

**BILATERAL RELATIONSHIP BETWEEN KENYA AND SUDAN: A  
QUEST FOR DIPLOMATIC RESOLVE**

**BY**

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AWARD OF THE DEGREE OF MASTER OF ARTS IN DIPLOMACY  
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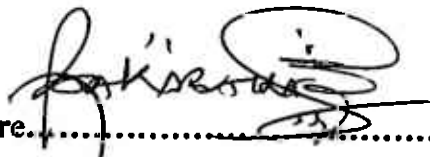
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**Declaration**

I hereby declare that this project is my original work and has not been submitted to any other University.

Signature.......... Date.....19<sup>TH</sup> NOVEMBER 2012.....

**Boniface Mutinda Kabaka**

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

**Dr. Ibrahim Farah**  
Signature.......... Date.....19/11/2012.....

## **Dedication**

To gallant revolutionists in Arab spring uprising for bringing about a new renaissance that renders cognizance of women and the youth voices to be heard.

Also, to the late Dr. Robert Ouko, an eloquent Foreign Affairs Minister for the Republic of Kenya, his murders roam large in Kenya.

**Boniface Mutinda Kabaka**

**October 2012**

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I also thank my secretaries Lucy Onam and Paul Ndore for typing at times my incomprehensible handwriting.

To all others who I have not mentioned but contributed in one way or another, please accept my profound appreciation for your contribution.

All errors and misapprehension if detected on any aspect in this thesis, would be squarely due to my own failing.

Boniface Mutinda Kabaka

Nairobi.

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## **ABSTRACT**

This study is about diplomatic relation between Kenya and Sudan and the implications of foreign policies of the two states whereas its objectives are to analyze the roles and contributions of interstate diplomatic methods in the management of Sudan-Kenya tottering diplomatic relations; to investigate and explain the nature of Kenya's foreign policy towards Eastern Africa States; to explore Conflict Management Theories and Strategies to resolve the Kenya – Sudan diplomatic debacle and to contribute to an understanding of International Relations and International Law interface on Rome Statute, and indictment of a seating president

The framework of analysis examined in this study includes realism theory that looks at the power politics of states, interplay between the international relations and international law and the conflict-solving approach methodology.

The research methods used here is library-oriented study which mainly involves critical examination of secondary sources. These include but not limited to books, legal journals, articles, the internet, case laws, dissertations and relevant studies on the subject matter.

The key findings of the study are that there is need for Kenya to strengthen her foreign policy to reflect the new constitutional dispensation; the Constitutional power tussle between the judiciary and the executive arms of the government needs to be urgently resolved to ensure that Kenya does not water down her institutions in an effort to streamline external relations.

Finally, future studies are needed to explore the practicality of AU's inclusion of crime jurisdiction in its Charter similar to that of the Rome Statute (ICC) and the impact on international peace of indicting sitting African heads of states.

## **LIST OF ABBREVIATION**

<b>ADB</b>	<b>African Development Bank</b>
<b>AMISOM</b>	<b>African Mission to Somalia</b>
<b>ASEAN</b>	<b>Association of Southeast Asian Nations</b>
<b>AU</b>	<b>African Union</b>
<b>CEWARM</b>	<b>Conflict Early Warning and Response Mechanism</b>
<b>CPA</b>	<b>Comprehensive Peace Agreement</b>
<b>EAC</b>	<b>East Africa Community</b>
<b>EACM</b>	<b>East African Common Market</b>
<b>ECOWAS</b>	<b>Economic Community of West African States</b>
<b>EU</b>	<b>European Union</b>
<b>EXIM Bank (China)</b>	<b>Export Import Bank</b>
<b>FNLA</b>	<b>National Front for the Liberation of Angola</b>
<b>GDP</b>	<b>Gross Domestic Product</b>
<b>IGAD</b>	<b>Intergovernmental Authority on Development</b>
<b>ICC</b>	<b>International Criminal Court</b>
<b>ICU</b>	<b>Islamic Courts Union</b>
<b>ICTR</b>	<b>International Criminal Tribunal of Rwanda</b>
<b>ICTY</b>	<b>International Criminal Tribunal of Yugoslavia</b>
<b>KANU</b>	<b>Kenya African National Union</b>
<b>KDF</b>	<b>Kenya Defence Force</b>
<b>OAU</b>	<b>Organization of African Union</b>
<b>ODM</b>	<b>Orange Democratic Movement</b>
<b>ICJ</b>	<b>International Commission of Jurists</b>
<b>KCB</b>	<b>Kenya Commercial Bank</b>

<b>MPLA</b>	<b>Movement for the Liberation of Angola</b>
<b>MRC</b>	<b>Mombasa Republic Council</b>
<b>MSF</b>	<b>Medecins Sans Frontieres</b>
<b>NATO</b>	<b>North Atlantic Treaty Organization</b>
<b>NFD</b>	<b>Northern Frontier District</b>
<b>NIF</b>	<b>National Islamic Front</b>
<b>NRA</b>	<b>National Resistance Army</b>
<b>NTC</b>	<b>National Transitional Council</b>
<b>PNU</b>	<b>Party of National Union</b>
<b>PRGF</b>	<b>Poverty Reduction and Growth Facility</b>
<b>PTA</b>	<b>Preferential Trade Area</b>
<b>R&amp;D</b>	<b>Research and Development</b>
<b>SPLA</b>	<b>Sudan People Liberation Army</b>
<b>TFG</b>	<b>Transitional Defence Forces</b>
<b>UAE</b>	<b>United Arab Emirates</b>
<b>UNAMID</b>	<b>United Nations African Mission to Darfur</b>
<b>USA</b>	<b>United States of America</b>
<b>UDI</b>	<b>Unilateral Declaration of Independence</b>
<b>UN</b>	<b>United Nations</b>
<b>UN AMISOM</b>	<b>United Nations African Mission to Somalia</b>
<b>UNESCO</b>	<b>United Nations Educational, Scientific and Cultural Organization</b>
<b>UNITA</b>	<b>National Union for the Total Independence of Angola</b>
<b>UNLA</b>	<b>Ugandan National Liberation Army</b>
<b>UNSC</b>	<b>United Nations Security Council</b>
<b>WB</b>	<b>World Bank</b>

## LIST OF CASES

Kenya Section of The International Commission of Jurists v Attorney General & another  
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1456 (H.L. 1998)

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# CHAPTER ONE

## INTRODUCTION TO THE STUDY

### 1.0 Introduction

General Omar Al-Bashir came into Power in June 1989 through a military coup d'état. This was a pivotal event in the political history of the Horn of Africa that also roughly corresponded with the end of the cold war. Specifically, there was reason to believe that the contentious regional relations of the previous decades might end and usher in a new era. However, relations between Sudan and its neighbours, which began as friendly, deteriorated in the mid 1990s to a state of virtual war. A period of easing tensions was marked by the signing of the Machakos Protocol in July 2002.<sup>1</sup>

This event signalled a critical advancement in a peace process sponsored by the Intergovernmental Authority on Development (IGAD) that ultimately led to the signing of a Comprehensive Peace Agreement in 2005 (essentially ending the Southern Sudanese Conflict).<sup>2</sup> This chapter focuses on Sudanese Foreign Policy debacle with Kenya specifically in relation to the International Criminal Court (ICC) indictment against General Omar Al-Bashir following judicial pronouncement by a Kenyan High Court Judge that the Sudan President be arrested pursuant to the Darfur crisis on crimes against humanity stipulated in the Rome statute.

This primary agreement of the analysis that follows with such Judicial Pronouncement will affect the Executive decision of maintaining cordial diplomatic relationship between the two states. The critical element involved the changing perceptions of state interest as determined the by the International Criminal Court indictment against General Omar Al-Bashir.

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<sup>1</sup> Machakos Protocol IGAD "Secretariat on Peace in the Sudan" Machakos Protocol July 20, 2002

<sup>2</sup> Between the Government of the Republic of the Sudan and the Sudan people's liberation movement/Sudan People's Liberation Army

In effect Sudanese –Kenya relations has been influenced by its big power alliance. Its ready acceptance of the US and its western allies’ direction to involve itself in peace process task leading the Sudan Peace Initiative by IGAD is therefore, not surprising when the Kenyan High Court Judge issued a ‘Judicial Bomb’ to the city of Khartoum to have its President arrested should he set foot in Kenya. The cause effect of such eventuality is culmination of tottering bilateral relationship between the two states who are key members of IGAD. The problem is further compounded by the fact that both states are looking at the East i.e China, India and Asia as politics of alternatives to promote their specific interests.

### **1.1 Background**

In the recent days, the diplomatic relationship between Kenya and Sudan has come under strain as a result of two successive events that adversely affected the mutual interests of the two countries.

Kenya and Sudan cemented their diplomatic relations with the establishment of the Kenyan Embassy in Sudan in 1982. The first Ambassador of Kenya to Sudan was posted on 7<sup>th</sup> September 1982. Since then, Kenya and Sudan have enjoyed cordial relations driven by the need to promote bilateral and mutual interests of both countries.

Prior to establishment of Southern Sudan, Kenya was one of the few countries bordering Sudan that had a largely non-conflictual relationship with its government. The relationship between the two countries remained cordial partly because a significant proportion of the Sudanese population has linkage to several other Kenyan communities and hare languages, culture and have a long historic linkage.<sup>3</sup> Thus, over the past few years, Kenya enjoyed cordial relations with Sudan even as it absorbed countless refugees both from what is now

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<sup>3</sup> John Ryle, Jusstin Willis, Suliman Baldo and Jok Madut Jok (eds) “*The Sudan Handbook*” Rift Valley Institute 2012



South Sudan and from Darfur, including tens of thousands of Sudanese migrants in the vast Kakuma Refugee camp in its North West.

In dealing with Sudan, Kenya has emphasized on its foreign policy pillars, namely: economic diplomacy, environmental diplomacy, sport diplomacy, foreign peace mission diplomacy and diaspora diplomacy. To enhance the implementation of the above five pillars, the Kenyan Embassy in Sudan has developed a Service Charter to guide its diplomatic staff in serving clients and customers. The Charter defines the role of the Kenyan Mission in Sudan. It summarizes the services provided to its customers and clients, sets standards and quality performance guidelines, in order to effectively achieve our vision; *"To be a Kenyan Model Diplomatic Mission"*.<sup>4</sup>

Kenya is a state party to the Rome Statute which is the constituting treaty of International Criminal Court. The Rome Statute imposes a duty on ICC state parties to enforce its arrest orders upon any of the court's, allowed Eashir in August 2010 to visit drawing strong rebuke from Western nations and rights groups. It also stops fugitives from entering the country's borders. Thus, there was uproar when the government of Kenya invited and hosted President Al-Bashir to the Constitutional promulgation. Indeed, the Orange Democratic Movement (ODM) headed by Prime Minister Raila Odinga which hares the coalition government with Party of National Union (PNU) led by Mwai Kibaki criticized the decision arguing that it went contrary to the ideals that Kenya committed to uphold as outlined in the Constitution whose promulgation H.E Al-Bashir had been invited to witness on behalf of Sudan.

In November 2010, the Kenyan High Court received a request from the local chapter of the International Commission of Jurists (ICJ) seeking to compel the government to execute the

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<sup>4</sup> [http://www.kenembsud.org/index.php?option=com\\_content&view=article&id=9&Itemid=9](http://www.kenembsud.org/index.php?option=com_content&view=article&id=9&Itemid=9) (Accessed on 12<sup>th</sup> October, 2012)

arrest warrant against Bashir should he visit again.<sup>5</sup> In his judgement in the case, Justice Ombija upheld the position of the applicants and issued an order of arrest against President Al-Bashir of Sudan. The judgement resulted in diverse contestation with some parties supporting decisions while others castigating it. For instance, IGAD issued a legal opinion arguing as follows:

“It’s evident from reading the judgement that the judge erred in law: the judge was wrong to issue the order. To summarize Judge Ombija’s decision, he says that Kenya has an obligation to arrest Al-Bashir because we ratified the Rome Statute, passed a law domesticating it and have in any case a Constitution that applies every treaty ratified by Kenya as part of our law. Under the International Crimes Act that domesticates the Rome Statute, only the Minister can approach the High Court for an arrest warrant. Under our law, there are only two possibilities for a private citizen to come to court on this matter: for judicial review asking the court to issue orders compelling the Minister to approach the court for a warrant, or rely on the general provisions on standing in the Constitution by alleging that the Constitution, in particular the Bill of Rights has been violated. Neither of this was done by the ICJ. In short, the judge improperly allowed a private citizen to act as the Minister”.<sup>6</sup>

In the aftermath of this decision, Kenya found itself struggling to balance the opportunity to profit from South Sudan (and oil, more specifically) whilst its own High Court demanded the arrest of Sudanese President Omar Al-Bashir, but finding itself unwilling to risk a complete diplomatic impasse in its relations with Khartoum.<sup>7</sup> Matters were compounded by the ongoing economic tussle between Sudan and Kenya in a bid to control the export of South Sudan oil.

At the end of the day, Kenya came across as trying to balance between prioritizing its relationship with Khartoum or South Sudan. The country’s strategy appeared to be largely trying to benefit from relations with both countries. On the other hand, Kenya recognized the potential of South Sudan as a key partner and agreeing to various infrastructural investments with the country, including the recent pipeline agreement between South Sudan and the

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<sup>5</sup> *Kenya Section of The International Commission of Jurists v Attorney General & another* [2011] eKLR

<sup>6</sup> [http://www.sudantribune.com/spip.php?iframe&page=imprimable&ic\\_article=40851](http://www.sudantribune.com/spip.php?iframe&page=imprimable&ic_article=40851) (Accessed on 12<sup>th</sup> October 2012)

<sup>7</sup> Peter Howes, “*Kenyan-Sudanese Relations: Heading for a collision*” *African Arguments* – The Royal African Society, 9 February 2012

Kenyan port of Lamu, which hypothetically bypasses the need for a Sudanese role in the production of South Sudan's oil reserves. On the other hand, Kenya has been struggling to placate Khartoum by ignoring its own High Court's ruling demanding the arrest of the ICC charged Bashir.<sup>8</sup>

While the merits and demerits of the decision of the court are not what is under analysis, the court decision by Kenyan puisne judge ordering the government to arrest president Omar Hassan Al-Bashir brought to the fore a diplomatic row that can only be compared with the souring in Kenya's diplomatic relationship with Idi Amin's Uganda after the Entebbe raid with logistical support from Kenya. In my opinion, the decision merely served to bring to service Kenya's poor foreign legal and policy framework. In majority of democracies, foreign policy and maintenance of the resultant relations is the domain of the Executive. The fact that the constitutional drafters left the control at the mercy of courts and control of Parliament raises more questions than it answers.

Further, the fact that the diplomatic relationship between Kenya and Sudan came to a near standstill albeit for intermittent period raises the question whether the relationship was well grounded in the first place. It also invites valid question as to the ability of Kenya to handle diplomatic crises. In any case, not much was done while the relationship soured to the extent that the Sudanese government asked the Kenyan ambassador in Khartoum to leave the country (declared *Persona non grata*). Kenya also capitulated and appeared to have compromised her Constitutional standing to placate Khartoum while at the same time came out from the event embarrassed.

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<sup>8</sup> *Ibid*

## **1.2 Statement of the Research Problem**

Due to the foreign policy debacle that has led to tottering diplomatic relationship between Kenya and Sudan, this thesis attempts to disentangle diplomatic deadlock on how Kenya will achieve its diplomatic resolve with Sudan without necessarily breaching International Law and Treaties especially the Rome Statute of which it is signatory and constitute part of its jurisprudence. The Interface and balancing act of Kenya's national interest vis-à-vis its international obligations under the international law and the Rome Statute in appeasing diplomatic relationship with Sudan, forms the critical problem and focus of this thesis and requires meta-diplomatic analysis as to the way forward.

## **1.3 Objectives of the Study**

The broad objective of the study is to analyze the roles and contributions of interstate diplomatic methods in the management of Sudan-Kenya tottering diplomatic relations.

**More specifically, the study aims to:-**

- a) investigate and explain the nature of Kenya's foreign policy towards Eastern Africa States.
- b) explore Conflict Management Theories and Strategies to resolve the Kenya – Sudan diplomatic debacle.
- c) contribute to an understanding of International Relations and International Law interface on Rome Statute and indictment of a seating president.

## **1.4 Literature Review**

The relevant literature to this study is classified into two categories: those which deal with conflict management and that which deals with the Sudan - Kenya Conflict and attempts to manage it. The field of conflict is complex however it manifests itself differently to

conflicting parties' perspective with resultant consequences that are either adverse or favourable.<sup>9</sup>

Mwagiru argues that until recently the idea of conflict system was not generally accepted in conflict analysis. Individual conflicts therefore tended to be analysed in a very idiosyncratic way:

“The result of this was that individual conflicts to and re-incarnated as individual conflicts which had no implications for or relationship with regional diplomatic and environmental structures.”<sup>10</sup>

He further argues,

“Certain things become evident when conflicts in a region are surveyed through the conceptual glasses of a conflict system approach. A system of interlocking and overlapping conflicts in a region becomes discernible.”<sup>11</sup>

Secondly, it becomes apparent on close analysis that those conflicts are played out against the backdrop of into phasing and competitive regional politics and diplomacy.

Mwagiru defines a system perceived in this way as a complex tessellation of relationships and interactions between actors and issues within the system.

#### **1.4.1 Literature on Conflict Management**

Mwagiru contends that the challenges of conflict management is not how to do away with conflicts but how to deal with them so that their harmful effects do not affect our societies and win our relationships<sup>12</sup>. He goes further to enumerate several methods of conflict management to which he classifies into coercive (e.g. Judicial Settlement and arbitration) or non coercive (negotiation, mediation and problem solving workshops). He observes those

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<sup>9</sup> M. Munene, “Preface to CCR Series” in Mwagiru, M. et al *Understanding Conflict and its Management* (Nairobi; Watermark Printers Limited, 1998)

<sup>10</sup> Mwagiru M, *Conflicts in Africa*, P.73

<sup>11</sup> *Ibid*

<sup>12</sup> Mwagiru, M et al, *Understanding Conflicts and its Management: Some Kenya Perspective*. Nairobi: CCR – WLEA Publications, 1998, P.32

coercive methods leads to settlement of conflicts, which is short lived, whereas non coercive methods lead to the resolution of a conflict with long lasting outcomes.

According to him,

“Settlement of conflict is informed by the idea that given the anarchical nature of society, and the role of power relationships, the best that can be done in situations of conflict is to reach accommodations which the parties in conflict are forced to live with<sup>13</sup>.

This position creates provision for coercive approach to conflict management. In support of non coercive approach Mwangiri argues that resolution is based on the belief that at the bottom of every conflict, are certain needs which are not negotiable. Conflict management should aim at identifying ways in which these needs can be fulfilled for both parties... Resolution aims at reaching a mutually self sustaining solution.<sup>14</sup>

For Mwangiri therefore, any of the methods of conflict management, whether coercive or non coercive, can only be dictated by the situation at hand. He observes that settlement is anchored on the notion of power, while resolution rejects power as the dominant approach for managing a conflict. He adds that settlement does not address the causes of the conflict but readjusts and regulates conflict relationships. The outcome of conflict settlement is determined by the power relationships of the parties. Conflict resolution stresses the importance of addressing needs which are neither negotiable nor in short supply. The parties can therefore redefine their needs. Conflict management according to Mwangiri is a process by which parties are encouraged to come together and do something about their conflict. Thus, parties to the conflict can negotiate about the issues of the conflict<sup>15</sup>.

Zartman identifies three phase of negotiation process: the pre-negotiation, negotiation and implementation phase. He observes that in the pre-negotiation phase the parties reach a

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<sup>13</sup> Mwangiri M. *Conflict in Africa: Theory Processes and Institutions of Management*, Nairobi Wacmark Publications, 2000, P.40

<sup>14</sup> *Ibid*, P.41

<sup>15</sup> *Ibid*, P.42

consensus or differ before the actual negotiation.<sup>16</sup> Therefore, pre-negotiation set the stage for negotiation and implementation phase.

Bercovitch introduces the concept of mediation in conflict management. He defines mediation as a peaceful process of conflict management which introduces a third party into the conflict.<sup>17</sup> He observes further that in the mediation process, the parties to the conflict seek assistance of or accept an offer for help from a third party in order to facilitate the settlement of the conflict without using force and it is voluntary process.

Mason introduces the dimension of institutional framework for conflict management. He argues,

“Conflicts can also be institutionalized or un institutionalized conflicts occur within geopolitical system and its management is handled through existing legal and institutional framework. Depending on how effective and efficient such institutions are, the conflict is resolved quickly.”<sup>18</sup>

Rupesinghe’s view of conflict management lays emphasis on the development of an effective early warning system that is able to give early signals to a conflict and trigger early mitigating response. According to him,

“no matter how well planned a strategy may be, if no real action is taken to prevent the outbreak of violence, then any early warning information, case study statically data or sophisticated system of indicators is of little use.”<sup>19</sup>

He goes on to argue,

“War does not start overnight. No matter how desperate or complex a society may be, communal violence does not erupt unprovoked. Inevitably, it is the manifestation of accumulated hostility and aggression between opposing sides.”<sup>20</sup>

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<sup>16</sup> I.W Zartman, *Pre-negotiation and Negotiation in Ethnic Conflict: The Beginning the Middle and the End* in J.V Montville (ed.) *Conflict and Peace Making in Multi-Ethnic Societies*. Lexington: DC Heath; 1997, PP. 511-533

<sup>17</sup> I.W Zartman, op. cit p. 39

<sup>18</sup> Mason S.A: *From Conflict to Co-operation Diss* (Zurich, Institute of Technology, eth. 2003) P.78

<sup>19</sup> Kumar Rupesinghe: *Civil Wars Civil peace : An Introduction to Conflict Resolution*: London : Pluto Press), P. 78

<sup>20</sup> *Ibid*

The absence of an effective early warning system creates a situation where a conflict develops, matures and explodes into violent clashes with serious consequences that the governments conflict analysts and managers by surprise.

Sandole favours a system of management where the parties to a conflict are given an opportunity to sort out their conflict. He argues,

“The goals of conflict resolution are to assist severely alienated parties in conflict to analyze the cause of their conflict to imagine methods of reconstructing or replacing the system that is generating it to cast out various conflict resolving options and to implement the options agreed upon”<sup>21</sup>.

He however recommends the involvement of a facilitator whose role is to help the parties to create a new social contract capable of satisfying long term human needs and class interests. The aim of this practice, therefore is to facilitate the carrying out with minimum violence of an agreed upon social transformation.<sup>22</sup> The emphasis in resolution of a conflict is laid on the free will of the parties to negotiate.

Ramsbothan argues,

“Conflict resolution is more than a simple matter of mediating between parties and reaching an integrative agreement on the issues that divide them. It must also touch on the context of the conflict structure, intra-party divisions and the broader system of society and governance within which the conflict is embedded.”<sup>23</sup>

They propose beyond the “ripe moment peace processes which address the long peace building activities which will lead to transformation in the relationship between the conflicting parties. Transformation in the context used herein, requires real changes in parties’ interests, goals or self definition”<sup>24</sup>.

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<sup>21</sup> *Ibid*

<sup>22</sup> *Ibid* P. 27-28

<sup>23</sup> Reychler L. *Conflicts in Africa: “The Issues of Control and Prevention” in Medicin’s San Frontiers. Conflict in Africa. An analysis of Crisis Prevention Measures* (Brussels King Boudoin Foundation, 1997) P.29

<sup>24</sup> Sandole J.D Dennis and Hugo Van der Merwe: *Conflict Resolution Theory and Practice*: Manchester (Manchester University press, 1993), P. 153



Ramsbothan like Mwangi supports some coercive intervention by Government and other third party mediators in circumstances where some degree of pressure is justified to bring the conflict some early warning. He argues that when government bring coercion to try to force parties to change position; they become actors in the conflict. Forceful interventions clearly can bring forward was ending in some circumstances as was the case of Bosnia, where after many years of absenteeism the USA tactfully built up the Croatian Armed Forces and sanctioned NATO air strikes on Serb Position in order to force the Dayton Settlement<sup>25</sup>. He is however quick to add that the question to be asked in such a situation is whether the intervention leads to a stable ending and whether the imposed settlement sticks.

