.org on 12th July 2016
27. Moore, "History and digest of the International Arbitrations to which the United States has been a party" 1807-1849-1850 (Washington 1898)
28. Law of Treaties draft Convention with the comment prepared by the Research in International law of Harvard law school, 1935
29. the decision in James Brown Scott Argument of the Honorable Elihu Root on behalf of the United States of America before the North Atlantic coast fisheries Arbitration at the Hague 500 (Boston 1921)
30. "The Principle ***pactasuntservanda*** and the nature of obligation under International Law" by I. I Lukashu, The American Journal of International Law; Vol 83 No. (3 July 1987) pp 513-518, American Society of International law. Available at :http//www.jstor.org/stable/2203309 accessed on 15th June 2016 at 11:23 UTC
31. Kenya Section of the International Commission of Jurist v Attorney General & Another [2011] eKLR
32. D. Majanja, 'Embracing global treaties key to Kenya's legal progress'. *Nairobi law monthly September 2011* see also MMwagiru, ' From Dualism to Monism: The Structure of Revolutions in Kenya's Constitutional Treaty Practice'. (2011) 1 *Journal of Language Technology and Entrepreneurship in Africa*vol3 p 144 – 155
33. Permanent missions of the Republic of Kenya to the UN in Geneva http://www.kenyamission-un.ch

34. Gachie J. "*Kenya foreign policy and International Relations: Kenya and the world*" softkenyahttp://softkenya.com/world/ accessed on 15th August 2016
35. Institute of Security, "*Kenya Foreign policy and geostrategic interest*"; ISS and HSF Seminar report, Semonor held on 10th May 2012. Pretoria. http://www.issafrica.org/event/iss and hsf-seminar-report-Kenya-foreign-policy and geostrategic interest , accessed on 20th August 2016
36. P. Mweti Munya "*The organization of African Unity and its role in Regional Conflict Resolution & dispute settlement : A critical Evolution*" Boston College Third world law journal Volume 18 issue 2
37. Nzangalo Ntalaja "*The Nation question and the crisis of instability in Africa in perspective of Peace*"
38. Kings' record of World event; Volume 13, November, 1967, Somalia, Ethiopia, Kenyan,