A similar event is happening in Arab world among others in Syria where the revolutionists 'rebels' are fighting to topple the unpopular but lawful regime of President Assad and allies. The US has been sluggish in involving its allies - NATO States to intervene as of today. This is contrary to their lightning intervention in Libya perhaps to impose a regime that was 'easy' to deal with to champion its State interests. This is perhaps captured by Zartman's contention that "only time resolves conflicts but needs some help" raises the question of the right moment for intervention is a conflict. What is the right moment is a question of historical facts for instance US delay in Syria intervention as early warning or stoppage of Iran from accumulating nuclear bomb technology has become an hot potato issue in American presidential campaign on foreign policy between the perennial rivals the Republicans and the Democrats; where the former- Mitt Romney argues that this is the ripe moment to intervene militarily or otherwise to impose the US leadership in the International Relations and not to apply the Democrats' 'wait and see' attitude that demonstrate extreme weak leadership in the US Geopolitics.

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<sup>25</sup> *Ibid*

Dudley introduces the concept of conflict partnership which he defines as a 'process which deals with a specific conflict in a context of an overall relationship. He contends that conflict partnership combines relationship building and the conflict resolution and argues that all parties involved in the conflict feel that they have received something of benefit from the process'<sup>26</sup>. Dudley does not seem to favour cohesive approach to management of conflict. He is of the view that time and the perseverance is possible to create a conducive atmosphere for the parties to agree to negotiate.

#### **1.4.2 Literature on the Sudan-Kenya Diplomatic Conflict**

The diplomatic conflict between Kenya and Sudan typically began when the Government of Kenya invited several heads of states during Constitutional Promulgation among others the Sudanese President General Omar Al-Bashir. Several key government leaders among them the Rtd. Hon. Amollo Oginga the Prime Minister together with other members of non-governmental organizations raised red flag over invitation and actual gracing of the Kenya's momentous and historical milestone at the time when he had been indicted by the International Criminal Court on Monday, 14<sup>th</sup> July 2009 with 3 counts of genocide, 5 counts of crimes against humanity and 2 counts of war crimes. It is also the first time in history of the court that such charges of genocide, crimes against humanity and war crimes had been issued against a sitting head of state. It is also the first time that the former ICC's Prosecutor Moreno Ocampo concluded that Al-Bashir had masterminded and implemented a plan to destroy groups on account of their ethnicity.

In response to Sudanese claims that the death and destruction caused was the product of counter insurgency operations against the rebels, Ocampo stated,

“The crimes asserted in the Application are not the collateral damage of a Military campaign. At all times relevant to the Application Al Bashir specifically and

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<sup>26</sup> Dudley Weeks; *The Eight Essential Steps to Conflict Resolution*. New York (Jeremy P. Tasher/Putnam)

purposefully targeted civilians who were not participants to any conflict with the intent to destroy them, as a group.”<sup>27</sup>

The Prosecutor has determined that Al-Bashir bears criminal responsibility for the crime of genocide. Although he may not have committed these contemptible acts himself, he is deemed responsible for crimes committed through members of the state apparatus the army and the Janjaweed.

Since the arrest warrant was issued, the government of Sudan has strongly and openly opposed the International Criminal Court’s decision and has refused to turn President Al-Bashir over to the ICC for Prosecution. A Sudanese government official said in response

“This decision is exactly what we have been expecting from the Court, which was created to target Sudan and to be part of the new mechanism of neo-colonialism.”<sup>28</sup>

The President does risk being arrested and handed over to the Court if he leaves Sudan and travels to other countries, since all countries that are signatories to the ICC charter are obligated to arrest any person entering their country who has been indicted by the Court. However, since the issuance of the warrant Al-Bashir has continued to travel without repercussion throughout Africa and the Middle East, most notably to attend the Arab league summit at the end of March 2009.<sup>29</sup> At the conclusion of this summit, the Arab League issued a joint statement that read, “We stress our solidarity with Sudan and our rejection of the ICC decision.” This clarion was supported by Russia, the African Union (AU) and some of Sudan’s closest allies have chastised the ICC, claiming the arrest warrant for Al-Bashir will only serve to impede the peace process in Darfur. The Sudanese government has used this decision as an excuse to retaliate against the dissolving it humanitarian and human rights groups, including Oxfam, save the children, MSF and CARE, all accused of “Spying” for the ICC. This left 4.7 Million Darfur’s without emergency food, shelter and water aid.

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<sup>27</sup> <http://www.article1.org/sudan/icc-and-sudan.html> (Accessed on 17th September, 2012)

<sup>28</sup> *Ibid*

<sup>29</sup> Excerpts from the Arab League Summit 2009 Statements Doha, Qatar 30-31 March 2009

[http://www.iccnw.org/documents/Arab\\_League\\_Summit\\_2009\\_-\\_SummaryFV.pdf](http://www.iccnw.org/documents/Arab_League_Summit_2009_-_SummaryFV.pdf) (Accessed on 12th October, 2012)

It is on basis of this background that a warrant of arrest was issued against President Al-Bashir, due to an obligation that Kenya has to arrest him should he set foot in its territory, the Court has held. This followed an application by the International Commission of Jurists (ICJ)-Kenya which sought orders to the effect that a provisional warrant of arrest against President Al Bashir is issued and a subsequent order against the Minister of State for Provincial Administration to effect the said warrant of arrest. The application was predicated on grounds that the Constitution of Kenya at Article 2(5) applies all Treaties and Conventions that have been ratified by Kenya to be part of the laws of Kenya; that Kenya ratified the Rome Statute on the 15<sup>th</sup> March 2005 and followed up on the act by domesticating the Statute vide the International Crimes Act 2008; that the Constitution of Kenya, 2010 at Article 3 puts an obligation on every citizen, to respect, uphold and defend the Constitution, that there were outstanding warrants of arrests against President Al-Bashir March, 2009 and 21<sup>st</sup> July,2010.

When deciding on the above application that High Court judge on November 28<sup>th</sup>, 2011 N.R.O. Ombija J. said,

“applying International Law Principles to the facts of this case, the High Court of Kenya clearly has jurisdiction not only to issue warrant of arrest against any person irrespective of his status, if he has committed a crime under the Rome Statute, under the principle of universal jurisdiction but also to enforce the warrants of arrest should the Registrar of the International Criminal Court issue one.”<sup>30</sup>

In respect of this particular case, two warrants of arrest were issued against president Omar Ahmad Hassan Al-Bashir, the sitting President of the sovereign Republic of Sudan on 4<sup>th</sup> March, 2009 with counts of crimes against humanity. It is common ground that Kenya is a State party to the Rome statute. State parties are under a duty to execute or extradite the perpetrators of International Crimes to the ICC for prosecution.

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<sup>30</sup> *Supra* Note 5

## **1.5 Justification of the Study**

This thesis is important for two reasons: First, it will contribute to the existing body of knowledge on how to manage bilateral conflict management between Kenya and Sudan on foreign policy debacles and second, on the ongoing policy debates on whether it is possible to indict a sitting head of state over core crimes as defined in the Rome Statute and the possible expansion of the AU Charter to encompass Regional Criminal Jurisdiction to escape from the ICC's Jurisdiction purview.

The relationship between Kenya and Sudan for the last two decades has epitomized Kenya's role in the region as champion of peace and defined her priorities in foreign policy relations. In so doing, Kenya has been leading the Intergovernmental Authority on Development (IGAD)'s efforts which on 21<sup>st</sup> March 1996 in Nairobi amended its Charter/Agreement to foster regional co-operation. IGAD was to be the premier regional organization for achieving peace, prosperity and regional integration in the IGAD region.

In advancement of IGAD's mandate, Kenya has gone to great lengths to seek to promote peace and stability in the continent and Eastern Africa in general and in Sudan in particular leading in the negotiation that led to the ceasing of way between the Southern Sudan and Northern Sudan that culminated into the establishment of South Sudan in July 2011.

There is however, little material focusing on Kenya's foreign relations with Kenya. That is despite the fact that Kenya is the dominant economy in the East African region and is also relatively stable compared to most of its neighbours even after the violence which erupted after December 2007.

Further, given Kenya's position in the region, one would expect that in pursuit of its foreign policy which emphasizes the promotion of democratic peace, Kenya would have firm cordial relations with her immediate neighbours. However, this has not been an obvious case

especially in the case of Sudan. The study will investigate why this is so. The study will seek to show that the history of relations is that Kenya, compared to Uganda for example, is currently not in very cordial relations with Sudan.

It was against this background that relations between Kenya and Sudan have been souring and are now lukewarm or even 'tense'. The study seeks to explore diplomatic strategies that have been employed and that can be applied by Kenya in future to improve the relations and maintain the position of Kenya as the leader in peace building in Eastern Africa.

### **1.6 Hypotheses**

- The causes of diplomatic debacle/conflict between Kenya and Sudan are both legal and political. Legal as derived from the international law and political based on geopolitics of emerging nation states.
- The resultant consequences of the conflict are primarily political, military, economic and diplomatic.
- Diplomatic solution will be difficult to unlock Kenya diplomatic relationship between Kenya and Sudan foreign policy debacle.

### **1.7 Theoretical Framework of the Study**

This framework of analysis examined in this study includes the power politics of states, interplay between the international relations and international law, the conflict-solving approach methodology.

In order to understand the power politics of states the relevant theoretical framework to this study, it is incumbent to explore the traditional international relations theories and how they assist in the comprehension of Kenya's foreign policy and how it affects her relations with other Eastern Africa countries and Sudan in particular.

However, from the outset, it is important to underscore the fact that traditional international relations theories may not suffice in helping understand African international relations and by extension, foreign policies. Here, the study draws on the traditional international relations theories to help in the investigation of Kenya's relations with Sudan and to analyze her relations with Africa in general. The thesis shall explore the theories of realism and liberalism and how these traditional theories can and cannot explain with regard to Kenya's foreign relations.

According to Sabine and Thorson,<sup>31</sup> realism is the world view that conceived international relation as comprising of competing nation states and that aggressive competition between states can lead to war. In application to Africa, it is noteworthy that Africa states hardly wage war against each other. Nevertheless, there has been incidence where competition between countries has resulted in evident tension especially in the economic front. An example is the tension in the late 1990s which came to be known in the media as beer wars.<sup>32</sup>

In addition, there have been over 9 million refugees and internally displaced people from mainly internal conflict in Africa. Hundreds and thousands of people have been slaughtered from a number of conflicts and civil wars. Indeed, it has been argued that if this scale of destruction and fighting was in Europe, then people would be calling it World War III with the entire world rushing to report, provide aid, mediate and otherwise try to diffuse the situation.

Realists would argue that issues of national interests and competition for regional markets and resources including control of South Sudan oil are the cause for 'lukewarm' relations between Sudan and Kenya. Indeed, it has been asserted that realism portrays the world

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<sup>31</sup> Sabine and Thorson, (1973) *A History of Political Theory*. Dryden Press

<sup>32</sup> Kevin C. Dunn and Timothy M. Shaw (2001). *Africa's Challenge to International Relation Theory*. (Palgrave Publishers, New York

realistically, where each state pursues its own interests and should always be on guard against other self-interested (state) actors in international relations.

Realists would note Sudan's aggressiveness concerning Kenya's complacency in defending the case against the president and its close relations with South Sudan are just a classic case of a country trying to defend her sovereign interests. On the other hand, Jackson and Sorensen (2003)<sup>33</sup> argue that this is a pessimistic view of international relations, wherein national security and state survival are the most important foreign policy considerations. Jackson and Sorensen suggest that for realists, power is very important and the state is a central player in world politics. However, this argument fails to take note of the fact that African states are weak, especially with regards to global politics.<sup>34</sup>

According to Jackson and Sorensen, the primary aim of foreign policy is to "project and defend the interests of the state in world politics" (Jackson and Sorensen, 2003). As such, from a realist's point of view, Sudan's action towards the action by the Kenyan Court in issuing an arrest order against her President is in defence of the country's interest against Kenya's quest for a regional hegemonic position.<sup>35</sup>

In a word, realist thinking places issues of national interests above all other considerations. However, in reality the spat between Kenya and Sudan may not be as complicated as application of realism in analyzing the issue may try to make it. In any case, reality is that Sudan is under the authoritarian rule and control of President Al-Bashir and therefore anything that threatens his personal interests from his standpoint threatens also the interest of the state and therefore assumes grave diplomatic connotations.

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<sup>33</sup> Robert Jackson, George Sorensen, *Introduction to International Relations: Theories and Approaches*. (2003) Oxford University Press

<sup>34</sup> *Supra* note 32

<sup>35</sup> Landsberg, 2006, quoted by Amber Lee Hutchins, Marilee Manning Ransom, (2011) *Roles, Responsibilities, and Responses: The Intersection of Journalism and Public Relations in the Armstrong Williams, Mcmanus and Gallagher, and Et*, BiblioBazaar Publishers



This, it is telling that while Sudan did not react or take steps to protect her national interests when EAC chaired by Kenya refused her admission into the economic block and when Kenya entered into an infrastructural pact with South Sudan to construct a pipeline that will undermine Sudan's control of South Sudan oil interests. But when the person of the President of Sudan was affected by Kenya's municipal court decision, Sudan reacted aggressively even despite assurances from Nairobi on the Kenyan Government's official stand on the arrest orders.

Apart from realism, liberalism puts emphasis on individual rights, which form the bases for a modern civil society, democratic state and capitalist economy (Jackson and Sorensen, 2003). Liberalism posits the international relations are not about power struggles between nation states, groups and individuals. The significant difference is that societies are able to co-operate for the common good.

Thus, liberalism seems to promote the view that a country's foreign policy may be based on promotion of democracy without any hidden interest or agenda. Thus, compared to the realists, liberals generally take a more optimistic view of human nature, thus an inherent belief in human progress<sup>36</sup>. For instance, sociological liberals hold that international relations cannot be limited to state interactions but also involves transnational groups and international institutions. In thus, according to Hughes<sup>37</sup>, a country may be driven in its foreign relations mainly by its believe that the democratic experience can be exported through the promotion of negotiations and accommodation as a means of resolving differences and finding peaceful resolutions in conflict areas.

Thus, liberalism may in part explain Kenya's role in resolution of the conflict between South Sudan and Sudan which ran for decades. At the surface, is it hard to see any significant

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<sup>36</sup> *Supra* note 33, also see Kim Richard Nossal, (1998). *The patterns of world politics*. Prentice Hall Allyn and Bacon Canada

<sup>37</sup> Hughes T.P, (2006), *Governance and the Capacity to Manage Resilience in Regional Social-Ecological Systems*

national interest that drove Kenya to spearhead the peace negotiations between the two countries beyond the promotion of peace relations between the two countries?

The interface between the role of international relations and international law by states in enforcing international law cannot be over emphasized here especially when one state upholds the International Law against an errant member of international states whether it is a signatory to the Rome Statute or not and whether it is save to play international law and politics at expense of peace in the Horn of Africa states by impeaching a seating president.

However, one may question these optimistic assumptions of liberals based on the aftermath of the peace deal that has seen Kenya move to replace Sudan as the pivotal economic hub for the landlocked South Sudan. Further, the reaction of Sudan to the attempt by Kenyan court to impose democracy by insisting on the arrest of besieged Sudanese president has seen Sudan react not in appreciation of the efforts but rather to protect her national interests and sovereignty.

### **1.8 Research Methodology**

This was basically a library-oriented study which mainly involves critical examination of secondary sources. These included but were not limited to books, legal journals, articles, the internet, case laws, dissertations and relevant studies.

The study also examined the main stream literature on the role of diplomacy in bilateral conflict situation. The research was based on review of collected information from documented sources.

The information collected was subjected to a critical analysis and evaluation. The analytical approach sought to interrogate the implications of the High Court Judgement of Ombija J and also the grounds of Appeal by the office of the Government of Republic of Kenya's principal

legal adviser the Honourable Attorney General seeking to obtain a stay of the execution of the judgment and decree of the High Court of Kenya.

Also the diplomatic spat by the foreign Minister of the Republic of Kenya Hon. Moses Wetangula that the executive arm of the government of the Republic of Kenya does not recognize the decision of the judiciary, a paradox of the Constitutional doctrine of the separation of powers of the three arms of the government.

The study referred to secondary literature the IGAD and AU position with regard to the arrest warrants issued against a sitting incumbent head of state by another member state and its legal potent and implication. The research considered the available data/information on the implication of the expansion of criminal jurisdiction in the AU Charter vis-à-vis the Rome Statute of the member states; to establish if such inclusion of the criminal jurisdictions can quash or regale or nullify the prevailing arrest warrant against a sitting Head of State – President Omar Al Bashir and as to recommend the way forward on such conflict.

The study also looked at the implication of the diplomatic debacle on the foreign policy of the two states in relation to political military economic and diplomatic. Political in that the two states are at the precipice brink of declaring political relation separation or non-recognition of each other. Military catastrophe in the event a sitting president of Sudan is arrested on the Kenyan soil in support of the Kenyan government; then this could be tantamount to 'declaration of war' and this event could spark off interstate war. Further on International Space Law/Air Law the Sudan space would be closed for Kenya aviation industry, the economic loss in terms of trade and finance would be enormous in billions of Kenya shillings hence the Kenya GDP would be affected.

The tottering relationship may also have spill over effects on the Kenya and South Sudan trade and finance partnership especially the foreign direct investment by Kenya corporate and

the wealth generation not to mention the deportation of the a sizeable number of the Kenyan workforce in Khartoum and the negation of the Diaspora income. Also likely to be affected is not only the Juba- Lamu Pipeline project but also the railway line and the likely collapse of the South Sudan oil foreign exports of which it exclusively relies upon; and also a serious effect of oil exploration and production in the Southern Part of Kenya. It was considered that the consequences of such conflict may exacerbate to full scale war and indeed may be complicated by the Al Shabaab a Muslim terrorist group joining the Sudan came to punish Kenya (KDF) for sending its forces in Somalia and subsequent conquest of Kismayu. And indeed the refugee problem will escalate from the regional involving states.

### **1.9 Chapter Outline**

Chapter one of the study constitutes the introduction, statement of the problem, objectives of the study, significance of the literature review, theoretical framework, hypotheses and research methodology.

Chapter two discusses an historical diplomatic relation between Kenya and its neighbours in East Africa and horn of Africa and in particular its key role in non-aligned diplomacy and its recent involvement in Somali Al Shabaab conflict and the justification and implication to its foreign policy paradigm shift.

Chapter three covers the actual case study i.e. the tottering diplomatic relations between Sudan and Kenya.

Chapter four discusses three (3) emerging key issues from the study and will have them critically analyzed but from a scholarly perspective. The three (3) emerging issues are:

1. The implication of domestication of International Law in Kenyan Constitution (The Rome Statute/ICC);

2. The emergence of Constitutional power conflict between judicial pronouncements affecting the Executive decisions supremacy and
3. Whether a head of a state enjoys immunity for core crime as defined in the Rome Statute.

At the same time, Chapter Four compares the indictment by the ICC of seating presidents of States: General Omar Al-Bashir of Sudan, Pinochet of Chile, Gaddafi of Libya, Charles Taylor of Liberia and Laurent Gbagbo of Ivory Coast. And the doctrine of State immunity which borders on diplomatic immunity also serves to facilitate and maintain international relations and exceptions from state immunity for core crimes.

Chapter five has three sections that include the summary of the study, the key findings of the study or subject and the recommendation, lesson that have been learnt and suggestions on the way forward or areas of further research.

## PART I: OVERVIEW

### CHAPTER TWO

#### FOREIGN RELATIONS BETWEEN KENYA AND ITS NEIGHBOURS IN EAST AFRICA AND HORN OF AFRICA IN HISTORICAL CONTEXT

##### 2.0 Introduction

Kenya is the only country in Eastern Africa that has remained relatively stable (save for the post – election violence of 2007/8) since the independence era to the present day. This aspect is fortified by a consistent track record of maintaining appropriate economic policies that ensured that the country was considered one of the African economic heavyweights of the 1970s, with an annual 6.6 percent growth rate in Gross Domestic Product (GDP) from 1964 to 1973.<sup>38</sup> Infact at the time Kenya's economic growth and development was equated to the robust economies of Indonesia, South Korea and other developing economies of the period. These two states are more often than not cited as an historical example at which Kenya was at the time to demonstrate the point where Kenya would be hitherto because these two economies have hit an economic growth zenith in the last and current centuries respectively.

Dr. Surin Pitsuwan<sup>39</sup> states,

“Indonesia and South Korea are members of ASEAN (Association of Southeast Asian Nations) which is a collection of ten robust promising economies. Together With China, India, the United States, Russia, Japan etc, you have the world's biggest consumer markets, the world's biggest consumer markets, the world's leading R&D bases, the world's leading sources of raw materials, as well as the world's richest sources for investment.”

Although this rate declined during the 1980s and 1990s, rebounding once again after 2002 following the constitutional removal of the ruling Party, Kenya African National Union (KANU), Kenya remains the dominant economic power house in the region with an

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<sup>38</sup> Joseph Kipkemboi Rono, “*The impact of the structural adjustment programmes on Kenyan society*”, Journal of Social Development in Africa Vol 17 (1) January 2002, p. 81-98.

<sup>39</sup> Secretary-General of ASEAN

economic growth rate rebound of an average of 5-6 percent.<sup>40</sup> This position of growth is projected to grow further exponentially due to key mineral discoveries of oil in Northern and Coastal part of Kenya and coal in lower Eastern part of Kitui in Mui basin as well as the other potential areas that are currently under exploration.<sup>41</sup>

The stability of Eastern Africa is of paramount importance to Kenya's foreign Policy which is focused on cultivating strong trade ties with a variety of international trading parties, including Great Britain, United Arab Emirates (U.A.E.) and China. Past cases of regional instability such as the civil war in Sudan, the Eritrea-Ethiopia war (1998-2000) and the collapsed state of Somalia posed serious security concerns for Kenya's foreign policy establishment.<sup>42</sup> Ethnocentric and communal perceptions, geopolitical factors and the security complexities in the horn of Africa including the indictment of Sudan president General Omar Al-Bashir by the International Criminal Court (ICC) also play important roles in determining Kenya's policy behaviour. The preservation of national security, sovereignty and national integrity are some of the cardinal responsibilities of sovereign states including Kenya. Kenya's pro-active involvement in conflict resolution initiatives in Eastern Africa is mainly influenced by these fundamental responsibilities.<sup>43</sup>

## **2.1 Historical Diplomatic Relation between Kenya and its Neighbours in East Africa**

The foreign policy approach of Kenya mainly towards the neighbouring Eastern Africa States can be unravelled by looking at the role of individual actors in the character of the three

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<sup>40</sup> Peter Stein, *"The Economics of Burundi, Kenya, Rwanda, Tanzania and Uganda"*, Report prepared for Swedfund International AB, Spring 2010.

<sup>41</sup> Chinese firm, Fenzhi Mining Industry Company Limited won the tender to explore, evaluate, extract, develop, produce, process, store and dispose of coal in Blocks C and D in Mui coal Basin. (<http://allafrica.com/stories/201207280528.html>) (accessed on 14th October 2012)

<sup>42</sup> Adar, K.G 2004b. *"Collapsed States and State Recommendation: The Role of State and Non-State Actors in Somalia"*. Paper presented at OSSRIA Conference on *"African Conflicts, Management Resolutions, Post - Conflict Recovery and Development"*, Addis Ababa, Ethiopia, November 29 – December 1.

<sup>43</sup> Moufida Goucha and Jakkie Cilliers (eds), *"Peace, Human Security and Conflict Prevention in Africa"*. Proceedings of the UNESCO-ISS Expert Meeting held in Pretoria, South Africa 23–24 July 2001.

presidents; the late Mzee Jomo Kenyatta (1962-1978), Retired President Daniel Toroitich Arap Moi (1978-2002) and Emilio Mwai Kibaki (2002-2013).

Christopher Hill<sup>44</sup> has expressed the intimate relationship between the role of individual actors and structure in foreign policy analysis very well. He states thus:

“Foreign policy-making is a complex process of interaction between many actors, differently embedded in a wide range of different structures. Their interaction is a dynamic process, leading to the constant evolution of both actors and structure”.<sup>45</sup>

In other words, in the real world we find a number of actors, both domestic and international, who are closely involved in foreign policy decision making in one manner or another; and equally, there are a number of structures on both sides of the domestic and international divide that decisively affect these actors in many different ways. A few examples include the Heads of States, Head of Government, Foreign Minister or Secretaries of State, Inner Executives, Security Councils, Cabinet, Politicians or Government as a whole, Parliament and Parliamentary Committee, Political Parties and so forth. These are what Hill calls “the responsible decision- makers”, that is, those with a political mandate relevant to foreign policy in one form or another. Although by no means complete, the list suffices to illustrate the empirical complexity facing decision making in foreign policy.<sup>46</sup> As Hudson emphasis: “States are no agent because states are abstractions and thus have no agency.” As such this type of approach is explicitly in ‘actor-specific’, meaning that the actors are not generic entities but always specific individuals.<sup>47</sup>

Throughout President Kenyatta’s tenure as Head of State, he hardly left the country on official visits perhaps due to ill health reasons or fear of military upsets during his absence. He instead delegated foreign policy responsibilities to his Ministers of foreign affairs. His initiative as peace broker in the Democratic Republic of Congo in the 1960s and in the

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<sup>44</sup> Christopher Hill, (2003). *The Changing Politics of Foreign Policy*, Palgrave Macmillan P. 23

<sup>45</sup> Quoted in Steven Smith, Amelia Hadfield and Tim Cunne. *Foreign Policy: Theories, Actors and Cases* P. 86

<sup>46</sup> *Ibid* P. 87

<sup>47</sup> *Ibid* P. 88



Angolan Civil War in the 1970s are the few instances when President Kenyatta was directly involved in foreign policy initiative. President Kenya was also intimately involved in the conclusion of the first Treaty for East African Cooperation that culminated in the launch of the East Africa Community (EAC) in 1967. However, the Community lasted barely a decade and eventually EAC collapsed partly due to the role of staunch critics within Kenya.<sup>48</sup>

Under Kenyatta's Presidency, Kenya's foreign policy concerns focused mainly on Kenya's security and territorial integrity, as well as the maintenance of good neighbourliness, despite regional security concerns. The regional security concerns for Kenya were dominated by support of shifta militia fighting waging secessionist efforts against Kenya by respected leaders of Somalia. This posed a genuine threat to Kenya and threatened to sour the relations between Kenya and Somalia. Somalia's political, military and logistical support for the Shiftas (bandits) who were fighting for the autonomy and unification of the Northern Frontier District (NFD) with Somalia and who engaged Kenya's security forces in guerrilla warfare for most of 1960s, threatened Kenya's sovereignty and territorial integrity.<sup>49</sup>

Kenyatta gradually centralised more power around the presidency throughout the series of Constitutional amendments which strengthened the executive power of the Presidency vis-à-vis Parliament and the Judiciary. However, the constitutional amendments notwithstanding, Kenyatta remained largely disinterested in foreign policy, opting for a "wait and see" approach towards International Affairs. As a result foreign policy decisions during the Kenyatta era reflected either a mixed process (that is, involvement of most of the stakeholders in the foreign policy making process) or were largely handled by the Ministry of Foreign Affairs. As Munyua Waiyaki, Minister of Foreign Affairs under Presidents Kenyatta and Moi, stated:

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<sup>48</sup> Korwa G. Adar, "*East African Community*", First Democracy Report 2011.

<sup>49</sup> Abdirashid Abdullahi, *Colonial Policies and the Failure-of Somali Secessionism in the Northern Frontier District of Kenya Colony, C.1890-1968*, Thesis Submitted in Fulfilment of the Requirements for the Degree of Master of Arts History Department Rhodes University, February 1997.

**“We had been licensed by President Kenyatta to steer Kenya’s foreign policy. We were very conscious of Kenya’s and Kenyatta’s image. We interacted very actively with our diplomatic missions and sought clarifications where necessary.”<sup>50</sup>**

Waiyaki’s observation shed light on two foreign policy making models that had some applicability during the Kenyatta’s Presidency namely the organisational process and bureaucratic politic models. In the organisational process model, the organisation’s foreign policy role and standard operating procedures shape the policy process. The bureaucratic politics model adds to this foreign policy mix, emphasising political competition between separate and competing bureaucracies. In respect of Kenyatta’s style of administration and executive fear imposed by him and his charisma as he was frequently referred to as ‘Mzee’ or old man, by Kenyans and others. He often delegated foreign policy making to his Ministers, the Cabinet, Parliament and the intelligence community.

The Moi’s Presidency inherited and further strengthened a centralised and personalized State particularly after the attempted Military coup of 1982. The transformation of Kenya into a *de jure* one party State officially laid the foundation for this process. Article 2A of the revised 1983 Constitution of Kenya stipulated that “there shall be Kenya only one political party, the Kenya African National Union (KANU). Over the years KANU and the State became identified with Moi. Specifically, the Party, the State and the President over time became one and the same thing. Mwai Kibaki, who was the Vice President and leader of government business in Parliament at the time, succinctly, put it before the Members of the House:

**“Your belonging to a nation is only identified in a living sense to the extent that you identify yourself with the head of the nation. We were elected on the KANU ticket and we in a one party state and owe a lot to the head of the party.”<sup>51</sup>**

Moi was both President of Kenya and the head of KANU. Unlike his predecessor, President Moi involved himself directly and indirectly in the formulation and implementation of domestic and foreign policies, to the extent that he frequently contradicted Members of the

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<sup>50</sup> Adar 1999, p. 4.

<sup>51</sup> Mwai Kibaki as quoted in the Weekly Review of 28<sup>th</sup> September 1984 at p.4.

Cabinet and other Government Officials publicly. Moi made this explicitly clear when he stated that:

“All executive decisions entrusted to the presidency are and will continue to be made by him personally at all times...The Constitution has no provision for acting President whether the President travels abroad or not.”<sup>52</sup>

The foreign policy making process during the Moi administration is best characterised as highly centralised or state-centric. Moi was always on the centre stage in the management of foreign Kenya policy both in crisis and routine situations, with the defence portfolio also being located in the Office of the President.<sup>53</sup>

The role of Parliament and the Ministry of Foreign Affairs in the foreign policy making process was subordinate to the Presidency. For example, Parliament was not consulted when Moi in 1980 entered into an agreement with the Carter Administration to allow the US Rapid Deployment Force to use Kenya’s Military facilities in Mombasa. The Minister of State in the Office of the President made this clear when he emphasised in parliament that defence and security issues could not be discussed publicly, suggesting that Parliament had no role to play in the country’s foreign policy. The issue had been raised at the floor of the House by Members of Parliament.<sup>54</sup>

When Kenya severed diplomatic relations with Norway in 1990, it was the President that unilaterally made the decision without seeking approval from Parliament. This State House-centric foreign policy making process with Moi at the helm reflected a highly personalized foreign policy making model in which the President and his inner circle were directly involved in formulation and implementation of foreign policy.<sup>55</sup>

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<sup>52</sup> President Daniel Arap Moi as quoted in the Financial Review (March 27<sup>th</sup> 1982, 12-13).

<sup>53</sup> Korwa G. Adar, “*Kenya's Foreign Policy and Foreign Policy-making Process: An Analytical Context*” Chapter 4, *Globalization and Emerging Trends in African Foreign Policy*, P. 83.

<sup>54</sup> Kenya National Assembly Hansard, 1981, Column 1261.

<sup>55</sup> *Ibid.*, p. 84.

Indeed, party policies and preferences were translated into official policies of the Government. Others have observed, however, that to equate Kenya with the concept of a single-party state is to misinterpret and underestimate the reality. Instead, Kenya was a “one – man state” during the Moi administration. However, the role of Civil Society, in shaping Kenya’s internal and external policies during Moi’s Presidency cannot be ignored. It was through their persistence, agitation for pluralism, often with the support of foreign donors, that Moi acquiesced to the introduction of a multi – party political system. The opposition parties nonetheless remained fragmented, providing a limited impact and direction on foreign policy either collectively within Parliament or as individual parties.<sup>56</sup>

During President Kibaki’s tenure, although foreign policy remained largely unclear, ad hoc and inchoate (incomplete), the regional, continental and global foreign policy interest set out during the Kenyatta years, that is, respect for sovereignty and territorial integrity, good neighbourliness, peaceful co-existence, peaceful settlement of disputes, non- interference in the internal affairs of other sovereign states, non- alignment and adherence to the AU, IGAD and UN Charter was upheld as fundamentally remain unchanged.<sup>57</sup>

President Kibaki’s leadership style, particularly with respect to foreign policy- making, seems to reflect an hybrid or a mix of the Kenyatta and Moi leadership styles. Whereas the Minister for Foreign Affairs and International Cooperation (as in the case of other Cabinet Ministers) is given much leeway to manage foreign affairs, Kibaki as was the case with Moi, retained the defence and intelligence portfolio within the Presidency. The issue of national insecurity, the main responsibility of the Kenya Armed Forces and the Intelligence Community, is an important one that requires close scrutiny by the Presidency and the Kenyan Armed Forces.<sup>58</sup>

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<sup>56</sup> Korwa G. Adar and Isaac M. Munyae 2001. "*Human Rights Abuse in Kenya under Daniel Arap Moi (1978-2001)*," *African Studies Quarterly* 5(1): 1. <http://web.africa.ufl.edu/asq/v5/v5i1a1.htm>. (Accessed on 20th October, 2012)

<sup>57</sup> *Ibid.*, p. 84-87.

<sup>58</sup> *Ibid.*

Foreign policy – making under the Kibaki administration is best characterized as decentralized, mixed and ad hoc, with less interference in the handling of foreign policy issues by the Ministry of Foreign Affairs and International Cooperation. The central point is that, in contrast with the Moi administration, the Kibaki administration provides a relatively open environment for cabinet Ministers to discharge their responsibilities, with a limited interference for example, when the Minister for Internal Security, the late George Saitoti with his Defence counterpart Hon. Yusuf Haji jointly declared that the Al Shabaab Militia were enemies of state of Kenya and therefore Kenya would wage war in Somalia to uproot them all in the interest of self defence and self preservation as a sovereign state. Most Kenyans questioned the President's (as the Commander in Chief of the Armed Forces) disquiet on the issue.

However, both political and military analysts argued succinctly that it was no surprise given President Kibaki's hands free approach and trust towards his Cabinet Ministers and the fact that this was not an act of war interstate Kenya and Somalia per se but was an exceptional case of decisively dealing with a militia/terrorist group that was opposed to the Government of Somalia and as such there was no need for the President to decree any war. Also, this was a historical event that involved other players such as AMISOM Contingent. Gradually or sooner than later, Kenya's troops (KDF) are meant to leave Somali once concrete operationalization and administrative mechanisms are in the hands of the Government of Somalia with the ground support of the UN AMISOM. And as for the type of national interests and benefits Kenya stands to gain are enormous including national pride (Kenya Defence Day), economic benefits, tourism security, enhanced and structured international

trade and finance, refugees translocations back to their homeland and inter border security guarantee and diminished terrorist attacks within its bounders.<sup>59</sup>

In an attempt to reverse the negative image in Kenya and to re-establish donor confidence, Kibaki embarked on a number of bilateral and multi lateral initiative. He has since visited the US and re-opened negotiations with the Bretton Wood Institutions to resume foreign aid to Kenya. Such initiative paid dividends with the European Union (EU) promising to grant Kenya over \$300 million in aid over five years for development. The EU and other foreign actors nonetheless increasingly challenged the Kibaki administration to continue Constitutional reforms and tackle the problem of corruption. For example in November 2003, the IMF approved a three year \$25million Poverty Reduction and Growth Facility (PRGF) package, following the passage of anti-corruption legislation and commitment on structural reforms. Under the Kibaki era, a Constitutional dispensation has come into force with devolution of power and foreign policy responsibilities falling under the purview of the Prime Minister, the Cabinet and the Minister directly in charge of foreign policy matters.<sup>60</sup>

## **2.2 Historical Diplomatic Relations between Kenya and its Neighbours in the Horn of Africa**

The relations between Kenya and Somalia remained sour for more than two decades due to Somalia's irredentist claims to areas inherited by ethnic Somalis in each of its three neighbours – Djibouti, Ethiopia and Kenya. The 1977 – 78 Ogaden war with Ethiopia, although a humiliating defeat for Somalia, had created deep suspicions in the Horn of Africa concerning the intentions of the Siad Barre regime. His fear of Ethiopian military power

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<sup>59</sup> John Harrington Ndeta, "*Managing Somalia war effects in Northern Kenya*", [http://www.peacenetkenya.or.ke/index.php?option=com\\_content&view=article&id=205:managing-somalia-war-effects-in-northern-kenya&catid=3:newsflash](http://www.peacenetkenya.or.ke/index.php?option=com_content&view=article&id=205:managing-somalia-war-effects-in-northern-kenya&catid=3:newsflash) (Accessed on 20th October, 2012)

<sup>60</sup> *Ibid.*, p. 84-87.

induced him in the early 1980s to begin a process of rapprochement with Somalia's other neighbours, Kenya and the former French territory of Djibouti.<sup>61</sup>

Kenya had long suspected Somalia of encouraging separatist activities among the predominantly ethnic Somalia population in the Northern Frontier District (NFD). The Somali's claim was that all the Somali people living outside the nation-state have a right to self-determination, and thus the right to become part of Somali if they so wish. Somalis admitted that their division of their people had been created by arbitrary colonial bondages and that many of Africa's boundaries similarly defy ethnographic logic. But the Somali case is unique, the claim in that Somalis have possessed for several centuries a developed sense of nationhood and cultural uniqueness.<sup>62</sup>

Since independence, a significant number of these Somalis have taken their resentment towards what is felt to be an alien government to the stage of an armed, insurgent, secessionist movement. The Kenya Government has been involved since 1963, on an increasing scale, in a costly and only superficially successful campaign to eliminate what have been come to be called Shifta (rebels), and to create orderly political control in the Province. The Shiftas have constituted a threat which from a military point of view the Kenyan Government has felt itself able to defeat easily and inexpensively, were it not for the arms, training facilities and refuge offered to the insurgents by the Somali Government. Furthermore, it is a movement which from a political point of view, the Kenyan Government has felt itself able to undermine and finally defeat, were it not for the virulent and seditious propaganda emanating from Radio Mogadishu.<sup>63</sup>

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<sup>61</sup> Adar Korwa Chapter 4 P. 75-6

<sup>62</sup> John Howell, *An Analysis of Kenyan Foreign Policy. The Journal of Modern African Studies*, 6, 1 (1968) pp. 29-48

<sup>63</sup> For some examples see Colin Legum '*Somali Liberation Songs*', to *The Journal of Modern African Studies* 1.4. March 1963.

In 1967 following a reconciliatory approach under Prime Minister Mohammed Ibrahim Egal initiative, the Kenyan and Somali delegations came together at the Organization of African Union (O.A.U today A.U) Assembly held in Kinshasa.<sup>64</sup> At Kinshasa, both Governments 'expressed their desire to respect the other's sovereignty and territorial integrity', 'pledged to ensure maintenance of peace and security on both sides of the border', and 'agreed to refrain from conducting hostile propaganda'.<sup>65</sup> In addition, such options as referendum on self-determination, or a redrawing of boundaries were firmly ruled out. This was in line with the Statement given by the Kenyan Government following the conclusion of the 1965 Arusha to the effect that Kenya will not allow any part of its territory to be dismembered and will defend her territorial integrity by every means.<sup>66</sup> The conclusion to the matter was the President Said Barre's public renunciation of any Somalia's territorial claims on Kenya at a summit in Nairobi in 1987. In return, Kenya gave President Siad Barre safe haven and passage in Nairobi when his regime was overthrown in 1991.

On its part, Kenya's foreign policy towards Ethiopia is influenced by a number of multidimensional but interrelated internal and external factors including historical, geographical and strategic variables. The historical connections and the common borders it shares, as well as long-standing links, cross-border ties and the normal correlation amongst the peoples of the Horn of Africa over many centuries are the bed-rock of the good relations that exist between Kenya and Ethiopia. In addition, due to their common opposition to any greater Somalia project in the Horn of Africa, the two countries have maintained cordial relations since the 1960s, culminating in the signing of a defence pact by Kenya's President, the late Jomo Kenyatta and Emperor Haile Selassie of Ethiopia. The defence pact was renewed in 1979 after the end of the Somali-Ethiopia war by Presidents Mengistu Haile

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<sup>64</sup> Prerequisite for Negotiation (Nairobi, 1967)

<sup>65</sup> Agreement published in the Daily Nation (Nairobi), 8 September, 1967)

<sup>66</sup> East African Standard, (15<sup>th</sup> December 1965)



Mariam and Moi. The common borders of Kenya, Ethiopia and Somalia are inhabited mainly by peoples of Somali origin, and are prone to frequent clan and inter-clan clashes. These clashes have sometimes prompted the Ethiopian armed forces to undertake “hot pursuits” operations into Kenyan and Somali territories.<sup>67</sup>

On a number of occasions, the Ethiopian armed forces have also crossed the Somali territory to deal with what the administration of the late Meles Zenawi considered as security threats posed by Ethiopian rebel movements based on Somali territory. This explains why the Ethiopian government fought along the Somali Government against the Al Shabaab terrorist group on several occasions. Further, the Ethiopian Government has deployed troops alongside various Somali guerrilla groups, including but not limited to the Rahawayr Resistance Army, Somali National Democratic Union and Somali National front to fight against the Oromo Liberation Front, the Ogaden National Liberation Front and al-Ittihad , who frequently engage in hostilities against Ethiopian territory. The most recent example, of course, is the Ethiopia Military intervention in December 2006 to overthrow the Islamic Courts Union (ICU) and place the Transitional Defence Forces (TDF) in control of Mogadishu. These and other Ethiopian military incursions are viewed with concern by Kenyan policy-makers, most notably when they involve Ethiopia’s violation of Kenya’s sovereignty.<sup>68</sup>

The other close links between the two states have been particularly visible in the way the two states have constantly supported each other’s positions in international forums in many different areas especially in cross-border terrorism, piracy, regional integration under the umbrella of IGAD and on the matters of the prime importance to peace and security in the Horn of Africa and beyond. Both countries have consistently demonstrated their common interest through the organization, their support for revitalizing IGAD and for ensuring that it

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<sup>67</sup> *Ibid*

<sup>68</sup> Rob Wise, “*Al Shabaab*”. CSIS Case Study Series, Case Study Number 2, July 2011.

provides the basis for one of the AU's regional Economic Units. The two states have also worked together to bring lasting peace in Somalia and showed their commitment by organizing several Somali national reconciliation meetings not to mention involving or contributing their military personnel to UN AMISON to bring stability in Somalia. They also worked closely in brokering the peace deal between the South and North Sudan, and the signing Comprehensive Peace Agreement (CPA), ending the longest war in Africa, as well as providing for the reinstatement of the Transitional Federal Government (TFG) in Somalia.<sup>69</sup>

Ethiopia and Kenya have also cooperated closely over cross-border problems. One important element of IGAD for both Ethiopia and Kenya is the Conflict Early Warning and Response Mechanism (CEWARM). This has been successful in organizing and expanding community-led peace initiatives in areas along the border. All the communities along the border have expressed their commitment to adopt a similar accord, pledging to work towards living peacefully and sharing resources both internally and along the border.<sup>70</sup>

Additionally, both countries have embarked on a number of joint development programs in road construction, commerce and trade and other areas. Ethiopia has been exploring the possibility of using Mombasa as a port and is taking a keen interest in the discussions about the creation of a new port in Lamu and the possibilities of rail links with other areas. In fact, multilateral treaties have been executed between several stakeholders on this project supported by the World Bank, African Development Bank and other financial syndicates/consortium.

The other major new project has been the development of the Omo River Valley which alarmed some conservationists in Kenya who, worried about the impact on Lake Turkana. In fact, the series of dams in the Omo Valley, in particular Gilgel Gibe III, will generate nearly

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<sup>69</sup> *Ibid.*

<sup>70</sup> Herbert Wulf and Tobias Debiel, "Conflict Early Warning and Response Mechanisms: Tools for Enhancing the Effectiveness of Regional Organisations? A Comparative Study of the AU, ECOWAS, IGAD, ASEAN/ARF AND PIF" Working Paper no. 49.

2000 MWs of hydro-electric power, most of which will go to Kenya. As a result, Kenya's Environment Minister said that "Gilgel Gibe III should brighten not threaten our future".<sup>71</sup>

Kenya and Djibouti have had chequered and cordial relation especially beginning in 1982 when both states apparently encouraged by Siad Barre's stand and willingness to hold direct talks with Ethiopia's Mengistu made diplomatic efforts to mediate between Somali and Ethiopia. This meeting took place in 1986 in the city of Djibouti. A second meeting was held in April 1988, in which they signed a peace agreement and formally re-established diplomatic relations. However it is important to pin point that most of Djibouti's diverse population consists of ethnic Somalis of Iise clan, traditional rival of the Isaaqs who dominated the SNM guerrillas that defeated Sias Barres forces in August 1988 making him flee Mogadishu in January 1991.<sup>72</sup>

The relationship between Eritrea and Kenya is suspect given that Eritrea was part of Ethiopia before cessation. In any case, that Kenya has had cordial relations with Ethiopian government since the days of Haile Selassie, Magistu Haile Mariam and Meles Zenawi. Further, Eritrea withdrew its representative to the AU in protest of what they claim is the AU's lack of leadership in the implementation of the demarcation of the border between itself and Ethiopia.

Recently in November 2011, diplomatic relations between Kenya and Eritrea worsened after Kenya formally filed a case with the United Nations Security Council asking it to investigate Eritrea's support of Al Shabaab terrorist group. At the same time, Eritrea counteracted accusing Kenya of hurting its image proposed that and it should be castigated and compelled to apologize. Therefore, one would conclude that the bilateral relation between Kenya and Eritrea is at best at its lowest ebb hitherto.

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<sup>71</sup> Bilateral Ethiopia-Kenya Relations, <http://www.mfa.gov.et/BilateralMore.php?pg=22>. (Accessed on 20th October, 2012)

<sup>72</sup> Abdulahi A. Osman, "*Cultural Diversity and the Somali Conflict: Myth or Reality?*" African Journal on Conflict Resolution. Vol. 7(2), 2007 p. 93.

The diplomatic relationship between Kenya and Sudan clearly is traceable with the emerging of the National Islamic Front (NIF) regime of General Omar al-Bashir in power in June 1989 through a military *coup d'état*. This was a pivotal event in the political history of the Horn of Africa that also roughly corresponded with the end of the cold war. Specifically, there was reason to believe that the contentious regional relations of the previous decades might end and usher in a new era. However, relations between Sudan and its neighbours, which began as friendly, deteriorated in the mid – 1990s to a state of virtual war following the escalation of the civil war between the North and the South with most of regional neighbours apparently supporting South's secessionist efforts. A period of easing tensions was marked by the signing of the Machakos Protocol in July 2002. This event signalled a critical advancement in a peace process sponsored by the Intergovernmental Authority on development (IGAD) that ultimately led to the signing of a comprehensive Peace Agreement in 2005 (essentially ending the Southern Sudanese Conflict.)

According to Daniel and Luke state that Kenya was less directly involved with Sudan (before the Machakos Protocol), but there was an awareness of the political potential of the country's Muslim minority, and moves were undertaken to block it. The Islamic Party of Kenya was banned and described as 'Arab fundamentalist' and in 1993 its leader Sheikh Khalid Balala, was arrested for incitement when he called for a Jihad. Awareness of an Islamic threat was maintained by the 1998 bombing of the US embassy in Nairobi, after which America launched a missile attack on an alleged Sudanese chemical weapons facility in Khartoum North.<sup>73</sup>

The disarray in Sudan after the signing of the CPA was matched by disarray in the International Community in responding to the possibility of cessation of Sudan's hostilities. The US spoke of genocide and maintained sanctions in spite of the CPA. The European

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<sup>73</sup> Gregory Alonso Pirio. "*Radical Islam in the Greater Horn of Africa*". <http://www.dankalia.com/archive/2005/050202.htm> (Accessed on 12th October, 2012)

powers were sober but knew their politics were hostile to the Sudan government. Arab and African states were concerned, with Chad also becoming a major factor given that it was affected by deterioration between the Northern and Southern Sudan. Sudan's new Asian friends remained largely uncritical in public, though China appointed an envoy and engaged in quiet diplomacy.<sup>74</sup>

The major dividing issue, internationally, turned out to be the International Court (ICC) which had been established by the UN Security Council. Following the Security Council's referral of Darfur to the ICC, three Sudanese nationals were indicted on war crimes and charges of crimes against humanity, including President Omar Bashir. Kenya, being a signatory to the Rome Statute which establishes the ICC, has jurisdiction to enforce such arrest warrants against the three Sudanese nationals especially the sitting head of state General Omar al-Bashir. This raised a lot of diplomatic furore between the two states and its cause effect is the centre of gravity of this thesis. A lot of issues of concern in nature of the interface between the application of International relations (studies) with the international law and diplomacy of conflict management need to be explored here.<sup>75</sup>

The Kenya Executive arm of government seems to be in conflict with the Judicial arm of the government on the application of law, international relations and diplomacy on the foreign relation between Kenya and Sudan. As the matter stands, the Kenya-Sudan diplomatic relations is fluid and versatile.<sup>76</sup>

### **2.3 Key Role of Kenya in Non-Aligned Diplomacy**

Kenya's foreign policy in Africa is far less a product of domestic political pressures than both her global and East African policies are. In African affairs generally, does Kenyan foreign policy hardly conforms to the traditional ideas of foreign policy as simply a product of

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<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

leaders taking independent decisions. Indeed, Kenya's role in African affairs in a curious way reflects a synthesis between the paradox of radical policy abroad and more cautious conservatism nearer home which explains the sense of neutrality in all African affairs. As such, Kenya is neither a member of the 'radical' group of states nor the 'moderator' or 'conservative.' If anything, Kenya leads in the cluster of 'neutral' countries. This neutrality has occasionally meant that Kenya has been thrust to the forefront of Africa's diplomacy. Certainly, Kenya has not been reluctant to involve herself in the affairs of the Continent, but it would be wrong to assume that she has deliberately set out to pursue a policy of influential neutrality.<sup>77</sup>

Kenyan prestige and importance in African diplomatic circles are due to several factors. First, the late Jomo Kenyatta with his long and impeccable nationalist record, remained a much-respected figure in the African world despite his reluctance to travel outside. Secondly, Nairobi which is centrally placed and offering excellent diplomatic facilities, was and still considered a natural nerve centre for a good deal of inter-African diplomatic activity. Thirdly, Kenya's apparent governmental stability means that other nations have a confidence in her which they will not have in states with more vulnerable regimes. However, the main factor behind Kenya's emergence as a prestigious neutral in African affairs has been the adoption of a position between committed groupings of states to right and left; she has been strongly committed to those causes close to the African Nationalism without allowing, as other less cautious states have done, that commitment to transgress the wishes of fellow African states. But, if this appears too fulsome an interpretation of Kenyan foreign policy, it should be remembered that Kenya has hardly been in a position to opt for either right or left groupings.<sup>78</sup>

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<sup>77</sup> John Howell *An Analysis of Kenyan Foreign Policy, The Journal of Modern African Studies*, Vol. 6, No. 1 (May, 1968) pp. 29-48

<sup>78</sup> *Ibid* P. 45

Some illustrations emphasising the role of Kenya's non-aligned African diplomacy policy began soon after its independence. In 1964, as the continuing civil strife in the Congo created the prospect of a new cold war battle ground, there were strong demands within Africa for a negotiated solution through the Organization of African Union (O.A.U). Congo Conciliation Commission in Nairobi, under Kenyatta's chairmanship, showed that Kenya was considered to be one of the very few African States who could possibly have brought the Congo crisis to an end.<sup>79</sup>

In the second major international crisis that Africa has faced since Kenya became independent, the same sense of powerlessness prevailed at the O.A.U over the Rhodesia Unilateral Declaration of Independence (UDI).<sup>80</sup> Kenya, for one, opted for neither the display of open rapture of Tanzania, for example, nor the resigned attitude of, say, Malawi. Joining neither the ten who broke off diplomatic relations with Britain following the O.A.U council resolution of 3<sup>rd</sup> December at Addis Ababa, nor the nine who stayed in their seats ignoring the African walk out on Harold Wilson's U.N speech of 16<sup>th</sup> December, Kenya proved to be a capable member of the middle group countries who feel they may still have some influence over the course of events, without any need to abrogate their principle.<sup>81</sup>

The instability of Uganda after the fall of Idi Amin saw Kenya mediate between the two protagonists; the National Resistance Army (NRA) of Mr. Kaguta Yoweri Museveni and Ugandan National Liberation Army (UNLA). In 1985, Nairobi became the diplomatic centre stage for the dispute resolution between two where President Moi actively engaged the two warring groups to solve their power struggle dispute diplomatically in order to give Uganda the much deserved peace a chance. At the period, and even before, Kenya had hosted hundreds of thousands of Ugandan refugees. Indeed a deal was eventually reached though

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<sup>79</sup> *Ibid* P. 46 - 47

<sup>80</sup> The Unilateral Declaration of Independence of Rhodesia from the United Kingdom was signed on November 11, 1965, by the administration of Jan Smith

<sup>81</sup> *Ibid* P. 48

sooner than later President Museveni breached the accord and dislodged Tito Okello from power to become the 3<sup>rd</sup> president of Uganda hitherto.<sup>82</sup>

Last, but not least, is the Kenya's involvement in achieving a lasting diplomatic solution by mediating the African longest war in Sudan. In order to achieve the signing of the Comprehensive Peace Agreement (CPA) between the Sudan and the Southern Sudan, Kenya had engaged the two protagonists in signing the Machakos Protocol on the 21<sup>st</sup> July, 2002. This was followed by the Naivasha Power Sharing Protocol of 26<sup>th</sup> May, 2004, Naivasha Wealth Sharing Protocol of 7<sup>th</sup> January, 2004, the Resolution of the Abyei Conflict and Conflict in Southern Kdofan and Blue Nile State of 26<sup>th</sup> May, 2004 respectively all of which were mediated and spearheaded by Kenya.<sup>83</sup>

#### **2.4 Kenya's Recent Involvement in Somali Al-Shabaab Conflict and Conquest of Kismayu**

Kenya's incursion into Southern Somalia started after the kidnapping of two Spanish women who were working for *Medecins Sans Frontieres* at the Dadaab refugee camp. The abductions were allegedly carried out by Al Shabaab militants. The Kenyan government claimed its troop deployment had received approval from the Transitional Federal Government of Somali (TFG). Indeed, Kenya's Foreign Affairs Minister, Moses Wetangula, stated that the deployment of Kenyan troops was at the request of the TFG although these are other conflicting theories as to why Kenya decided to intervene in the Somali crisis.

According to the Guardian:

“Several sources attribute that the Kenyan intervention plan was discussed and decided in 2010, a year ago, then finalized with input from Western partners, including the US and to a less extent France, with Nairobi using the kidnappings as an excuse to launch an operation ready and waiting.”

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<sup>82</sup> <http://www.dtic.mil/dtic/tr/fulltext/u2/a421943.pdf> (accessed on 17th October, 2012)

<sup>83</sup> Waithaka Waihenya, *The Mediator: Gen. Lazaro Sumbeiywo and the Southern Sudan peace Process*



On 27<sup>th</sup> October, 2011 Kenyan government stated that the incursion had been planned months in advance and that the operation had been 'going on for quite some time' as well as denying any participation by the Western forces. Nevertheless, operation received high approval rating from the Kenyan population.

On 16<sup>th</sup> October, 2011 Somali and Kenyan military officials had met over the weekend for talks in the town of Dhobley, situated near Somalia- Kenya border. It reported that the meeting "was to prepare a joint operation between the two forces which is meant to launch an offensive against Al Shabaab rebels who are scattered in different parts of Southern Somalia"

On 18<sup>th</sup> October, 2011 Somalia's then President Sharif Sheikh Ahmed and other TFG officials hosted a Kenyan delegation in Mogadishu to discuss security issues including co-operation against Al Shabaab. Kenya and Somalia Defence Ministers signed an agreement to collaborate against Al Shabaab. Both countries pledged to 'co-operate in understanding security and military operations', including 'co-ordinated *pre-emptive*.' Before then, Kenya had been training TFG troops and giving them both logistical and financial support.

Other reasons attributed to Kenya's incursion in Somalia include: First the US's effort to fight global terrorism. US felt that Al Shabaab is a cell of Al Khaeda in the Horn of Africa just like Boko Haram is to Nigeria. As such, Al Shabaab was considered as likely to jeopardize the US's national interest in both East African and Horn of African states. Further, the US having been humiliated in Somalia a few years ago in what is Christianized as 'Black Hawk Down' it was perhaps a sweet revenge indirectly by US supporting fully the Kenyan troops.

The other reason was that the attack was seen as part of the efforts to fight piracy that affected trade in the Indian Ocean and Far East and with support of European Union, Japan and other affected states. Indeed, this was considered as the main reason to have the Port of

Kismayu conquered to restore some decency in the International Marine Law in the Horn of Africa region.

It has been argued that link of flourishing Kismayu Port used by the Somali warlords to finance the Al Shabaab Militia was the focal point of the Kenya incursion into Somalia to capture the key and strategic port to minimize and weaken Al Shabaab base. The other reason peculiar to Kenya's situation was the need for Kenya to secure its borders with Somalia in order to ensure its multibillion tourism sector at the Coastal region grows unhindered and at high per capita growth rate.

Further, there was the issue of need to find a lasting solution in resolving the question of refugee 'housed' in Kenya. It was equally considered important to have the Somalia refugees gradually settled back into Somalia in a peaceful environment to rebuilt their lives and relieve the burden on Kenya. That ultimately would reduce the environmental issues such as competition over meagre natural resources such as grazing, water and generally environmental degradation with the Kenyan populations.

## **2.5 Justification and Implication of Traditional Non-Aligned Diplomacy of Kenya's Foreign Policy and Paradigm Shift to Pro-Active Engagement**

Kenya's foreign policy was originally concerned with economic issues and the security of her borders. Though she occasionally issued statements proclaiming her non-aligned status and participated in O.A.U deliberations, non-alignment and Pan-Africanism were considered low priority issues. Indeed, Kenya adopted such a cautious approach to international issues that one writer saw it fit to describe her foreign policy posture as that of 'quiet diplomacy'<sup>84</sup>. This is no longer the case today. Kenya's foreign policy has moved from quiet diplomacy to full identification and engagement since the identification with US as a superpower; drifting from

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<sup>84</sup> John Okumu, "*Kenya's Foreign Policy*". in O. Muko, *The Foreign Policy of African States*. London. Hoddes and Stoughton, 1997, P.136.

a position of partial neutrality in pan-African affairs to one of leadership of the African Union (AU).

The justification and motivating factors of Kenya's shift from non-alignment diplomacy of foreign policy to active engagement in the turbulent international geopolitical terrain may be explained by the fact that her national interests, goals, perception and fears have since changed since independence. In his analysis of Kenya's foreign policy in the mid-1970s, Professor John Okumu said that her policy was motivated by three factors, though he mentioned four in his list. These were:

- First, the threat of secession in Kenya's Coastal and North-eastern provinces alerted her to the primary need to consolidate her boundaries.
- Second, Kenya realized that a good neighbour was a logical step for the security of both her people and her territory.
- Third, a policy of vigorous economic development at home and economic co-operation and cultural exchange with her neighbours would strengthen her position in Africa.
- Finally, non- alignment was to remain a major tenet in her foreign relations.<sup>85</sup>

Professor Okumu's analysis of Kenya's foreign policy in this regard is inept because it omits the main facts that shaped Kenya's foreign policy, namely, the quest for and the dominance of – Western, especially British, capital in the country.<sup>86</sup>

Secondly, it puts a premium on secessionists movements in the North-Eastern and Coastal problem which had no influence on the formulation of foreign policy. After all the Kenyan government has sealed the fate of secessionist movement by declaring that those issues are domestic in nature and Kenya will never stand to see its geopolitical map dismembered.

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<sup>85</sup> *Ibid.* P. 138

<sup>86</sup> *Ibid.* P. 140

Perhaps the new Constitution seems to address most of clamours of these groups such as Northern Frontier District (NFD) and Mombasa Republic Council (MRC).

To understand Kenya's quiet diplomacy, one has to understand her dependence, that is, the fact that her policies were, to a large degree, circumscribed by the circumstances under which Kenya found herself after independence. Indeed, from the beginning, Kenya's foreign policy was shaped by the need to attract more foreign capital, maintain commercial links with the neighbouring states, ensure the security of her borders, and consolidate the domestic political power base. In pursuance of these goals, Kenya manifested her dependence in three different ways. First there was dependence on foreign investment and aid, which ultimately meant the predominance of Western, particularly British, capital and influence.

Second, there was a dependence on the wider East African Market, which meant Kenya's continued domination of the East African Common Market.

Third, there was a security dependence manifested in defence agreements with Britain and United States. The British government entered into a number of agreements with the Kenyan government immediately after Kenya's independence; including joint military exercises which have been taking place since 1965. Secondly, Britain was Kenya's main arms supplier until the mid-1970s. This security dependence helped Kenyan leaders to acquire extra military power to consolidate their domestic political power base and to deter a direct Somali attack on Kenya.<sup>87</sup>

Today, Kenya's foreign policy in the economic front has typically changed. Kenya is now actively looking into the East: China, India, Japan and Malaysia among others for foreign capital. This unprecedented shift is occasioned by several factors; First, the geopolitical relations between China and US and its allies. China is classified as both developing and

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<sup>87</sup> *Ibid*, P.190

developed depending on the issue at hand. This confusion has given trading edge of China products over those of other developed states. In addition, China's foreign policy in relation to the emerging and developing markets and its position in the Security Council is interesting in the way it engages these markets forces especially those with favourable natural resources and overseas trading opportunities. Kenya, for instance, has engaged China in key areas of development predominantly enjoyed by Britain and the US. All the major infrastructural development such as roads, railways, airports and marine engineering contracts have been awarded to Chinese firms. The reason being that China offers competitive contractual prices subsidized by their own EXIM Bank owned by the Chinese government to promote and cushion foreign investments against world financial turbulence experienced by the European states today. Also, Chinese firms are known to employ unlawful means of winning tenders known as 'kick backs' to parastatal heads and government officials.

The other advantage offered by trade relations with Eastern countries like China is that they do not entail many conditionalities imposed by Western powers. In fact, China's trading behaviour in Africa seems to be *modus operandi* in all the African states it is involved such as in Sudan, Malawi, Zimbabwe and Zambia copper mines its activities are shrouded with secrecy and leaves behind environmental degradation and pollution.

Another issue that led to the reassessment of Kenya's foreign policy was the fall of the Portuguese African Empire and the subsequent independence of her former colonies, namely Mozambique, Guinea-Bissau and Angola. Kenya, which had maintained a certain amount of neutrality in continental African politics was called upon to mediate among the warring Angola Liberation Movement – the popular Movement for the Liberation of Angola (MPLA), the National Front for the Liberation of Angola (FNLA) and the National Union for the Total Independence of Angola (UNITA). The mediation was short lived when in 1975 despite

President Jomo Kenyatta's efforts to bring the warring parties to negotiating table; a war broke out and Kenya withdrew its services.<sup>88</sup>

If the fall of Haile Selassie and the Portuguese African Empire gave Kenya cause to re-think her foreign policy, the collapse of the East African community in 1977 provided the most urgent need for the reassessment of that policy. This is after the Kenya-Tanzania border was closed rendering trade between Kenya, Malawi and Zambia impossible.

The collapse of the East African Community forced Kenya to look for markets in the other parts of Africa and the Middle East. It is at this time that Kenya started to moderate her very cautious attitude towards the Arab world by encouraging diplomatic and trade relations.<sup>89</sup> This saw Kenya make serious efforts to establish good working relations with a number of Arab countries in the 1980s and 1990s.

Subsequently, Kenya intensified efforts to search for ways of increasing trade with the Sudan and Ethiopia her northern neighbours. As a step towards that goal, Kenya, Ethiopia and Sudan established a tripartite Ministerial Committee which met regularly to review progress towards the improvement of communications and commercial links among the three neighbours.<sup>90</sup>

Kenya has also signed trade co-operation Treaties with Burundi, Rwanda and Zaire<sup>91</sup> and became very active in supporting the idea of the Preferential Trade Area (PTA) between African countries. However, the idea of PTA did not succeed immediately largely due to Tanzania's refusal to sign the Treaty, citing unresolved dispute with Kenya over the sharing of the liabilities and assets of the defunct African Community.<sup>92</sup>

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<sup>88</sup> *Ibid.* P.124

<sup>89</sup> African Contemporary Record 1977 – 78, Op. Cit, P. B 271

<sup>90</sup> African Research Bulletin (Economic and Financial Technical) 15 April -- 14 May 1982 PP 5893 - 4

<sup>91</sup> See the Weekly Review (Nairobi) 9 July 1982

<sup>92</sup> *Ibid.* P. 6266

## **2.6 Conclusion**

The chapter focused on placing the Kenya's foreign policy development in historical context. In this respect, the history of the diplomatic relations between Kenya and her Eastern African neighbours was discussed with focus on relations between Kenya- Ethiopia, Kenya-Somalia, Kenya-Uganda, Kenya-Djibouti, Kenya-Eritrea and Kenya-Sudan relations over the years since independence to the present time.

It emerged that Kenya's foreign policy approach towards the neighbouring Eastern Africa States has been highly influenced by the role of individual actors in the character of the three presidents, namely, the late Mzee Jomo Kenyatta (1962-1978), Retired President Daniel Toroitich Arap Moi (1978-2002) and Emilio Mwai Kibaki (2002-2013). In the recent day, it was established that Kenya is moving for non-alignment approach in foreign policy in the African and regional affairs towards pro-active diplomatic engagement ostensibly to protect her state security, economic and territorial interests.

The above general trend characterises the relationship between Kenya and Sudan which in the recent days has been impacted by geopolitical factors as well as the indictment of President Bashir by the ICC. The next chapter will discuss in depth the causes and implications of the diplomatic conflict between Kenya and Sudan.

## **CHAPTER THREE**

### **CASE STUDY OF THE TOTTERING DIPLOMATIC RELATIONS BETWEEN SUDAN AND KENYA**

#### **3.0 Introduction**

This Chapter discusses the facts and issues surrounding the actual case study of this thesis, namely, the tottering diplomatic relations between Sudan and Kenya. In this respect, the Chapter first lays a background to the diplomatic conflict between Kenya and Sudan by discussing the issues at stake. Secondly, the Chapter explores the facts and dynamics around the Darfur referral in an effort to show that political interests have greatly impacted the establishment of international criminal justice in the case.

Further, the Chapter analyses critical issues relevant to the study including the causes of the international conflict between Kenya and Sudan, the implications of the tottering diplomatic relations, the reactions and actions of other African States including Malawi and Zambia regarding the indictment of President Al-Bashir and the lessons and guidelines for Kenya. In addition, the regional and continental reactions and counteractions especially those of AU, IGAD and Arab League are also considered to show that the matter of President Al-Bashir's indictment is a matter of international concern with wide ranging implications. Finally, the Chapter discusses the possibility of disentangling from the Rome Statute and the legality of proposal to expand AU's criminal jurisdiction in an effort to provide an alternative and detraction from the ICC process to show that the future of international criminal justice is far from certain.



### **3.1 Background to Diplomatic Conflict between Kenya and Sudan**

In the recent day, the International Criminal Court has made major indictments that affected foremost military and political leaders in Africa. These indictments which included that of President Muammar Gaddafi and his son Saif al-Islam Gaddafi with respect for alleged international crimes committed against civilians during the uprisings in Libya in 2011, indictment of Former Ivory Coast President Laurent Gbagbo for post-election violence following a disputed election and indictment of President Omar Bashir for alleged crimes against humanity committed in Darfur Region. Indeed, it is the indictment of President Omar al Bashir of Sudan in 2010 which opened exposed the tension between the concept of sovereignty as currently concept in international law and practice realm and the need to review the concept to accommodate the emerging aspect of international criminal justice.<sup>93</sup>

President Omar al-Bashir of Sudan was issued with warrant of arrest by the International Criminal Court's (ICC) on charges of crimes against humanity and war crimes for his role in orchestrating Sudan's abusive counterinsurgency campaign in Darfur. This was and remains the only warrant of arrest to be issued against a sitting head of the state and was hailed by many human rights advocates as a step towards facilitating accountability of those responsible for making key decisions affecting the lives and welfare of persons within their territory. Human Rights Watch described the move as a step in the right direction in holding accountable those at the top for mass murder, rape and torture. The following statement highlighted the implication of the arrest warrant against Bashir on the future of international criminal justice:

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<sup>93</sup> Belinda Lowe. "*This Delicate Mosaic: The International Criminal Court and the Indictment of Bashir*" [http://www.ethics.org.au/sites/default/files/Think\\_Piece\\_International\\_Justice\\_September\\_2012.pdf](http://www.ethics.org.au/sites/default/files/Think_Piece_International_Justice_September_2012.pdf). (accessed on 14th October, 2012)

"Not even presidents are guaranteed a free pass for horrific crimes. By ruling there is a case for President al-Bashir to answer for the horrors of Darfur, the warrant breaks through Khartoum's repeated denials of his responsibility."<sup>94</sup>

President Al-Bashir's indictment followed a March 31, 2005 resolution of the Security Council which referred the situation in Darfur to the ICC prosecutor for investigation and prosecution. The decision was based on the recommendation of an international commission of inquiry, which found that violations of international humanitarian law and human rights law were continuing in Darfur and that the Sudanese justice system was unwilling and unable to address the crimes. Noteworthy, Darfur was the first situation referred by the Security Council to the ICC.<sup>95</sup>

The ICC prosecutor requested an arrest warrant for Bashir on July 14, 2008. Following the prosecutor's announcement, Sudanese government officials made implicit and explicit threats of retaliation against international peacekeepers and humanitarian workers. On July 25, a Sudanese presidential advisor, Bona Malwal, stated in regard to peacekeeping forces that, "We are telling the world that with the indictment of our President al-Bashir we can't be responsible for the well-being of foreign forces in Darfur." President Bashir also threatened to expel international peacekeeping forces if a warrant is issued.

On March 4, 2009, ICC Pre-Trial Chamber I issued an arrest warrant for al-Bashir for war crimes and crimes against humanity committed in Darfur. The Pre-Trial Chamber rejected the inclusion of genocide charges in the warrant on the basis that the prosecutor did not present "reasonable grounds to believe" that the Sudanese government possessed the necessary intent for the crime of genocide. However, on February 3, 2010, the International Criminal Court (ICC) appeals chamber rejected the standard used to exclude genocide charges in the ICC's arrest warrant for President Omar al-Bashir of Sudan. Further, the appeals chamber instructed

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<sup>94</sup> Richard Dicker, "*ICC: Bashir Warrant Is Warning to Abusive Leaders*", <http://www.hrw.org/news/2009/03/04/icc-bashir-warrant-warning-abusive-leaders>. (Accessed on 17th October, 2012)

<sup>95</sup> Ayad Derbal, "*The ICC's Involvement in the Situation in Darfur: Not a Threat to Peace*", University of Notre Dame, Center for Civil and Human Rights, Working Paper No. 1 Winter 2008

the pre-trial chamber to reassess the inclusion of genocide charges under a revised standard and amend the arrest warrant as necessary. The indictment of President Al-Bashir was confirmation that "ICC is an independent judicial institution in that although Sudan was not a party to the Rome Statute creating the court, it was made subject to ICC jurisdiction through Security Council resolution. Further, it emerged that having an official position as head of state does not provide immunity from criminal responsibility before the ICC."<sup>96</sup>

In addition to the warrant against President Bashir, the ICC has issued two other warrants in relation to Darfur. On April 27, 2007, the court issued arrest warrants for State Minister of Humanitarian Affairs Ahmed Haroun and a "Janjaweed" militia leader, Ali Kosheib. However, Sudan has so far refused to cooperate with the ICC and all the arrest warrants remain outstanding. Haroun continues in his official position as state minister of humanitarian affairs. The question is: what role should other countries especially those that enjoy strong diplomatic relations with Sudan do in the face of the arrest warrants and the need to maintain cordial relations with Khartoum? Human rights advocates argue thus:

"Because the ICC has no police force of its own, it needs strong support from governments to ensure that all those charged with crimes are arrested."<sup>97</sup>

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<sup>96</sup> *Supra*, note 1.

<sup>97</sup> *Ibid.*

### **3.2 The Basis and Criticism of Security Council's Darfur Referral to ICC the UN**

Security Council is the United Nations' primary and most powerful organ responsible for keeping peace in the world. Under Article 1 of the UN Charter, "the maintenance of international peace and security... in conformity with the principles of justice and international law" is the foremost responsibility of UN as an organization. Article 24 of the Charter vests the Security Council with the primary responsibility for the maintenance of international peace and security. Further, under Article 25 of the Charter Members of the United Nations agree to accept and carry out the decisions of the Security Council. This Council is also tasked with promoting and encouraging respect for human rights and for fundamental freedoms for all in implementing Article 1 section 3 of the Charter.<sup>98</sup>

The International Criminal Court (commonly referred to as the ICC) is a permanent tribunal to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression. The Court came into being on 1 July 2002 when its founding treaty, the Rome Statute of the International Criminal Court, came into force. ICC is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community. The ICC is an independent international organisation, and is not part of the United Nations system. Its seat is at The Hague in the Netherlands.<sup>99</sup>

In the Article 2(1) of the Relationship Agreement between the UN and the ICC, which was entered into force in October 2004 recognizes the Court as an independent permanent judicial institution which...has international legal personality. Further, Article 2(2) declares the principle that "The United Nations and the Court respect each other's status and mandate" meaning that the UN and the ICC are independent of each other and capable of acting on

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<sup>98</sup> Lawrence Moss, "*The UN Security Council and the International Criminal Court: Towards a More Principled Relationship*", March 2012. <http://library.fes.de/pdf-files/iez/08948.pdf>. (Accessed on 17th October, 2012)

<sup>99</sup> *Ibid.*

their own motion or cooperating where necessary. The Rome Statute's preamble recognizes a relationship between the aims of justice and maintaining peace and security affirming that grave crimes must not go unpunished not only because, inter alia, they threaten the peace, security and well-being of the world.<sup>100</sup>

The jurisdiction of the Security Council to refer investigation to the Prosecutor of ICC is mainly vested in Article 13 of the Rome Statute. In particular, Article 13 (b) of the Rome Statute provides that the Court may exercise jurisdiction over statutory crimes if “[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.” Further, Article 16 provides that “no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” The implication is that the Security Council has a clear mandate to refer disputes to ICC and also may request the court to postpone the prosecution of a case upon a resolution to that effect.<sup>101</sup>

However, criticism has been levelled on the powers of referral and deferral of ICC prosecutions granted to the Security Council on the basis that it may affect the credibility and legitimacy of the Court. In the first place, there have been questions on the fairness and impartiality in choosing which situations it should refer to the Court. This owes to the fact that there are no credible criteria and processes to choose which situations to refer and the individual Security Council members may have vested interests tied to the referral or deferral which do not necessarily serve the interests of justice. For instance, the Council may refer or

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<sup>100</sup> *Ibid.*

<sup>101</sup> <http://www.icc-cpi.int/Menus/ICC/about+the+Court/>. (Accessed on 18<sup>th</sup> October, 2012)

fail to refer some situations based on political interests, or refrain from referring some situations due to political ties.<sup>102</sup>

Secondly, only two of the five permanent members of the Security Council, namely, France and the United Kingdom are Parties to the Rome Statute. Russia and the United States signed the treaty without ratifying it, and China has never signed the treaty. Commentators have raised the issue that three of the five P-5 members are not themselves parties to the Court, yet exercise such power to refer other non-parties for possible prosecution, and to defer any investigations or prosecutions.<sup>103</sup>

The referral of the Darfur Situation for investigation to ICC was the first referral of the Security Council to ICC. The facts behind the referral are that fighting began between Darfur rebel groups and the Sudanese government in February 2003. The government has been accused of arming and supporting Janjaweed militias which committed widespread ethnic cleansing against the tribes from which the rebels were drawn. By November 2004, many tens of thousands of people had been killed, some 1.65 million internally displaced, with another 200,000 driven across the border into Chad. Hundreds of villages in the three states of Darfur were burned and destroyed, with indiscriminate attacks on civilians, rape, looting and torture.<sup>104</sup>

In terms of formality and procedure, the Resolution of the Council referring the Darfur situation to ICC is beyond reproach in that credible process was followed to the letter. The Darfur Referral was commenced with an issue of presidential statement expressing deep concern over the humanitarian crisis in April 2004. Secondly, the violence in Darfur was condemned by all parties in Resolution 1547 adopted in June 2004. Additionally, with Resolution 1556 which was adopted under Chapter VII in July 2004, the Council determined

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<sup>102</sup> Lawrence Moss, "*The UN Security Council and the International Criminal Court: Towards a More Principled Relationship*". <http://library.fes.de/pdf-files/iez/08948.pdf>. (Accessed on 18th October, 2012)

<sup>103</sup> *Ibid.*

<sup>104</sup> Report of the International Commission of Inquiry on Darfur to the UN Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004 (25 January 2005), paras. 73-488.

that the situation in Sudan constituted a threat to international peace and security. Further, the Resolution 1556 indicated that there was criminal responsibility for the violence being committed, and urged the Sudanese government to investigate and prosecute those responsible.

Finally, in September 2004, the Council adopted Resolution 1564 under Chapter VII, establishing a commission of inquiry “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties.” Pursuant to this Resolution, the UN Secretary-General appointed a five member commission in October 2004, which released its lengthy report in January 2005, finding that war crimes and crimes against humanity had occurred in Darfur. This Commission recommended that the Security Council refer the situation to the ICC under Article 13(b) of the Rome Statute. Subsequently, acting under Chapter VII, the Council adopted Resolution 1593 referring the situation in Darfur to the ICC on 31 March 2005.<sup>105</sup>

The Darfur Referral Resolution has been criticized for the fact that it did not take into account the diplomatic issues at stake in implementing the referral. In the first place, unlike the resolutions which established the International Criminal Tribunal of Yugoslavia (ICTY) and International Criminal Tribunal of Rwanda (ICTR), the resolution does not require all UN member states to cooperate with the investigation and prosecution, but merely urges their cooperation, and pointedly declares that non parties to the Rome Statute have no obligation. This was, clearly, with reference to the provisions of the Rome Statute which as a treaty is only binding to member states.<sup>106</sup>

Further, the Council directed the Sudanese government and all other parties to the Darfur conflict to assist and fully cooperate with the Prosecutor and the Court. However, in normal

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<sup>105</sup> Security Council Resolution 1593 referring the situation in Darfur to the ICC on 31 March 2005.

<sup>106</sup> Lawrence Moss, “*The UN Security Council and the International Criminal Court: Towards a More Principled Relationship*”, <http://library.fes.de/pdf-files/iez/08948.pdf>. (Accessed on 18th October, 2012)

circumstances when the Council acts under Chapter VII to refer a situation to the ICC, it is expected that it will back up the Court with its full power to mandate cooperation by all UN members. Indeed, the diplomatic conflicts arising from the arrest warrants appear to emanate from the lack of direction and clarity from international law framework under which the Darfur Referral was done in that there are no provisions for how to apply the UN framework to enforce the decisions of ICC such as arrest warrant against President al-Bashir.

Criticism has also been directed on the fact that the referral of the Darfur situation did not seem to have had any effect in deterring further violations of human rights and humanitarian law. It has been argued that the Darfur Referral hardly helped to restore any measure of peace but rather it made achieving peace and security more difficult. The proponents of the referral argue that it helped pressure one rebel faction and the Sudanese government into adopting the May 2006 peace agreement. In addition, the referral and the first two arrest warrants issued in 2007 may have helped pressure the Sudanese government's acceptance of the eventual UN-AU peacekeeping force (UNAMID). Also, the voluntary surrender of two rebel leaders indicted later may have influenced the government to resume peace talks.

However, it has also been observed that the killings in Darfur continued unabated after the referral, and even now ICC indicted Ahmed Haroun serves as governor of the Sudan's Southern Kordofan state, where the government has been bombing the civilian population. In effect, the general criticism against the Darfur referral and the indictment of President Al-Bashir is that it has neither acted as deterrent in stemming the violence in Darfur and has also contributed to the continuation of the violence because it has detracted the diplomatic efforts of the AU, IGAD and individual states to dealing with side issues such as the current conflict between Kenya and Sudan.<sup>107</sup>

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<sup>107</sup> *Ibid.*



In addition, while Resolution 1593 clearly directed the government of Sudan to cooperate fully with the ICC and its Prosecutor, issues of lack of support of the ICC mechanism have emerged creating the possibility that political and national interests may come into play to affect the mandate of Security Council respecting referral of Disputes to ICC. Even after Sudan blatantly refused to arrest and surrender government minister Ahmed Haroun and Janjaweed militia leader Ali Kosheib, charged with crimes against humanity and war crimes in the ICC arrest warrants issued in April 2007 as well as President al-Bashir since the warrant for his arrest was issued in March 2009, the Security Council has not taken any decisive action to address the issue.<sup>108</sup>

Indeed, the ICC Prosecutor reported to the Council in December 2007 that the Sudan was not cooperating, but China blocked efforts to have the Council issue a presidential statement. Further, the Prosecutor again briefed the Council on the Sudan's noncooperation in June 2008 whereupon Costa Rica threatened to table a resolution that China would have to veto forcing China to allow the Council to issue its first and only presidential statement noting the arrest warrants and urging the Sudan to cooperate fully with the Court. Beyond that, the Council has failed to take any further action to demand the Sudan's cooperation, even after the Court delivered to the Council a judicial decision finding that the Sudan had failed to execute the arrest warrants for Haroun and Kosheib.<sup>109</sup>

The question is, if the Security Council which is the UN body vested with the primary responsibility of maintaining international peace and security as well promoting and encouraging respect for human rights and for fundamental freedoms for all others in enforcing the decisions of ICC due to political and national interests of individual state members, is it reasonable to expect states like Kenya to comply without consideration of their individual political interests? Clearly, the diplomatic conflict between Kenya and Sudan owes

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<sup>108</sup> The Future of International Criminal Court Report of the Salzburg Retreat held on Salzburg, Austria 25-27 May 2006, [www.sbg.ac.at/salzburglawschool/Retreat.pdf](http://www.sbg.ac.at/salzburglawschool/Retreat.pdf) (Accessed on 18th October, 2012)

<sup>109</sup> *Supra*, note 15.

to the failure in crafting the duty to cooperate under the Rome Statute without exploring the realities of state cooperation and imperatives of state sovereignty.

### **3.3 Causes of Diplomatic Conflict between Kenya and Sudan**

Kenya and Sudan have over the years enjoyed cordial diplomatic relationship. However this tranquil moment has been affected by several factors that has sparked unprecedented diplomatic row.

First, a Kenyan Court decree issuing a warrant of arrest against Sudan President Omar Al-Bashir has triggered diplomatic row between Khartoum and Nairobi. This caused tremendous difficulties in bilateral relations between the two neighbouring states. The decision was triggered by High Court application made by the Kenyan Chapter of International Commission of Jurists (ICJ). Kenya, an ICC state party, had allowed Bashir in August 2010 to visit drawing strong rebuke from Western nations and rights groups. It also angered the Orange Democratic Movement (ODM) headed by Prime Minister Raila Odinga which shares the coalition government with party National Unity (PNU) led by president Mwai Kibaki.<sup>110</sup>

The decision of the court drew mixed reaction. In the first place, it went against the prevailing opinion of regional and continental bodies to which Kenya is member to, namely AU and IGAD. Noteworthy, African nations had rallied behind Bashir and the African Union (AU) had hitherto issued several resolutions directing its members not to cooperate with the court in apprehending the Sudanese leader. On its part, the IGAD secretariat issued a legal opinion in form of press statement castigating the decision of the Kenya judge opting to enforce the ICC arrest warrants in Kenyan jurisdiction. The opinion stated, inter alia:

“While international law applies in Kenya or at least has relevance in Kenya under the new Constitution, a discriminating approach should be pursued (under art 2.6) in the

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<sup>110</sup> Sudan Tribune, “*Kenya-Sudan relations veering towards a breakdown after court decision on Bashir's arrest*”. <http://www.sudantribune.com/Kenya-Sudan-relations-veering.40851> (Accessed on 18th October, 2012)

reading of international treaties ratified by Kenya. The reading by the judge of this provision (blanket application of the entire Rome Statute to Kenya) produces absurd results. In part, it would have it that the ICC is a Kenyan Court.”<sup>111</sup>

The second cause of conflict between Sudan and Kenya owes to Nairobi’s role and interest in the mediation leading to the signing of the Comprehensive Peace Agreement (CPA) between Sudan and Southern Sudan. It is a fact that Sudan government was not ready for the idea of the Southern Sudan secession and opted for status quo to remain to the extent of prolonging the war to eternity so long as it continued to exploit the oil fields of the Southern part of Sudan. In effect, its agreeing to come to negotiation table was an act that was not accepted by the Khartoum government but rather was a result of other geopolitical factors especially involvement of the US superpower. Kenya’s eventual involvement in the mediation process was as a result of wide consultations at the International sphere such within the UN and without the UN and in erstwhile geopolitical arena.<sup>112</sup>

The Khartoum was not happy indeed with Kenya’s facilitation of implementation of the CPA’s term and condition of self determination by the Southern Sudan’s in undertaking referendum on self independence. Indeed it was President Omar Al-Bashir expressed his emotional opinion and regretted the separation of the two states had a lot in common in terms of historical, geographical, cultural, economic, militarily and political phenomenon. This regret underscores the importance the Khartoum government placed on Juba.<sup>113</sup>

Third, Kenya national interests in Juba soon after signing of CPA did not either go well with Khartoum government. The foreign direct investment by Kenyan multinationals in various sectors in Juba must have caught the Khartoum government napping. Investments in financial and banking sector by Kenya Commercial Bank (KCB), Equity Bank and individual investors

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<sup>111</sup> Mahboub Maalim, “Legal Opinion Relating to the Al Bashir Arrest Warrant Decision”, [www.http://lead.int/index.php?option=com\\_content&view=article&id=402:legal-opin-on-relating-to-the-al-bashir-arrest-warrant-decision&catid=46:executive-secretary&Itemid=123](http://lead.int/index.php?option=com_content&view=article&id=402:legal-opin-on-relating-to-the-al-bashir-arrest-warrant-decision&catid=46:executive-secretary&Itemid=123) (Accessed on 18th October, 2012)

<sup>112</sup> *Supra*, note 19.

<sup>113</sup> Chlopak, Leonard, Schechter & Associates, “*Kenya’s role in brokering peace in Sudan*”, <http://republicofkenya.org/ally/kenyas-role-in-sudan/> (Accessed on 18th October, 2012)

such as contractors in both construction in road and real estate sectors, those in health sectors and investment in education greatly benefitted Kenya economy especially in small scale employment. Kenya people are known to be abrasive and proactive on educational and business ventures this fact is attributed by nature of its British and US style of training and developing human resource capacity building and the essence of exporting its human capital (labour) in Diaspora.<sup>114</sup>

The other important interest by Kenya in Juba is the exploitation of the oil from the Southern Sudan by entering into joint venture in Lamu pipeline running through South Sudan to Uganda. Kenya would derive substantial benefit from this venture by opening up not only the Port of Lamu but also opening up its hinterlands to more investment opportunities similar to that of Kilindini Port in Mombasa.<sup>115</sup>

Fourth, it should be recalled that during the advent of the CPA the Kenyan government was trading with the Juba government at military scale. At one time certain military cache ownership was vehemently disputed by the Kenyan government asserting that the military arsenals subjected to detention by Somali pirates belonged to itself for its own use and was not on transit to Juba. Eventually the social media exposed the goof by highlighting the same military arsenal being transported to Juba at night. So then the Khartoum government's intelligence was pretty aware of the interesting events as they unfolded. Kenya was sympathetic to the Southern Sudan quest for self-determination by supplying arsenal and even offering military training.<sup>116</sup>

Fifth, there is scramble and competition between Nairobi and Khartoum looking at the East and Asia for new trade and investment opportunities. The dynamics of geopolitics following

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<sup>114</sup> Lauren Ploch Blanchard. "*Sudan and South Sudan: Current Issues for Congress and U.S. Policy*", Congressional Research Service (CRS) Report for Congress, <http://www.fas.org/sgp/crs/row/R42774.pdf> (Accessed on 18th October, 2012)

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

emergence of the economies and economic decline of superpowers of US and Euro financial crisis coupled with decline in trade and foreign aid enabled the two African states to rethink and strategize their matrices in terms of who to turn to. The only choice was looking to the East, Asia and Arab States. China's satiable affinity of engaging the two natural resourceful states has indeed created diplomatic relation competition among the two states. Kenya's interest is doing oil business with Southern Sudan while China wants to engage Khartoum to be the sole conduit of the Southern Sudan oil through its port. This political ping-pong game explains why despite heavy bombardment of Southern Sudan on its borders by Khartoum government saw the China failure to blame or warn the Khartoum government to desist from doing so in the UN Secretary Council. Instead it offered to mediate between the two sister states over the subject.<sup>117</sup>

Sixth, the Sudan high expectation of Kenya government to prevail over the heads of the East African Community to unconditionally admit Khartoum in to the economic bloc club enraged Khartoum even after Kenya's President Mwai Kibaki assumed rotational chairmanship after Burundi President Pierre Nkurunziza term ended after two years in the helm of the top job. This quiet diplomatic warfare has seriously seen Khartoum and Nairobi as total strange bedfellows in the regional politics.<sup>118</sup>

Finally, Kenya government breach of the AU direction directing its member state out to implement ICC warrants against any indictment of a sitting head of state least of all the Sudan President Omar Al-Bashir. The Kenyan government as executive is seen b Khartoum as being politically feeble in controlling the judiciary. In Sudan there is fusion between the three arms of the government under the strong man of General Omar Al-Bashir. So the Khartoum government does not/enjoy the rule of law let alone the separation of power

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<sup>117</sup> Kwesi Aning and Delphine Lecoutre. "*China's ventures in Africa*", African Security Review vol. 17.1. p. 39-50.

<sup>118</sup> Sheila Naturinda, "Uganda, Tanzania reject Sudan's EAC entry", available at: <http://www.africareview.com/News/Uganda+and+Tanzania+reject+Sudan+EAC+entry/-/979180/1280738/-/120kimhz/-/index.html> (Accessed on 18th October, 2012)

doctrine which is a key pillar to democracy. No wonder it views Nairobi with utter disgust in that regard.

### **3.4 Causes and Implications of Tottering Conflict Relations**

The diplomatic row between Kenya and Sudan has serious ramifications. Firstly, it has a negative impact on Kenya's economy as Kenya's exports are affected. The Kenya's trade volume with Sudan in terms of export amounts to US Dollars 50 million. This sudden interference in trade resulting from the severing of relationship between the two countries would immensely affect Kenya's Gross Domestic Product (GDP) level.<sup>119</sup>

Secondly, the indictment of President Omar Al-Bashir at this time and period is seriously dangerous as Sudan is a key player on the ongoing peace process in the Horn of Africa. Indeed Kenya must be neutral and friendly to all states and parties involved. This is critical as the two Sudanese governments explore ways on how to agree on the border dispute. As such, Kenya should be an independent broker. The two countries are fighting over the oil rich Abyei region and over the demarcation of it but politically and legally in the International Court of Justice (ICJ).<sup>120</sup>

Thirdly, Sudan has also suffered a setback after the East African Community rejected its membership after Tanzania and Uganda rejected her bid on condition that she does not meet geographical proximity and that the country's leadership is an abuse of human rights, does not practice good governance, abuses democracy and does not respect social justice which are universal acceptable principles of joining the community.<sup>121</sup>

<sup>119</sup> About the Embassy, Kenya Embassy Sudan available at: [http://www.kenembysud.org/index.php?option=com\\_content&view=article&id=34&Itemid=36](http://www.kenembysud.org/index.php?option=com_content&view=article&id=34&Itemid=36) (Accessed on 18th October, 2012)

<sup>120</sup> International Crisis Group "*Sudan: Justice, Peace and the ICC*", Africa Report No. 152 – 17 July 2009.

<sup>121</sup> *Supra*, note 27.

### **3.5 Statements and Threats of Arrest by Malawi and Zambia**

The state of Malawi refused to host the July 6<sup>th</sup>, 2012 Summit citing the presence of Sudan President General Omar Al Bashir wanted by the ICC for war crimes committed in Darfur in the Western part of Sudan. The Vice-President Mr. Khumalo Kachali who delivered the statement on behalf of the Government of Malawi said:

“Much as Malawi has obligations to the AU, it has also other obligations; the Cabinet has decided not to host the Summit.”<sup>122</sup>

The decline following statement from AU to the effect that Malawi had no right as a member state to dictate who could attend the July 6<sup>th</sup> Summit, and that if it insisted on barring Sudan’s President Omar Al-Bashir, it would be moved to the AU headquarters in Addis Ababa, Ethiopia.

Perhaps Malawi’s Cabinet decision to deny Sudan President Omar Al-Bashir visit in its country could be attributed to change in guard in the leadership of Malawi. The newly sworn in President Joyce Banda has steered an independent path for Malawi since stepping in as President in April 2012 after the sudden passing on (death) in office of Bingu wa Mutharika. It should be recalled that at his reign the late President had graciously welcomed Bashir at a regional Summit last year. Therefore, this denial must have taken both Bashir and AU Secretariat aback. The Malawi’s national interest in the geopolitical landscape explains the change of attitude towards the AU and Bashir’s intention to participate in the AU Summit in that country. The newly elected President Joyce Banda was categorical as to the reasons behind her Cabinet decision to disallow AU and Bashir’s participation in the African Union (AU) Summit. She explained that such visit if allowed would be frowned upon by Malawi’s

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<sup>122</sup> Lawrence Mwagwabi, *“Malawi refusal to host the AU summit and its implication in International Law”*, [http://www.standardmedia.co.ke/?articleID=2000060163&pageNo=3&story\\_title=Malawi-refusal-to-host-the-AU-summit-and-its-implication-in-international-law](http://www.standardmedia.co.ke/?articleID=2000060163&pageNo=3&story_title=Malawi-refusal-to-host-the-AU-summit-and-its-implication-in-international-law) (Accessed on 18th October, 2012)

International Donors. It was equally a window of opportunity to repair diplomatic ties with donor states that had been strained by her predecessors.<sup>123</sup>

It is imperative to pinpoint that earlier in the same month (i.e. May, 2012) the International Monetary Fund (IMF) had agreed to a three – year as a package of \$157M ( £ 102M) after the current regime agreed to devalue her currency by one third as the fund had advised. The IMF had followed suit after Britain's Bank of England had agreed to work directly with the Reserve Bank of Malawi on how to apply its monetary and fiscal policies on the implication of the impact of currency devaluation. This was on top of a pledge of £ 30 million to help stabilise the Malawian economy and its ailing health system.<sup>124</sup> Therefore, it can be argued that the ICC bug was an opportune moment which Malawi government exploited to reinstate its diplomatic relation with Britain after both countries severed their diplomatic relations indefinitely last year, 2011.

### **The Zambian reaction**

Most African leaders complain that since its inception in 2002 the ICC has targeted only African leaders. At a 2009 summit in Addis Ababa, Ethiopia, the AU passed a resolution calling on the UN Security Council to defer an ICC indictment against Sudanese president Omar Al-Bashir. At a summit the next year in Kampala, Uganda, the AU instructed its member states not to arrest Al-Bashir and turned down a request by the ICC to establish an office in Addis Ababa to liaise with the AU to discuss its accusation that the ICC was picking on Africa. South Africa, Botswana and now Zambia are the exceptions, all having said they would arrest him if he set foot on their territories.<sup>125</sup>

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<sup>123</sup> [www.guardian.co.uk/world/2012/Jun/03/african-union-Mali-summit-Sudan](http://www.guardian.co.uk/world/2012/Jun/03/african-union-Mali-summit-Sudan) (Accessed on 16th October, 2012)

<sup>124</sup> *Ibid.*

<sup>125</sup> <http://www.iol.co.za/pretorias-news/icc-s-top-prosecutor-denies-targeting-only-war-criminals-in-africa-1.1305063#.UJLMbG9LXfl> (Accessed on 19<sup>th</sup> October, 2012)



It should be noted that Sudan had requested the AU to shift the summit to Ethiopia after President Joyce Banda indicated that Malawi would arrest Al-Bashir if he came for the summit. This also followed equal sentiments by other principled African countries such as South Africa, Botswana, Zambia and Tanzania against Omar Al-Bashir's attendance of the Summit. In addition, the Civil Society in Malawi made a statement backing the Government's decision's to withdraw from Hosting the 19<sup>th</sup> Summit of the Africa Union. In the statement the human rights advocates urged "all African countries and the African Union at large to do the needful by way of being agents of justice and not protect and give immunity to alleged or suspected criminals."<sup>126</sup> This goes to prove that the diplomatic dilemma is not unique to Kenya and, thus, as a country Kenya needs to craft its foreign policy stance cognizant there is a critical mass of countries including Zambia, South Africa, and Botswana who have made it clear that President Omar Al-Bashir is not welcome in their territories.<sup>127</sup>

### **3.6 The AU's and IGAD's Reaction on Indictment of a Sitting Head of State -Sudan's Omar Al-Bashir**

When the High Court of Kenya judge Hon. Mr. N.R.O Ombija delivered the controversial judgment on November 28<sup>th</sup>, 2011 directing the Executive arm of the Kenyan government to facilitate arrest of President Omar Al-Bashir of Sudan should he set foot in Kenya in future, there was quick reaction from IGAD and AU criticizing the decision. The AU and IGAD reaction explains a conflict between international and regional institutions founded on the UN Objectives. It also explains the assertion of AU and IGAD supremacy over any other UN Institution especially the ICC. The AU and IGAD Constitutional membership is founded by

<sup>126</sup> [http://www.issafrika.org/uploads/Al\\_Bashir\\_-\\_AU\\_cancellation\\_-\\_June\\_2012\[3\].pdf](http://www.issafrika.org/uploads/Al_Bashir_-_AU_cancellation_-_June_2012[3].pdf) (Accessed on 19<sup>th</sup> October, 2012)

<sup>127</sup> Civic and Political Space (CPS), Council for Non-Governmental Organization-- (CONGOMA), Human Rights Consultative Committee -- (HRCC), Gender Network (GN), Malawi Economic Justice Network -- (MEJN), Malawi Electoral Support Network -- (MESN), Malawi Health Equity Network -- (MHEN), Human Rights Defenders Forum -- (HRD) and The Governance Platform (TGP)

almost similar member states and as such any pronouncement by one of its distinct entity tends to mimic or reflect the position or stand point of the other entity.<sup>128</sup>

The AU made a number of arguments in support of its position opposing the Kenya's High Court decision of expediting warrant of arrest against Bashir. First, the AU argued that the Vienna Convention on Diplomatic Relations Treaty is in conflict with the Objectives of the International Crimes Act, 2008. As such, the AU in a Summit held in Sirte Libya in July 2009 under the auspices of the Assembly of Heads of States, the AU's highest decision making organ, directed all the AU member states to withhold co-operation with the ICC in respect of the arrest and surrender of President Omar Hassan Ahmad Al- Bashir.<sup>129</sup>

Second, the AU noted that it had repeatedly called upon the United Nations Security Council to invoke Article 16 of the Rome Statute to suspend the warrant of arrest against President Omar Al- Bashir. Thus, Kenya being a member state of the African Union, decisions and resolutions of AU are binding on Kenya and its people.<sup>130</sup>

Third, AU pointed that Kenya being a neighbour to Sudan, declaration of the warrant of arrest against Al-Bashir would be an act of aggression. Further, the execution of the warrant stands to greatly jeopardize or risk the lives and property of an estimated 500,000 Kenyans in Sudan and lead to deterioration of diplomatic relations between the two states.<sup>131</sup>

Finally, the regional organization (AU) highlighted that Kenya being a guarantor to the Comprehensive Peace Agreement (CPA) that ended the civil war in Sudan should not have take such drastic action. In any case, there was possibility that the decision of the court would undermine the impartiality of Kenya as the lead mediator and thereby precipitate instability in

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<sup>128</sup> *Ibid.*

<sup>129</sup> Panapress "*AU reaffirms Al-Bashir's immunity, urges Kenya, Sudan to preserve relations*" <http://www.panapress.com/AU-reaffirms-Al-Bashir-s-immunity,-urges-Kenya,-Sudan-to-preserve-relationships-12-808503-20-lang2-index.html> (Accessed on 18th October, 2012)

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

Sudan. AU argued that Kenya should have maintained the character of neutrality in the Sudan political question.<sup>132</sup>

### **3.7 The Arab League's Counter-Reaction of President Omar Al-Bashir's ICC's**

#### **Indictment**

On 4th March 2009, the International Criminal Court issued an arrest warrant for Al-Bashir on counts of war crimes and crimes against humanity, but ruled that there was insufficient evidence to prosecute him for genocide.<sup>133</sup> However, on 12 July 2010, after a lengthy appeal by the prosecution, the Court held that there was indeed sufficient evidence for charges of genocide to be brought and issued a second warrant containing three separate counts. The court's decision was opposed by the African Union, League of Arab States, Non-Aligned Movement, and the governments of Russia and China. The Arab League Secretary-General Amb. Moussa stated that the organization was "not convinced that the steps taken by the criminal court were well considered."<sup>134</sup>

In addition, the governments of individual Arab countries went on to issue statements of their own, with Egypt and Yemen expressing support for Bashir, and Iran's foreign prime minister Manouchehr Mottaki saying it viewed the ICC prosecutor's move as "unpleasant".<sup>135</sup> Arab leaders also expressed concerns that failing to thwart the ICC move against Bashir may encourage more foreign intervention in their affairs. Diplomats in New York stated that they expect the Arab League and the AU's Peace and Security Council to call on the Security Council to block any ICC moves in the interests of bringing peace to Darfur, devastated by the five-year-old conflict.

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<sup>132</sup> *Ibid.*

<sup>133</sup> International Criminal Court (4 March 2009) Warrant of Arrest for Omar Hassan Ahmad Al Bashir

<sup>134</sup> *Supra*, note 1.

<sup>135</sup> [http://archive2.globalsolutions.org/issues/sudans\\_president\\_omar\\_hassan\\_al\\_bashir\\_indicted\\_icc\\_what\\_s\\_next](http://archive2.globalsolutions.org/issues/sudans_president_omar_hassan_al_bashir_indicted_icc_what_s_next) (accessed on 20th October 2012)

Many Arabs and Muslims accuse Western powers of launching a war on their faith in the name of human rights while ignoring what they see as war crimes committed by Israel against the Palestinians and by U.S. troops in Iraq.<sup>136</sup>

### **3.8 Disentangling from the Rome Statute's Jurisdiction curse –vs- Expansion of the AU's Criminal Jurisdiction**

The AU Charter does not have concurrent jurisdiction with that of the ICC which is purely based on prosecution of crimes against humanity. Essentially the AU mandate relates to tackling of any disputes germane to matters relating to matters that do not invoke interference of members' sovereignty. As such, matters relating to crimes within each member state exclusively left to that state to handle. However, the ICC is perhaps the most innovative and exciting development in international law since the creation of the United Nations. The Statute is one of the most complex International Instruments ever negotiated. a sophisticated web of highly technical provisions drawn from comparative criminal law combined with a series of political propositions that touch the very heart of state concerns with their own sovereignty. Without any doubt the creation is the result of the human rights agenda that has steadily taken centre stage within the United Nations since Article 1 of its Charter proclaimed the provision of human rights to be one of its purposes.<sup>137</sup>

The jurisdiction and admissibility of the ICC seem to be the thorn in the AU's flesh. The AU is alive to the fact that the nature of the jurisdiction of ICC is such that the jurisdiction that the International Community has accepted for its new court is narrower than that individual states are entitled to exercise with respect to the same crimes. Moreover, the drafters of the Rome Statute sought to limit the ability of the Court to try cases over which it has, at least in theory, jurisdiction. Consequently, they have required that the state's own courts get the first

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<sup>136</sup> <http://www.france24.com/en/20080719-arab-league-back-sudanese-president-sudan-arab-league> (accessed on 20th October 2012)

<sup>137</sup> William A. Schabas, *An Introduction to the International Criminal Court* Chapter 1 P. 20 Para. 2

bite at the apple. Only when the domestic justice system is 'unwilling' to prosecute can the International Court take over. This is what the Statute refers to as admissibility. Here the emphasis by the AU seems to be the interpretation of the jurisdiction of the ICC vis-à-vis each individual state and by extension a regional organ having concurrent jurisdiction. The AU has held a Summit in Addis Ababa in Ethiopia where the head of states declared of their intention to have its mandate enlarged to encapsulate 'criminal jurisdiction' similar to ICC but restricted only to its member states.<sup>133</sup> This therefore poses two legal questions: first what happens to those of its members who are adherent to International Law and would at some time like to remain members of the Rome Statute?

Second, what become of the ICC warrants of arrest against Al-Bashir? Does the act of enlarging its mandate to include criminal jurisdiction negate ICC jurisdiction or does it suspend or annul the warrants? Finally, what happens when the UN Security Council gives jurisdiction to the ICC to try some offences in its court? Will this be a conflict between the AU Charter and the parent organization the UN Charter? Which one prevails?

These and many more other jurisprudential question will arise when the AU implements its resolution. However it is important to argue that whatever the direction the AU takes on enhancement of its criminal jurisdiction, in its Charter the UN is vested with overall powers to intervene and request the ICC to intervene and prosecute crimes against humanity committed in certain states. In the circumstances, a state does not have to be a signatory to the Rome Statute for UN to direct for its prosecution.<sup>139</sup>

The UN in so acting is typically directed by the Principles and Doctrines of both the International Law as well as the International Relations. The other limitations that the AU may confront include the political will by African dictators to prosecute one of their own. AU

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<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

will also be limited by the inadequacy of resources needed to mount credible trial. There are far-reaching implications of diplomatic furore that is likely to occur as well as neutrality of prosecutors and judges given the overriding issues of state interest. All in all the ICC warrants of arrest has been fired towards Khartoum and the only logical move is for it to turn in its President for trial.

### **3.9 Conclusion**

This Chapter has explored the factual and thematic issues surrounding the diplomatic conflict between Kenya and Sudan which resulted from the decision by the Kenyan court upholding the Rome Statute to the effect that Kenyan government was compelled to arrest and enforce the decision of the ICC if the occasion arose. One issue that emerges is that this conflict is unique in that, for the first time, it does not touch on boundary or any other doctrinal issue but rather it turns to questions of interpretation and enforcement of international law by different institutions of one country against the institutions of another country in the face of diplomatic relations between the countries. It emerges that the conflict between Kenya and Sudan does not appeal to conventional solutions and requires a rethinks as to the available modes and mechanism of resolving diplomatic disputes.

Importantly, the Chapter established that the main cause of the diplomatic dispute between Kenya and Sudan is mainly poor and inefficient enforcement mechanisms of the ICC decisions as captured under the Rome Statute. Thus, it may be necessary to explore the option of amending the Statute to avoid any such future diplomatic disputes. The next Chapter will explore the foreign policy and international law and policy issues that are related to the Kenya-Sudan dispute and the relevant case studies that may provide guidance as to the applicable options for resolving or dealing with the issue in short term and long-term.

## **PART II: CRITICAL ANALYSIS**

### **CHAPTER FOUR**

#### **EMERGING ISSUES AND THE IMPLICATION OF DOMESTICATION OF INTERNATIONAL LAW IN KENYAN CONSTITUTION**

##### **4.0 Introduction**

This Chapter discusses the issues emerging from the study, namely, the implication of domestication of International Law in Kenyan Constitution especially the Rome Statute, the emergence of Constitutional power conflict between judicial pronouncements affecting the executive decisions supremacy and whether a head of a state enjoys immunity for core crimes as defined in the Rome Statute. In addition, Chapter Four compares the indictment by the ICC of seating presidents of States: General Omar Al-Bashir of Sudan, Pinochet of Chile, Gaddafi of Libya, Charles Taylor of Liberia and Laurent Gbagbo of Ivory Coast. Finally, the doctrine of state immunity which borders on diplomatic immunity is discussed with a focus on international relations and exceptions from state immunity for core crimes.

The objective of this chapter is to still the key points made in the study and comment on the outstanding points towards understanding the nature of Kenya's foreign policy towards Eastern Africa States. Further, the chapter will help explore the available conflict management theories and strategies available in resolving the Kenya-Sudan diplomatic debacle and how they interface with the dynamics of international criminal justice as outlines in ICC jurisprudence and the provisions of the Rome Statute with respect to the indictment of a seating president.

## **4.1 Emerging Issues**

### **4.1.1 The Implication of Domestication of International Law in the Kenyan Constitution (The Rome Statute)**

Mwagiru argues that the new Constitution has reconfigured Kenya's institutions across board. First, it has created a scientific revolution in Kenya's Treaty practice. For the first time, Kenya's treaty's treaty practice is enshrined in the constitution marking a shift from the old dualist practice to monism.<sup>140</sup>

Mwagiru emphasizes the importance of this new *gestalt* switch by presenting plausible argument as to its significance for Kenya's domestic legal relations, and its external diplomatic and legal relations. He argues that without the system of treaties and agreement pervading international relation, the world would be more impoverished. Treaties are an increasingly important feature of international and regional relations. They are an important aspect of diplomacy and a notable feature of regional diplomacy. However, he argues that treaties that promote the system of human rights are probably the most important treaty regime given the repercussions of not obeying human rights such as holocausts and genocide. He castigates world governments for trying their level best not to be bound by this regime. In his view, this explains the war of words between several interested parties on the domestication and application of the Rome Statute (ICC) in Kenya.<sup>141</sup>

Essentially, practices of individual states define how these states will relate not only to international law generally, but with these treaties they have accepted to be bound by, that is, these treaties that the sates have ratified. In most cases treaty practice is often spelt out in the

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<sup>140</sup> Mwagiru M., "From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice", Journal of Language, Technology & Entrepreneurship in Africa Vol. 3 No. 1, p. 144-155.

<sup>141</sup> *Ibid.*



Constitution of the country. All states have a treaty practice, although there are states that while having some kind of treaty practice have not enshrined it in their Constitutions.<sup>142</sup>

Treaty practice is one part of the more general problem of how International Law and Municipal Law interact with each other, and what their relationship should be. Thus, it is important to understand how treaty regime was incorporated in the second revolutionary Constitution in Kenya. Mwagiru discusses the two main schools of thought that exist with respect to treaty practice, namely, the monist and the dualist school. The dualist school posits that treaties do not become automatically binding on states unless they have first been transformed into municipal law.<sup>143</sup>

The inimical methodology of transformation requires that the legislature which makes law domestically must, first of all, transform treaties into municipal law. The transformation of treaties into municipal law entails clothing them domestically by enacting them through the mechanism available for enacting the Statutes of the country. Thus, in Kenya, for example, the Rome Statute was transformed into the International Crimes Act, 2008.<sup>144</sup>

Mwagiru brings into perspective the dynamics of domestication in Kenya treaty process. He argues that the language usage of 'domestication' posed a further far reaching problem for International Law. It meant that for International law to be applicable domestically, it had to, first of all, be treated in the same way as Municipal Law was treated in the political domain of the state. However, in some states, the international law is not treated with respect, and hence political feel that they can change it, and even disregard it when it does not serve their purposes.<sup>145</sup>

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<sup>142</sup> J. Craig Barker, "*Mechanisms to Create and Support Conventions, Treaties and Other Responses*," <http://www.colss.net/EolssSampleChapters/C14/E1-44-01/E1-44-01-TXT-C2.aspx> (Accessed on 20th October, 2012).

<sup>143</sup> Mwagiru, *Supra*.

<sup>144</sup> *Ibid*.

<sup>145</sup> *Ibid*.

Thus, in this thesis, it is argued that after realizing that Kenya might have goofed in subscribing to the Rome Statute, Kenyan politicians triggered by the ICC naming of the six (6) of the so called the Ocampo six threatened to vote to revoke Kenya's ratification of the treaty. In essence, they were threatening pulling Kenya out of the jurisdiction of the Rome Statute and, in effect, ICC. The process was triggered by the PNU side of the government which embarked on the 'shuttle diplomacy' led by the Vice-President H.E Kalonzo Musyoka trotting globally from key African states such as Libya, South Africa, Uganda, Nigeria, the AU and the UN Security Council.<sup>146</sup> However, the process did not bear fruits as the Council categorically pointed out Kenya's breach of procedural protocol in that rather than exhausting the procedural provisions contained in the Rome Statute on 'deferral' of the Kenyan ICC case as it was incompetent and superfluous to seek the intervention of the UN Security Council against an institution with clear jurisdictional mandate and with its own rules of procedure such as ICC.<sup>147</sup>

Mwagiru commenting on this difficulty states:

'The plea of 'domestication' in this respect was that the universalism of International Law had no space in municipal context, and could be done away with through domestic frameworks. This explains the responses that have met the issuing of warrants for the International Criminal Court. The idea is that such warrants should not be issued because the Statute of the ICC has not been 'domesticated' meaning subjecting it to the domestic political processes which often champion impunity. The new Constitution of Kenya, by making Kenya a monist state through Article 2 (5) that provides that the general rules of International Law shall form part of the Laws of Kenya; and especially through Article 2 (6) that provides that any Treaty or Convention ratified by Kenya shall form part of the Laws of Kenya effectively kills the doctrine the dangerous doctrine of domestication'.<sup>148</sup>

That the whole essence of 'domestication' is conceptualized in the context of the domestic politics can be illustrated from recent experiences of Kenya. In Kenya electoral violence of

<sup>146</sup> UN Council shelves Kenya request to defer ICC case, Reuters, 9 April 2011, <http://af.reuters.com/article/topNews/idAF10E73801120110409>, (Accessed On 21st October, 2012)

<sup>147</sup> East African Center for Law & Justice Brief, "Kenya's Shuttle Diplomacy Challenges ICC Plan": <http://www.eaclj.org/component/content/article/6-in-the-news/46-kenyas-shuttle-diplomacy-challenges-icc-plan.html>

(Accessed on 21st October, 2012).

<sup>148</sup> Mwagiru, *supra*.

2007-8, it was acknowledged that individuals who were responsible for that election violence and deaths that accompanied it should not enjoy the impunity that they had enjoyed in the past.<sup>149</sup>

The fight against impunity for crimes against international law has been codified in the Rome Statute of the International Criminal Court. Kenya has ratified that Statute. It also passed the International Crimes Act, 2008 implementing the Rome Statute, which requires state parties to “ensure that there are procedures available under their national law for all of the forms of co-operation...”<sup>150</sup>

However, because of the trend of domestic politics, and the status of those involved in the violence in Kenya, the thinking emerged that Parliament should enact a local Statute creating a Tribunal to try locally those involved in the planning and commission of the crimes against humanity. In the debate that followed, there was a substantial group of politicians who supported the local tribunal. The thinking was that with such ‘domestication’ of the trial process, they would be able to escape from the rigours of International Criminal Law, and would even enjoy continued impunity. Parliament did not pass the bill on the local tribunal that was being championed.<sup>151</sup> Many MPs took the view that ‘domesticating’ the trial aspects would encourage non-compliance with international criminal law and that it would do so on the basis of domestic political configuration.

#### **4.1.2 The Emergence of Constitutional Power Conflict between Judicial Pronouncements Affecting the Executive Decisions Supremacy**

Constitutions, as widely acknowledged, are written to control and contain political regimes. Perhaps the genius of Kenyan 2<sup>nd</sup> Constitutional system inheres in it being the fruit of two

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<sup>149</sup> Kenya’s third periodic report (state report) under the ICCPR, [http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.KEN.3\\_en.doc](http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.KEN.3_en.doc); (Accessed On 21st October, 2012)

<sup>150</sup> *Ibid.*

<sup>151</sup> Mwangi, *supra*.

such reactions – the perceived abuse of power by the Executive via the Kenya African National Union (KANU) and absence of Judicial and Parliamentary power at that time.<sup>152</sup>

The allocation of functions between the three branches of government is usually referred to as the separation of powers. This clear over-simplification of political reality is counter posed by the rival notion of checks and balances that the framers also embraced. For instance, the President obviously shares in the legislative process by vetoing legislation they share in the judicial process by granting pardons. Parliament and Senate may impeach officials and direct agencies in the Executive fashion. Courts may rewrite or negate Statutes. The system of checks and balances promotes liberty through each agency acting as a watchdog guarding the others. The intention is not to create efficiency but to maximize freedom by minimizing unchecked power.<sup>153</sup>

Still, the separation of powers notion comes into play when one arm of the government moves into what has been held to be core of another branch's function -- a sort of extension of the Court's own continued unwillingness to extend itself into the executive's foreign policy and defence role or the legislature's monopoly over legislation. The conflicting position taken by the two arms of government one by the High Court of Kenya decision enforcing arrest warrants and another by the Executive to the extent of issuing a statement by the Foreign Minister Hon. Moses Wetangula that he did not recognize the High Court decision and, as such, Khartoum should ignore it. The legal and diplomatic situation is murky but in practice these actions have disarmed critics of such diplomacy.<sup>154</sup>

On how to disentangle the application of the Separation of power doctrine Mvagiru says,

“The adoption of the monist treaty practice will indeed sharpen the separation of powers in Kenya. In this approach, the role of each of the three powers in Kenya will

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<sup>152</sup> *Ibid.*

<sup>153</sup> Ralf Dahrendorf, *A confusion of powers: Politics and the rule of law* (1977) 40 *Modern Law Review* 1, 11–12

<sup>154</sup> Malcolm M. Feeley and Samuel Krislov, *Library of Congress cataloguing in publication Data*, 1985 Chap 2, President and Congress Separation of Power and the Balance of Authority P. 79-81

become even better defined. The Executive will negotiate treaties; Parliament will debate about them, and make voting decisions about whether they should be ratified. And following that decision making, and only following it, the Executive will ratify the treaties as it is required to do by the laws and practices of treaty law and diplomacy. This will without doubt enhance significantly the diplomacy of treaty practice in Kenya. Since the Constitution recognizes a ratified treaty as being part of the Laws of Kenya, the old framework of transformation, or its various devices such as 'domestication' will no longer be a required treaty practice of the Republic. Once the treaties have become law in this way, the court will interpret them as is their judicial function... This is why, given the monist framework that has now been put in the books in Kenya, judges will require to be well trained in international Law if they are to discharge this Constitutional duty properly."<sup>155</sup>

The above exposition is clearly captured by the landmark decision by of the High Court Justice Ombija who clearly applied the principles of the International Law in their entirety at the same time citing judicial precedent or previous cases and authorities all over the world in particular where key political figures were found guilty of violation of fundamental rights of individual fellow citizens. The learned judge in a nutshell said,

"..... Applying the foregoing International Law, principles to the facts of this case, the High Court in Kenya clearly has jurisdiction not only to issue warrant of arrest against any person, irrespective of his status, if he has committed a crime under the Rome Statute, under the principle of universal jurisdiction, but also to enforce the warrants should the Registrar of the International Criminal court issue one."<sup>156</sup>

This case was an unprecedented watershed in Kenyan Constitutional history which highlighted a case of 'government by judiciary' or "judicial supremacy" yet even then there was never any genuine likelihood that the Court would in the final analysis effectively dominate the Executive and the Legislative branches. When all is said and done, the judiciary led by the Supreme Court of Kenya does not possess the political power, the arsenal of potent weapons of government, the tools of the publicity media, or the strategic position in the government or in the body politic generally enjoyed by the other two branches and necessary to wield any significant "supremacy" as against the other branches of government.<sup>157</sup>

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<sup>155</sup> Mwangi, *Dualism to Monism* P. 154 Para. 2

<sup>156</sup> *Kenya Section of International Commission of Jurists -vs- Paris A . Ltd & another (2011) eKLR* at Page 19

<sup>157</sup> Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton University Press, Princeton, New Jersey, 2009), p. 161.

#### **4.1.3 Whether a Head of a State Enjoys Immunity for Core Crime as Defined in the Rome Statute**

'Core crime' is used to denote genocide, crimes against humanity and war crimes except crimes against aggression. State immunity is the right not to be submitted to the exercise of foreign jurisdiction. Its purpose, in general, is to safeguard the ability of states to discharge their functions without foreign interference, as well as to protect their functions without foreign interference, as well as to protect their dignity. Moreover, the area of state immunity which borders on diplomatic immunity also serves to facilitate and maintain international relations. As is indicated by the term 'state immunity' itself, primary tenant and beneficiary of this right is the state. This is reflected in the fact that immunity may be waived only by a state, never by an individual. However, if state immunity was strictly restricted to state as legal entities, no effective protection would be achieved. Rather, it would be very easy to circumvent the law by simply suing or charging certain state officials instead of the state itself.<sup>158</sup>

Therefore, state immunity, in a derivative form also covers those individuals who act on behalf of the state. This derivative state immunity exists in two different forms. First, in most cases the individual (incumbent) or former) state official is protected only with respect to official conduct. The person as such is not protected by immunity *ratione materiae*. In terms of duration, this immunity only ends if the state itself ceases to exist. In contrast, the second kind of derivative state immunity, immunity *ratione personae* is in principle, all encompassing in that it attaches to the person as such: any excuse of (compulsory) foreign jurisdiction, regardless of the conduct in question, is incompatible with this immunity. It is

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<sup>158</sup> Steffen Wirth, "Immunity for Core Crimes? The ICJ's Judgement in the Congo vs. Belgium", EJIL (2002) Vol. 13 No. 4, 877-893.

available only for the highest state officials (including heads of states) who are the most important guarantees of state's internal stability and external reliability.<sup>159</sup>

#### **4.1.4 Exceptions from State Immunity for Core Crimes**

The suggestion that a head of state can invoke some argument of immunity was laid to rest at Nuremberg where the allies affirmed their determination to prosecute the Nazis for war crimes. In October 1945, indictments were served on twenty four Nazi leaders, and their trial – known as the trial of the major war criminals – began the following month. It concluded a year later, with the conviction of nineteen defendants and the position of sentence dealt in twelve cases.<sup>160</sup> The principle repeated in Article IV of the Genocide Convention, and once again reaffirmed in Article 27 of the Rome Statute that stipulates:

“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular official capacity as a head of state or Government, a member of a Government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, on itself constitute a ground for reduction of a sentence.”<sup>161</sup>

And as to whether immunities or Special Procedural Rules accorded by national or international law bar the ICC from exercising its jurisdiction over such a person. The issue has now been settled by Article 27 (2) that stipulates,

“Immunities or Special Procedural Rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person.”<sup>162</sup>

This therefore means that once state parties to the Rome Statute, with regard to the application of this Statute, waived any immunity by accepting its Article 27.

It is on this basis that the Ocampo Four especially the presidential candidates Deputy Prime Minister Hon. Uhuru Kenyatta and Eldoret North Member of Parliament William Ruto

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<sup>159</sup> *Ibid.*

<sup>160</sup> Richard Arens. “*Nuremberg and Group Prosecution*”. Washington University Law Review, Vol. 1951. Issue 3, p. 329-357.

<sup>161</sup> Article 27 of the Rome Statute.

<sup>162</sup> *Ibid.*

should be debarred from running for presidency in Kenya, because of the likelihood of one of them clinching the presidency in the upcoming general election. This act will not augur well in diplomatic circles where the likelihood of the head of state being indicted would curtail his/her travel to foreign mission and, by extension the execution of key International Treaties.

Reference of Article 143 (4) clearly negates sub-Section 1 of the same Article that offered legal protection of a sitting head of state for a crime which the president may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.<sup>165</sup>

#### **4.1.4.1 Pinochet's Case**

The former head of State of Chile, General Augusto Pinochet Duarte ruled from 11 September 1973 until 11<sup>th</sup> March 1990. He was accused of having committed various crimes against humanity including torture, hostage taking and murder for which it was alleged that he was knowingly responsible for. In October 1998, while Pinochet was in Britain receiving medical treatment, the judicial authorities in Spain issued international warrants for his arrest to enable his extradition to Spain to face those alleged offences<sup>164</sup>

The Spanish Supreme Court held that the Courts of Spain have jurisdiction to try him. Pursuant to those international warrants on 16<sup>th</sup> and 23<sup>rd</sup> October 1998. Subsequently, the Metropolitan Stipendiary Magistrates issued two provisional warrants for his arrest, under Section 8 (1) (b) of the Extradition Act of 1989 and Pinochet was arrested.<sup>165</sup>

He immediately applied to the Queen's Bench Divisional Court to quash the warrants. The warrant of 16<sup>th</sup> October was quashed. Further, the second warrant of 23<sup>rd</sup> October 1998 was quashed by an Order of the Divisional Court of the Queen's Bench Division. However, the quashing of the second warrant was stayed to enable an appeal to be taken to the House of the

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<sup>163</sup> *Ibid*

<sup>164</sup> Michael Byers, "The Law and Politics of the Pinochet Case", Duke Journal of Comparative & International Law Vol. 10 (2000), p.415-441.

<sup>165</sup> *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 3 W.L.R. 1456 (H.L. 1998)



Lords on the question as to “the proper interpretation and scope of the immunity enjoyed by a former head of state from the arrest and extradition proceedings in the United Kingdom (U.K) in respect of acts committed while he was head of state”. The Court’s final decision was that indeed Pinochet could not enjoy any protection of the law (immunity) on crimes against humanity among others. The House of Lords restored the second warrant of 23<sup>rd</sup> October 1998.<sup>166</sup>

This case is distinct from Al Bashir case because the ICC warrants of arrest are being issued during the pendency of his presidency. However, the emphasis today is on the provision of Article 27 of the Rome Statute that categorically declares that no head of state would enjoy any immunity or protection of either domestic law or international law or crimes against humanity committed while in office.

#### **4.1.4.2 Gaddafi’s Case**

Muammar Muhammad Abu Minyar al-Gaddafi, commonly known as Muammar Gaddafi or Colonel Gaddafi was the ruler of the Libyan Arab Republic from 1969 to 1977 and then the “Brother Leader” of the Libyan Arab Jamahiriya from 1977 to 2011. Gaddafi seized power in a bloodless military coup from King Idris in 1969 and served as the country’s head of state until 1977, when he stepped down from his official executive role as Chairman of the Revolutionary Command Council of Libya and claimed subsequently to be merely a symbolic figure head styling himself as “Leader of the Revolution.” In 2008, a meeting of traditional African rulers bestowed on him the title “King of Kings”. A leading advocate for a United States of Africa, he served as Chairperson of the African Union (AU) from 2 February 2009 to 31 January 2010.<sup>167</sup>

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<sup>166</sup> *Ibid.*

<sup>167</sup> Michael Bochenek, “ICC issues arrest warrant for al-Gaddafi”, available at: <http://www.amnesty.org/en/news-and-updates/icc-issues-arrest-warrant-al-gaddafi-2011-06-27> (accessed on 20/10/2012).

Gaddafi replaced the Libyan Constitution of 1951 with laws based on the political ideology he had formulated, which he called the Third International Theory and published them in *The Green Book*. After establishing the *Jamuhiriya* ("state of the masses") system in 1977, he officially stepped down from power and after that time held a largely symbolic role within the country's official governance structure.<sup>168</sup>

In February 2011, following revolutions in neighbouring Egypt and Tunisia, protests against Gaddafi's rule began. These escalated into an uprising that spread across the country, with the forces opposing Gaddafi establishing a government, based in Benghazi, named the National Transitional Council (NTC). This act led to a civil war, which precipitated military intervention by a NATO-led coalition to enforce a UN Security Council Resolution 1973 calling for a no-fly zone and protection of civilians in Libya. The assets of Gaddafi and his family were frozen, and both Interpol and the International Criminal Court issued arrest warrants on 27 June for Gaddafi, his son Saif al-Islam, and his brother-in-law Abdullah Senussi, concerning crimes against humanity.<sup>169</sup> However, opinion was divided on the merits and demerits of this decision. Amnesty International argued thus in support of the warrants:

"Justice must be delivered to the victims of serious human rights abuses and violations of international humanitarian law committed in Libya during and following the brutal repression of pro-reform protests."<sup>170</sup>

Others argued that the request by chief prosecutor Luis Moreno-Ocampo that arrest warrants for war crimes be issued against Colonel Muammar Gaddafi, his son Saif al-Islam, and the head of Libya's intelligence service, Abdullah al-Senussi, only confirms the role of the International Criminal Court as a tool of the imperialist powers. Thus, it was argued that the warrants were, in effect, being issued on behalf of the United States, Britain and France, the chief architects of the bombardment of Libya. In effect, the act of Moreno-Ocampo gathering evidence against the three accused was seen as aimed at preventing any possibility of a

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<sup>168</sup> *Ibid.*

<sup>169</sup> <http://www.independent.co.uk/news/world/africa/uk-revokes-muammar-gaddefis-immunity-2227147.html>

<sup>170</sup> Bochenek, *supra*.

negotiated end to the war, and to further isolate Gaddafi and pave the way for regime-change.<sup>171</sup>

#### 4.1.4.3 Charles Taylor's Case

Charles McArthur Ghankay Taylor is a Liberian former politician who was the 22<sup>nd</sup> President of Liberia, serving from 2 August 1997 until his resignation on 11 August 2003. Born in Arthington, Montserrado County, Liberia, Taylor earned a degree at Bentley College in the United States before returning to Liberia to work in the government. After being removed for embezzlement, he eventually arrived in Libya, where he was trained as a guerilla fighter. He returned to Liberia in 1989 as the head of a Libyan-backed resistance group, the National Patriotic Front of Liberia, to overthrow the Samuel Doe regime, initiating the First Liberian Civil War. Following Doe's execution, Taylor gained control of a large portion of the country and became one of the most prominent warlords in Africa. Following a peace deal that ended the war, Taylor coerced the population into electing him president in the 1997 general election.<sup>172</sup>

During his term of office, Taylor was accused of war crimes and crimes against humanity as a result of his involvement in the Sierra Leone Civil War which lasted between 1991 and 2002.<sup>173</sup> Domestically, opposition to his regime grew, culminating in the outbreak of the Second Liberian Civil War which lasted from 1999 to 2003.<sup>174</sup> By 2003, he had lost control of much of the countryside and was formally indicted by the Special Court for Sierra Leone. That year, he resigned as a result of growing international pressure and went into exile in Nigeria. In 2006, the newly elected President Ellen Johnson Sirleaf formally

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<sup>171</sup> International Committee of the Fourth International (ICFI), "The International Criminal Court and Gaddafi. available at: <http://www.wsws.org/articles/2011/may2011/pers-m18.shtml> (accessed on 20/10/2012).

<sup>172</sup> Who is Charles Taylor? <http://www.charlestaylortrial.org/trial-background/who-is-charles-taylor> (Accessed on 20th October, 2012).

<sup>173</sup> Diplomats Handbook, Sierra Leone, "*Sierra Leone: Related International Engagement Ends a War, Helps Consolidate a Fragile Democracy*". [http://www.diplomatshandbook.org/pdf/Handbook\\_SierraLeone.pdf](http://www.diplomatshandbook.org/pdf/Handbook_SierraLeone.pdf) (Accessed on 20th October, 2012).

<sup>174</sup> Republic of Liberia, Truth, Justice and Reconciliation Commission, Final Report, Volume II: Consolidated Final Report, <http://trcofliberia.org/resources/reports/final/trc-of-liberia-final-report-volume-ii.pdf> (Accessed on 20th October, 2012).

requested his extradition, after which he was detained by UN authorities in Sierra Leone and then at the Penitentiary Institution Haaglanden in The Hague during trial. He was found guilty in April 2012 of all eleven charges levied by the Special Court, including terror, murder and rape. In May he was sentenced to 50 years in prison. Reading the sentencing statement, Presiding Judge Richard Lussick said:

"The accused has been found responsible for aiding and abetting as well as planning some of the most heinous and brutal crimes recorded in human history."<sup>175</sup>

On 16<sup>th</sup> June 2006, the United Nations Security Council agreed unanimously on the extraditing of Taylor to The Hague where he was taken into custody and held in the detention centre of the International Criminal Court. Taylor's trial commenced on 7<sup>th</sup> January 2008 whereby the Chief Prosecutor alleged that a key insider witness who testified against Taylor went into hiding after being threatened for giving evidence against Taylor. Furthermore, Joseph "Zigzag" Marzah, a former military commander, testified that Charles Taylor celebrated his new-found status during the civil war by ordering human sacrifice, including the killings of Taylor's opponents and all es that were perceived to have betrayed Taylor, and by having a pregnant woman buried alive in sand. Marzah also accused Taylor of forcing cannibalism on his soldiers in order to terrorize their enemies.<sup>176</sup>

The verdict was announced in The Hague on 26 April 2012. It was unanimously ruled that Taylor was guilty of all 11 counts of "aiding and abetting" war crimes and crimes against humanity. Taylor was convicted of acts of terrorism, murder, violence to life, health and physical or mental well-being of persons, in particular cruel treatment, conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, enslavement, pillage and other inhumane acts.<sup>177</sup>

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<sup>175</sup> The Prosecutor vs. Charles Gnankay Taylor, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (Accessed on 20<sup>th</sup> October, 2012)

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

#### **4.1.4.4 Laurent Gbagbo's Case**

In 2010, Côte d'Ivoire had a presidential election that saw Gbagbo face off with Alassane Ouattara. Gbagbo, whose mandate had expired in 2005, had delayed the election several times. Following the 2010 presidential election in Côte d'Ivoire, the incumbent President Laurent Gbagbo challenged the vote count, alleged fraud and election malpractices. On 28 November 2010, the second round of the presidential election was held. Four days later the Ivorian Election Commission (CEI) declared Alassane Ouattara the winner with 54.1% of the vote.

Gbagbo's party complained of fraud and ordered that votes from nine regions be annulled, but the claims were disputed by the Ivorian Electoral Commission and international election observers. The Constitutional Council, in accordance with its legal powers in article 94 of the Ivorian Constitution nullified the CEI's declaration based on alleged voting fraud, and excluded votes from nine northern areas. The Constitutional Council concluded that without these votes Gbagbo won with 51% of the remaining vote. The constitutional restriction on Presidents serving more than ten years was not addressed. With a significant portion of the country's vote nullified, especially in areas where Ouattara polled well, tensions mounted in the country. Gbagbo ordered the army to close the borders and foreign news organizations were banned from broadcasting from within the country.

In addition, Gbagbo called for the annulment of results from nine of the country's regions. Alassane Ouattara was declared the winner and was recognized as such by election observers, the international community, the African Union (AU), and the Economic Community of West African States. However, the Constitutional Council, which according to Article 94 of the Ivorian Constitution both determines disputes in and proclaims the results of Presidential elections, declared that Gbagbo had won and he was sworn in as president but international community refused to recognise him.

President Ouattara also took a parallel oath of office, based on an earlier pronouncement by the CEI that he won the election. The international community, including the African Union, recognized Ouattara as the duly elected president and called for Gbagbo to respect the will of the people. ECOWAS, the Economic Community of West African States, also recognized Ouattara and demanded Gbagbo cede power. Gbagbo responded by launching ethnic attacks on northerners living in Abidjan with his army made up partly of Liberian mercenaries.

ECOWAS countries led by Nigeria demanded Gbagbo step down and the EU began imposing sanctions and freezing assets, Gbagbo demanded foreign troops in particular the UN peace keepers and French troops to leave the country. Leaders of the Forces Nouvelles (former rebels) asserted that Gbagbo was not the Head of State and could not make such a request and also asserted that the demand was a part of a plan to commit genocide on ethnicities from the north of the country, as stated by Gbagbo's Minister of Youth and Employment.<sup>178</sup>

On 6 April 2011, forces loyal to Ouattara moved to seize Gbagbo at his residence in Abidjan after failed negotiations to end the presidential succession crisis. The UN had insisted that he be arrested, judged and tried for crimes against humanity during his term and since the election of Ouattara. On the afternoon of 11 April 2011 Gbagbo was arrested.

In October 2011, the International Criminal Court opened an investigation into acts of violence committed during the conflict after the election, and ICC chief prosecutor Luis Moreno Ocampo visited the country. The ICC formally issued an arrest warrant for Gbagbo, charging him with four counts of crimes against humanity – murder, rape and other forms of sexual violence, persecution and "other inhuman acts", allegedly committed between 16<sup>th</sup> December 2010 and 12<sup>th</sup> April 2011. The ICC's confirmation of charges hearing for Gbagbo was scheduled for June 18, 2012, but was postponed to August 13, 2012, to give his defense

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<sup>178</sup> Background information for the case *The Prosecutor v. Laurent Gbagbo*. <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/icc02110111/background%20information/ginfo?lan=en-GB> (Accessed on 20th October, 2012).

team more time to prepare. The hearing was then postponed indefinitely, citing concerns over Gbagbo's health.<sup>179</sup>

#### **4.1.5 The Adequacy of Diplomatic Methods of Conflict Management**

The Intergovernmental Authority Development (IGAD) membership states have experienced internal conflict and as the sub-regional organization, IGAD has been instrumental in managing the internal conflicts, especially the civil wars in Sudan and Somalia. Other conflicts include that of Uganda from 1950s to the 1980s and Kenya's post election violence of 2007-8. All the prior cases are similar in that they were largely intra-state meaning that IGAD did not spearhead the conflict management between third parties. Indeed it is appreciated here that different conflicts call for different technique to handle. However in all these cases, negotiation have been used as peaceful methods for resolving conflict as a measure to prevent conflict from reoccurring, intensifying and spearheading.<sup>180</sup>

Nevertheless, there are diverse methods of dispute resolution that are available for resolving the Kenya-Sudan dispute as spelt out in United Nations Charter. The Charter provides as follows:

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, result to regional agencies or arrangement or other peaceful means of their own choice.<sup>181</sup>

In most of the IGAD or African conflict crises are ironically boundaries, transboundary resources sharing or internally derived conflicts involving inter-tribal, or clan conflicts. All these types have found a place in diplomatic space of solving the conflicts. However, the Kenya Sudan diplomatic row is a unique type of conflict and calls for microscopic relook of this conflict in relation with the traditional negotiation methods. Indeed, it will be interesting

<sup>179</sup> [http://en.wikipedia.org/wiki/Laurent\\_Gbagbo](http://en.wikipedia.org/wiki/Laurent_Gbagbo) (Accessed on 20th October, 2012).

<sup>180</sup> Mwangiru N., *Conflict: Theory, Processes and Institution of Management* (Nairobi, Watermark Publication, 2000)

<sup>181</sup> Article 33 of The United Nations Charter (June 1945)

to assess the adequacy of these methods used in conflict management and evaluate their adequacy.<sup>182</sup>

In Kenya-Sudan diplomatic conflict for both countries to protect their bilateral interests, the parties should negotiate with each party and keep public gestures at the minimum. For instance, during the height of the diplomatic furore, Kenya's Minister of Foreign Affairs took the efforts to visit Khartoum and explain the Kenya government position. The Minister made it clear to Khartoum that despite the warrant of arrest, the government did not recognize and, therefore was not committed to enforce the judgement of the High Court of Kenya. The Minister argued that the judiciary was an independent arm of the government and that its decision was inconsequential and did not take into consideration the cordial bilateral diplomatic relations between the two states. This was typical and plausible an argument in legal parlance on the operationalization of the Constitutional doctrine of separation of power.

As to the cause effect of Foreign Ministers position with his peers in the parliament was a different issue all together and an issue to be solved another day as the Minister had made his case and Khartoum softened their stance. The Khartoum government seemed to only have required an assurance from Nairobi that all was well despite the High Court Decree enforcing the ICC warrants of arrest. Equally, Khartoum was keen on bringing to bear on Nairobi its leverage given the diplomatic interests and needs. Khartoum had threatened to terminate diplomatic relations with Kenya, declare the Kenyan ambassador '*persona non grata*' by giving him twenty four (24) hours to move out of its capital, impose an economic embargo against Kenya's especially in using its auspice of its plane flying via Khartoum airspace and freezing its imports from Kenya hence creating undesirable balance of payment deficits.

In addition, there was the unarticulated threat of Sudan's application of the art of war technique<sup>183</sup> by intensifying its boundary and oil claims against Southern Sudan thereby

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<sup>182</sup> Institute for Security Studies (South Africa), "*The Sudan IGAD peace process: Signposts for the way forward*" African Security Analysis Programme Forthcoming Occasional Paper, 13 February 2004.



seriously hurt Kenya's regional and international trade. This is crucial for Kenya given that the country was in the process of completing a transaction with Southern Sudan, Uganda and Ethiopia in developing the Lamu pipeline and railway line to exploit the new oil and gas discoveries in both Southern Sudan and Uganda. Given the importance of the multi-billion US dollars project to Kenya, it was important that the country amicably resolve the diplomatic row with Sudan. That way, even without any need of negotiation, that real threat was the magic number to make Nairobi for quick response.

Zartman defines negotiations as processes which are used to decrease conflict while building peace. Thus, negotiations are lengthy and circular processes in which parties seek to manage conflict by either resolution or settlement.<sup>184</sup> Therefore, in the Kenya-Sudan dispute there was need to reduce the negotiation process by building lasting peace despite the tension at the time. The relationship between these bilateral states may not be back to normalcy but at least they are lukewarm and in talking terms.<sup>185</sup>

According to Moore, negotiations also provide parties with a forum for discussing their needs and resolving issues.<sup>186</sup> As a result, there are at least two levels and sets of negotiations. Saunders identifies them as public and official negotiation processes. These processes differ in that the public negotiation process relies on the role of constituents and other non state actors in the managing conflict. He argues that in this process, parties are aware of the causes and sources of conflict and may use various techniques to resolve conflict. Some of the techniques used may be enshrined in communal or social norms. The official process constitutes the participation of states and non-states actors.<sup>187</sup>

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<sup>183</sup> Martin Van Creveld, *The Art of War: War and Military Thought* (2000)

<sup>184</sup> Zartman I.W.S., *Structures of Escalations and Negotiation in International Conflict* (Cambridge University Press, 2005)

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<sup>186</sup> Moore C.W. *The Mediation Process: Practical Strategies for Resolving Conflict* 2<sup>nd</sup> ed. (San Francisco: Jossey Bass Publishers, 1996) 8

<sup>187</sup> *Ibid.*

Since negotiation teams participate in the process, there are inevitable discussions and consultations between parties.<sup>188</sup> Mwagiru notes that negotiations are processes which bring parties together to work towards managing conflict jointly. The process also entails mapping future relationships.<sup>189</sup> He argues that the process can either be dyadic or multilateral. Dyadic negotiations can be described as processes between two parties or between two negotiating teams. Multilateral negotiations include many parties. In both cases, there are third party interveners such as mediators or facilitators or other parties such as allies and their constituents. Whichever, the case, parties should keep engaging themselves over the dispute especially where the issues at hand are clear. This is in line with the United Nations Charter Chapter VIII on Regional Arrangements proposed and stressed in Article 52 (2) Chapter VIII the need for parties to use regional agencies to manage conflict:

The members of United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional agencies before referring them to the Security Council.<sup>190</sup>

These regional agencies (such as IGAD) provide good offices to the parties. IGAD's Article 18/AB of the Protocol on the establishment of IGAD urges member states to 'preserve peace and stability by co-operating on the pacific settlement of differences and dispute.'<sup>191</sup>

The Kenya-Sudan dispute was referred to IGAD and because the nature of the dispute was tangible and was a single cause of conflict it was easy for IGAD to identify the issue in the centre of the conflict. The enforceability of the ICC warrants of arrest by Kenyan government against President Omar Al-Bashir of Sudan. Since both states are active member states of IGAD it was easy for IGAD to issue an injunctive measure against Kenya not to arrest Al Bashir. And that declaration applied to all the member states by all means. That is the

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<sup>188</sup> Saunders H., *Pre-Negotiation and Circum-Negotiation* Crooker C., Hampson O., & Aill P. (eds) *Turbulent Peace: The Challenges of Managing Internal Conflict* (Washington DC, US Institute of Peace, 2006)

<sup>189</sup> Mwagiru M., *Conflict: Theory Processes and Institutions of Management* Op. Cit. 113

<sup>190</sup> The Charter of the United Nations (1945)

<sup>191</sup> See Article 18/AB of the Protocol establishing IGAD

reason when Malawi and Zambia decided to defy a similar injunctive declaration. (Majority of IGAD state members also are AU members). The AU head of states meeting was referred back to its headquarters in Addis Ababa. It should be noted that the nature of conflict between Kenya and Sudan may also be classified as intangible issues such as principles, belief, ideology and legitimacy.<sup>192</sup>

Principles, ideology and legitimacy for Kenyan judiciary on the basis of the facets of the international law, the Rome Statute (of which Kenya is a signatory) and ideology because of its belief in the rule of law and democratic practices that motivated the judiciary to issue the Decree of warrant of arrest against Al Bashir. Therefore because of this character and the nature of the dispute involving some international relations and international law the structure of the international system that is made up of units interact have interconnections and relate with each other.

Events such as co-operation and conflict therefore affect the behaviour and interaction of these units. Consequently, reactions and responses to conflict are determined by the arrangement and interactions in the system.<sup>193</sup> There are a number of determinants involved in the internationalization of conflict.<sup>194</sup>

The international system is comprised of norms which among other seek to enhance and protect actors. The human rights regimes in this context seek to prevent and protect rights from abuse. This states and international organizations intervene in internal conflict because of these moral obligations.<sup>195</sup>

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<sup>192</sup> Jackson R., *Successful Negotiation in International Violent Conflict* *Journal of Peace Research* Vol. 37 No. 3 (May, 2000) 323-343

<sup>193</sup> Dessler D., *What's at Stake in the Agent-Structure Debate?* *International Organization* Vol. 43 No. 3 (Summer 1989) 441 - 473: 448 - 449

<sup>194</sup> Mwangi M., *Conflict, Processes and Institutions of Management* Op. Cit 62 -70

<sup>195</sup> Kennan G. F., *Morality and Foreign Policy* *Foreign Policy* Vol. 64 No. 2 (Winter 1985) 205 - 218

The media is also an agent of internationalizing conflict. By communicating and giving priority to internal conflict especially in the world news, the media is able to set the agenda and become an avenue of acquiring and disseminating information about conflict.<sup>196</sup> Internal conflict becomes internationalized because of the historical, political and economic interdependence of states especially within a region.<sup>197</sup>

Mwagiru argues that dynamics of the internalization of conflict are insightful in managing internal conflict. Because of the implication of conflict, parties consider the charges in interactions and relations attributed to conflict. Due to the changing attributes of parties in the system, conflict analysts are forced to think about the appropriate method of conflict management. For example, IGAD members had to consider managing conflict in the failed state of Somalis whose conflict had internationalized and began contributing to instability in the IGAD region.<sup>198</sup>

The Kenya Sudan diplomatic conflict is no different because it involves complex issues of the international law on human rights, international studies and relations of different states. Thus explains why powerful states even those not signatory to the Rome Statute like US, China, Russia, Arab states among others are leaking statements about the Al-Bashir ICC warrants of arrest. Indeed these members being key players in international relations and studies are bound to react and counteract on the Kenya and Sudan diplomatic conflict. That is why we have two opposing blocks. Those for the arrest of Al Bashir include the US and its allies while those against his arrest essentially include the Arab world principally based on ideological and religious theosophies.

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<sup>196</sup> See Hanon E. C., *The Media, Foreign Policy Making and Political Conflict*, *Mershon International Studies Review* (1998) 42, 157 – 163. See also Bob C., *Merchants of Morality*, *Foreign Policy* No. 129 (March – April 2002) 34 -45

<sup>197</sup> Sriram C. L & Nielsen Z. S., *Introduction: Why Examine Sub Regional Sources and Dynamics of Conflicts?*; Sriram C.L & Nielsen Z. S., *Exploring Sub Regional Conflict: Opportunities for Conflict Prevention*. New Delhi: Viva Private Law 1-

17:3.

<sup>198</sup> *Supra*, note

#### **4.1.6 Possibilities of Regional War versus Failed Diplomatic Relations**

Barston explains about the changing nature of diplomacy by saying:

“Diplomacy is often thought of as being concerned with peaceful activity, although it may occur for example within war or armed conflict or be used in the orchestration of particular acts of violence, such as seeking overflight clearance for an air strike. The blurring of the line, in fact, between diplomatic activity and violence is one of the developments of note distinguishing modern diplomacy.....”<sup>199</sup>

Further commenting on diplomacy and security he says,

“The relationship between diplomacy and security is complex and evolving..... in the event of violence occurring, the task of diplomacy is ultimately peaceful settlement, through the negotiation of ceasefire, withdrawal and other measures of a long-term nature. For a quite different perspective violence may be a preferred and in itself and diplomacy the means of orchestrating violence rather than bringing about a negotiated solution”.<sup>200</sup>

If President Omar Al-Bashir ever steps in Kenya, there are two possibilities. Kenya's executive arm of the government through the Internal Minister of Security may make good the High Court decree that he be so arrested and handed in to the ICC in Hague for prosecution or it may ignore the decision. In any case, the action taken will receive different interpretation and counter-reaction locally, bilaterally and at international level. To the Kenyan pro-democratic civil society and international allies, the failure to effect the arrest would be a triumph of evil over good and against constitution. However, such a move would effectively help cement the diplomatic and international relations of Kenya and her Eastern Africa neighbours and especially Sudan.

On the other hand, if Kenya would move to implement the arrest, the move would not only help enhance Kenya's international standing as champion of human rights, it would also augur well with Kenya's efforts towards democratization. Nevertheless, such a move would have Khartoum and the Arab world castigate Kenya's actions as being a violation of state sovereignty and an outright declaration of war. Inside Sudan, the anti-government group

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<sup>199</sup> Barston R. P., *Modern Diplomacy* (Longman, London, 1988), p.1.

<sup>200</sup> *Ibid.*, p. 184.

(opposition) would be celebrating and exploiting the window of opportunity to install their own regime answerable to the international community.

The reaction by both the regional bodies the AU and IGAD would clearly be interesting given that both institutions are established under the auspices of the United Nations Charter whose key objective is to maintain peace in the world. It can, thus, be argued that such an arrest of al-Bashir would be a violation of their Charter and would be illegitimate in the eyes of the international community even though it serves to promote rule of law. The irony of Kenya going to war with Sudan would be catastrophic in the region and in the world order especially where interested third parties are involved both directly and indirectly to safeguard their national interests resting within Kenya.

Indeed there is always a high chance of the two regional states engaging in war with each other. The assessment of Bashir regime suggests this as a likely scenario given that Bashir's government alienated the United Nations and International donors in the autumn 1990 – by refusing to admit that the public faced famine, by suspending foreign food and medical relief mission to the south and aerielly bombarding SPLA controlled towns in which foreign relief agencies were providing food and medical care.<sup>201</sup>

Bashir also visited Iraq in October 1989 just as Libyan and Iraqi planes bombed three SPLA held towns in the South Sudan. When Ethiopia restored diplomatic relations with Israel in November 1989, Bashir tapped Iraqi as well as Libyan hostility for Israel by arguing that Mengistu had granted Israel an offensive base on an island in the Red Sea and that Israel was arming the SPLA as part of its design to encircle the Arab world.<sup>202</sup>

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<sup>201</sup> Sudan Monitor (October 1990)

<sup>202</sup> David Smock R. *Waging War and Waging Peace: Foreign Intervention in Africa* (United States Institute Peace, Washington, 1993) p. 95.

Saddam Hussein received the reward for his assistance in August 1990, when Bashir refused to denounce Iraq's invasion of Kuwait and sponsored demonstrations that condemned the United States. As the Gulf crisis mounted, rumours circulated that Iraqi scud missiles were stationed in Northern Sudan, targeted at Egypt's Aswan High Dam and Saudi ports on the Red Sea. Mubarak threatened military retaliation, and the Saudis considered closing Sudanese branches of Saudi banks.<sup>203</sup>

A year later, Iraq sought to regain influence in Sudan. In support of Khartoum's drive to arabicize all levels of the curriculum, Baghdad offered the Sudanese technical training and access to its universities as well as Arabic textbooks. Because of the continuation of UN sanction, however, Iraq could not provide oil or military aid. In the same year, Idris Deby, the Chadian dissident who had taken sanctuary in Darfur in April 1989, invaded Chad. Supported by the Libyan forces that had also camped in Darfur, Deby seized N'djamena in December 1990 and expelled Habre's government. The Sudanese government supported Libya's strategic drive to dominate Chad and quickly established close relations with Deby's government.<sup>204</sup> Last but not least, Khartoum and Tripoli helped to eliminate Mengistu's regime in Ethiopia in May 1991 which Gaddafi opposed. The above Al Bashir historical events truly paint him as a man shrouded in controversy and ready to do anything or take any side to perpetuate his reign.<sup>205</sup>

Clearly, Kenya's declaration that she had no interest to arrest Al Bashir in diplomatic mission or engagement with Sudan in literally a public relation decoy only meant to appease Khartoum. In any case, it does not have legal backing given that the High Court was within its constitutional jurisdiction to issue the said orders. Thus, in the event of change of guard in leadership of Kenya, Khartoum will find herself having to renegotiate the position with

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<sup>203</sup> *Ibid.* p.96.

<sup>204</sup> *Ibid.* p.97.

<sup>205</sup> *Ibid.*

Nairobi. For instance, The Prime Minister is on record castigating the Kenyan leadership of H.E Mwai Kibaki for accommodating President Omar Al-Bashir visits in Kenya. Raila will definitely uphold the rule of law to have Bashir arrested.

In addition, due to the possibility of diplomatic embarrassment and the likelihood of undue negative media attention on both countries, it is unlikely that Nairobi would propose to host President al-Bashir anytime in the near future until the matter is rested. Indeed, the matter is drag on Kenya-Sudan bilateral interests in that even the Kenyan President cannot easily visit Khartoum to transact business due to the difficulties in reciprocating President Al-Bashir.

#### **4.2 Conclusion**

Sometimes diplomats make things worse. They are human beings after all, and as such, fallible. Moreover, although it is hoped that direct personal interaction can reduce the likelihood that national will resort to force in order to settle their differences, such interactions also provide the opportunity to interpersonal hostility.

Accordingly, diplomacy is only as effective as the military power available to each side, the threats that underwrite courteous diplomatic interchanges. Diplomacy without armaments, according to Fredrick the Great, is like music without instruments.<sup>206</sup>

Omar Al-Bashir has DNA of war in his blood and should be given war for he does not understand diplomacy. However this should be done peacefully within the United Nations charter and the Rome Statute even involving the powerful states like in the case of Jose Daniel Ortega of Nicaragua, General Augusto Pinochet and the arrest of Charles Taylor.

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<sup>206</sup> David P. Barash and Charles P. Webel *Peace Conflict Studies* (Sage Publications Ltd, London, 2002) p. 275.



## CHAPTER FIVE

### CONCLUSION

#### 5.1 Summary

This project has four major chapters. Each chapter has its substance but all are closely related to the topic of study. All the four chapters aim at achieving the objectives of the study and answer the statement of the problem as well as the hypotheses.

Chapter one introduces the topic by bringing in political history of Sudan from the reign of Omar Al Bashir in June 1989 through a military *coup d'état* and his leadership style that is typically abrasive as against his critics including the waging war or supporting acts of terrorism and especially on its own people then SPLA.<sup>207</sup> The chapter explains in a nutshell the factors that precipitated diplomatic row between Khartoum and Nairobi. These factors included the violation of human rights or Darfur holocaust and the subsequent relation with the United Nations humanitarian agencies and other non-governmental organization mistreatment including their unexplained death and disappearance of UN peace keepers hence the ICC indictment of the incumbent president Al – Bashir. The Kenyan government came into the picture after such indictment by ICC, that is, during the Constitutional Promulgation<sup>208</sup> when the one side of the grand coalition officially invited Al- Bashir to grace the historical event with other Africa continental dignitaries. Kenya did not attempt to arrest Al- Bashir although it is a signatory to the Rome Statute and has a reciprocal responsibility to arrest any person indicted by the ICC and had him/her to the court based at The Hague. This caused a lot of discomfort among the other party in the coalition the Orange Democratic Movement (O.D.M) insisting that the government did not consult it on Al- Bashir invitation and in the alternative the government should have executed the warrant of arrest. Later the

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<sup>207</sup> Machakos Protocol IGAD "Secretariat on Peace in the Sudan" Machakos Protocol July 20, 2002

<sup>208</sup> On 27<sup>th</sup> August, 2010 [www.voanews.com/content/kenyas-constitution.../124592.htm](http://www.voanews.com/content/kenyas-constitution.../124592.htm) (Accessed on 29<sup>th</sup> October, 2012)

International Commission of Jurists (I.C.J) moved to the High Court for declaration that Kenya being a signatory to the Rome Statute should arrest Al- Bashir should he ever step on Kenya soil. Following the declaration, Sudan counter-reacted with a heavy stick threatening dire diplomatic reactions including declaring Kenya's diplomat in Khartoum *persona non-grata*. This stirred the present diplomatic dispute between Khartoum and Nairobi which is yet to be settled to date.<sup>209</sup>

The chapter also gives the statement of the research problem on how Kenya should handle or solve its diplomatic issues with Sudan without necessarily tainting its image in the international community and in conformity with the international law and international relations and studies. This is a tall order that Kenya should attempt to achieve. The Chapter also discusses the objectives of the study is meant to analyze the roles and contributions of the interstate diplomatic methods in the management of Sudan – Kenya tottering diplomatic relations.

This chapter zeros in on literature remarks on the subject. The relevant literature to the study is classified into two categories; those which deal with conflict management and that which deal with the Sudan – Kenya conflict. The great authors and mind include Mwangi Makumi, Zartman Mason, Kumar, Sandole, Reyckler, Dudley among others. The justification of the study is twofold; first the study will contribute to the existing body of knowledge on how to manage bilateral conflict management between Kenya and Sudan on foreign policy debacles and second, on the ongoing policy debates on whether it is possible to indict a sitting president of state over core crimes as defined in the Rome Statute and whether doing so is tantamount to interfering with state sovereignty and so declaration of war and whether by expanding the AU Charter to encompass regional criminal jurisdiction similar to ICC whether the AU membership would escape from ICC jurisdiction purview.

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<sup>209</sup> <http://ufh.netd.ac.za/bitstream/10353/514/1/Avom's%20Mini-Dissertation.pdf> (Accessed on 25<sup>th</sup> October, 2012)

The chapter has three salient hypotheses that which this study will have to affirm or disaffirm. These include first the causes of the diplomatic debacle/ conflict between the two countries are but legal interpretation and political interest. Second, the study posits that the ultimate consequences of the conflict are primarily political, military, economic and diplomatic. Last, this being a complex and unprecedented issue diplomatic solution may be difficult to unlock the debacle between the two states.

The theoretical framework of the study include the power politics of states, interplay between the international relation and studies and the international law, the conflict management approach methodology. The traditional theories such as realism predominantly stand tall among other competing theories of international relations and studies to explain state position in geopolitical positioning.<sup>210</sup>

Chapter two discusses the historical diplomatic relations between Kenya and it neighbours in East Africa since independence<sup>211</sup> with Uganda and Tanzania that essentially has been quiet except on one occasion when Jomo Kenyatta has threatened to go to war with Uganda's Idi Amin declaration of wanting to annex some Western parts of Kenya claiming ownership. Kenya's relation with Tanzania has been cordial except one point over dispute on the sharing of the East African Community assets and liabilities this has since sparked an economic warfare and is stumbling block to unification of the East Africa union. The chapter establishes that the traditional role Kenya played in its foreign policy of non-alignment of sovereign respect of its neighbours in fact Kenya only crossed international boundaries in Africa, and Europe and Asia via the United Nation auspices. Then the chapter explains the imminent paradigm shift of this policy to that of physical engagement especially ongoing in Somalia with the Al Shabaab terrorist rag tag militia group.<sup>212</sup> Diverse reasons are advanced from economic, political (sovereignty), security, piracy, stability in the region among others

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<sup>210</sup> (Dunn and Shaw, 2001).

<sup>211</sup> Quoted in Steven Smith, Amelia Hadfield and Tim Dunne. *Foreign Policy: Theories, Actors and Cases*: P. 86

<sup>212</sup> Rob Wise, "*Al Shabaab*", CSIS Case Study Series, Case Study Number 2, July 2011.

and all that is basically locked in the prison of justification and implication of that pro-activism engagement and with a snapshot conclusion.

Chapter three zeros in on the causes of diplomatic conflict between Kenya and Sudan. It lays down the facts surrounding the diplomatic row between Kenya and Sudan showing that the gist of matter between the countries is mainly the High Court of Kenya's issuance of warrant of arrest directed against the current President of Sudan Omar Al-Bashir. Other contributing factors have been Sudan's perceived view of Kenya's support and favouring the Southern Sudan during the war of liberation; Khartoum realization that it has lost much of the oil in Southern Sudan and that Kenya was essentially beneficiary especially in investing heavily in the Southern Sudan and especially the ongoing joint-venture of Lamu<sup>213</sup> port and railway elongation to Southern Sudan whereby Sudan stands to lose when an alternative export route (pipeline) will be finalized.

The implication of tottering conflict relation between the two is exposed in the chapter to include among others how Kenya will stand to suffer beginning with President Al Bashir bashing of the Kenyan diplomats to leave Khartoum within 24 hours. The economic loss in trade of US\$5 billion which though insignificant still is important at the time when Kenya's devolved system require every dime from whatever source. Threats by Sudan not to allow its airspace to be used by Kenya airplanes and threats to shoot them down and worse is threats to expel the Kenyan citizen working in Khartoum, thus creating unemployment when at home Kenya is suffering from acute unemployment.

Also such diplomatic debacle would hurt Kenya more taking into consideration Sudan may restart the war with Southern Sudan to deny Kenya enabling environment to trade with Southern Sudan especially on diverse investments. The chapter also captures some moments from allies and foes of Al- Bashir reaction following ICC indictment. The Arab league issued

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<sup>213</sup> Craig Collins and John Packer, *Options and Techniques for Quiet Diplomacy*, Conflict Prevention Handbook Series

a stern statement abusing the ICC arrest threat at the same time saying that it would never recognize such neo-colonialism institution established by superpower states who are not signatory to because they themselves are the greatest abusers of human rights.<sup>214</sup> The AU and IGAD (which Kenya and Sudan are key members) issued a similar statement to ICC and Kenya that to arrest the president would be detrimental to the regional peace and development but would also complicate the hard earned peace.

On the other hand, Malawi and Zambia also members of AU castigated Al- Bashir and threatened to have him arrested should he ever step in the respective states. This was so serious that at one point the AU head of state meeting had to be trans-located to the AU headquarters in Addis Ababa. The Chapter finalizes by giving proposal on how AU ought to disentangle itself from the ICC or Rome Statute jurisdiction. Here it is demonstrated how the AU and the Rome Statute are at variance but at the same time a reflection of the United Nation Charter. The AU head of state meeting held in Addis Ababa in Ethiopia proposed to expand its jurisdiction. Similar to the criminal jurisdiction of the ICC in order to mobilize its members to terminate their treaty with the Rome Statute so that all criminal matters would be handled regionally without comprising the sovereignty of each member state. To that extent, it is argued that this attempt by AU is too late for the remaining Ocampo four.<sup>215</sup> It is shown that this is an act in futility in that it is like closing the stables when the horses have already bolted.

Finally chapter four deals with diverse issues though still pegged on the topic. The Chapter looks at the critical issues that are emerging in the study. They include the implication of domestication of international law (treaty making) in Kenya especially the Rome Statute. Here, it is shown that Kenya's constitutional amendment ushered a revolution in Kenya's

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<sup>214</sup> <http://www.france24.com/en/20080719-arab-league-back-sudanese-president-sudan-arab-league> (Accessed on 20th October 2012)

<sup>215</sup> [http://standardmedia.co.ke/index.php/busines/ads/InsidePage.php?articleID=2000064219&story\\_title=Tonv-Gachoka%E2%80%99s-propaganda-can%E2%80%99t-save-Ocampo-Four](http://standardmedia.co.ke/index.php/busines/ads/InsidePage.php?articleID=2000064219&story_title=Tonv-Gachoka%E2%80%99s-propaganda-can%E2%80%99t-save-Ocampo-Four) (Accessed on 30th October, 2012)

constitutional treaty practices by moving from dualism to monism. Basically the culture of introducing treaties in Kenya jurisprudence since independence purely on executive whim without parliamentary scrutiny is lambasted and it is shown that the trend is no longer sustainable under the new constitutional dispensation.<sup>216</sup>

It is argued that this new state of affairs does not augur well with politicians who want to change the Constitution at their whim and caprice. Indeed, the case leading to the High Court decision ordering the arrest of President al-Bashir emanates from such executive excesses in that he had been invited to the occasion without clear and express cabinet consensus. Under the new constitutional dispensation, once a treaty (including the Rome Statute) is domesticated then for all purpose and extent it has the force of law and is enforceable.

Another area that is tackled is the conflict of Constitutional power between Kenya judiciary and executive and the implication in diplomacy management. The chapter gives legal explanation why a head of state can never enjoy immunity for core crime defined in the Rome Statute.<sup>217</sup> In doing so, the landmark case laws or instances where such occasion obtained including the Pinochet, Gaddafi, Charles Taylor and Laurent Gbagbo are explored as examples. The chapter also discusses the adequacy or inadequacy of the available diplomatic methods in resolving the Kenya-Sudan conflict in the short-term and long-term. However, as much as there are diverse methods, it emerges that each situation of diplomatic conflict calls for a unique strategy to apply and tackle the debacle. A multi disciplinary method should be open to uniqueness of the emerging conflict.<sup>218</sup>

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<sup>216</sup> Mwangi M., *"From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice"*, *Journal of Language, Technology & Entrepreneurship in Africa* Vol. 3 No. 1, p. 144-155.

<sup>217</sup> Steffen Wirth, *"Immunity for Core Crimes? The ICJ's Judgement in the Congo vs. Belgium"*, *EJIL* (2002) Vol. 13 No. 4, 877-893.

<sup>218</sup> *Ibid*

## **5.2 Key Findings**

The chapter explores the question whether there is any possibility of Kenya engaging into a regional war with the Sudan over tottering diplomatic relations. Evidence is drawn from diverse commentators such as Barton who have attempted to define diplomacy in relation to unsuccessful diplomatic negotiation. It is argued that it must always be kept in mind that diplomacy is an extension of war and as such war may bring about diplomacy and where one is unsuccessful, it may usher the other. Indeed, it is argued that given President Bashir's militant track record since he took the leadership of Sudan, the possibility of the diplomatic conflict between Kenya and Sudan escalating into full scale war cannot be gainsaid.

At the same time, it is noteworthy that although the current political leadership in Kenya may not be keen on enforcing the arrest warrant against President al-Bashir, there is no guarantee that future leadership in Kenya will sustain this position. In any case, even within the ruling grand coalition ODM faction has been vocal in support of the execution of the arrest warrant. There is also the issue of the potential diplomatic embarrassment and possible negative publicity and likely international community backlash making it unlikely for Kenya to invite President al-Bashir into the country or President al-Bashir to visit the country despite the undertaking by Nairobi to Khartoum that the arrest warrant will not be implemented. The Kenyan executive stands also to face possible impeachment for violating the constitution by the Legislature for flouting a standing court decision in the effect that it fails to arrest President al-Bashir if he steps on Kenyan soil.

In brief, the root issue behind the Kenya-Sudan diplomatic spat-out is far from settled and one can only wait and see the turn the matter will take in future both at the national, regional, and international fora. However, one thing is certain, the matter has strained the diplomatic relations between Kenya and Sudan and exposed the weaknesses in Kenya's current foreign policy in efficiently addressing emerging international law, relations and studies issues such

as enforcement of international criminal courts and decisions which are now common phenomena.

### **5.3 Recommendations**

In view of the foregoing findings of the study, there is need for Kenya to strengthen her foreign policy to reflect the new constitutional dispensation. First, given Kenya's emerging role as the economic and political hub of Eastern Africa, the country need to clearly spell out non-negotiable issues in engaging her neighbours to avoid constitutional issues such as caused by the High Court decision.

Kenya also needs to enhance its institutional framework for ratification of international treaties to avoid a situation where, as it seems to be the case with regard to the Rome Statute, it appears to be caught unawares when the international instrument affects its economic and political interest. This appears to be the scenario in the Kenya and Sudan dispute which is arguably hinged purely on interpretation of the international law and the Rome Statute.

Third, the Constitutional power tussle between the judiciary and the executive arms of the government need to be urgently resolved to ensure that Kenya does not water down her institutions in an effort to streamline external relations. In any case, it is not justified whatever the cost that Kenya should water down her institutions and principles seeking after fleeting bilateral relations and interests which may not stand the test of time.

Finally, as a scholarly suggestion, the study highlights the need for further research and study in the following two areas. Future studies are need to explore the practicality of AU's inclusion of crime jurisdiction and the impact on international peace of indicting sitting heads of states under the Rome Statute.



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