



**SCHOOL OF HUMANITIES AND SOCIAL SCIENCES
MASTER OF ARTS IN DIPLOMACY, INTELLIGENCE AND SECURITY
MDIS 8212: LEGAL ASPECTS OF NATIONAL SECURITY POLICY
END OF SEMESTER EXAMINATION**

Date: 11th December 2023

Time: 18:00-20:30

Instructions

1. This examination consists of **FIVE** questions.
2. Answer **Question ONE (COMPULSORY)** and any other **TWO** questions.
3. This is an open-book exam with the following unmarked materials allowed:
 - a. Kenyan Constitution
 - b. Lecture materials and notes
 - c. United Security Council Resolution 2699 (2023)
 - d. The Kenya Defence Forces Act
 - e. National Security Council Act, 2012
 - f. National Defence Policy
 - g. UN Charter

QUESTION 1 (20 marks)

“The national government has overzealously protected its security mandate. This has made Kenya’s security architecture remain state-centric, divorced from local needs, context, and reality. Yet, security is a multi-dimensional and multi-phenomenon domain and involves many players (state and non-state) and often requires formulation of an integrated policy, coordination, and collaboration of all actors in dealing with threats objectively. The incessant focus on state security has not secured the state and the people. The national government cannot effectively and efficiently discharge its security functions without involving people in the matter of their security at the local level. This emanates from the fact that all acts of insecurity are perpetrated locally and the need for local solutions and ownership cannot be over emphasized.” *Nzau, Mumo and Guyo, Mohammed (2018) "The Challenge of Securing Kenya: Past Experience, Present Challenges and Future Prospects," The Journal of Social Encounters: Vol. 2: Iss. 1, 37-59.*

Critically analyse this statement in the context of Kenya’s security and offer your practical recommendations therein of the same.

QUESTION 2 (20 marks)

The National Security Council is the President’s principal forum for national security and foreign policy decision making with his or her senior national security advisors and cabinet officials, and the President’s principal arm for coordinating these policies across different State

agencies. Article 240 of the Kenyan Constitution provides for its roles and functions. However, questions abound as to its constitution. ‘Strangers’ have found themselves in the NSC beyond the established ‘constitutional’ composition. Critically analyse:

- a) The constitutional composition of the NSC and the role each member plays in the NSC. **(5 marks)**
- b) The ‘strange’ additions and their constitutionality or lack thereof; and **(5 marks)**
- c) The roles and powers of the NSC **(10 marks)**

QUESTION 3 (20 marks)

Article 132 (4) (e) of the Constitution of Kenya provides for **The Functions of the President and in particular the power to declare war i.e. *The President may - with the approval of Parliament, declare war.***

Article 95 (6) of the Constitution of Kenya provides for the Role of the National Assembly i.e. ***The National Assembly approves declarations of war and extensions of states of emergency.***

This brings to question the duality of the war powers and in this case the division of war powers between the Legislative and Executive Branches of government.

Discuss:

- a) The concept of the duality of war powers in Kenya. **(5 marks)**
- b) Situations when the President Is Permitted to Use the Armed Forces Without Prior Parliamentary Authorization. **(10 marks)**
- c) Critique the duality of war powers in Kenya and proffer your practical recommendations on the same **(5 marks)**

QUESTION 4 (20 marks)

Excerpt 1

On October 16, 2011, two battalions of the Kenyan army, numbering 2,400 troops, crossed the border into southern Somalia. The invasion was called ‘Linda Nchi’ in Swahili (‘Operation Protect the Nation’). The military’s move came as a surprise to many. The then Prime Minister Raila Odinga and Foreign Minister Moses Wetang’ula were not part of the inner decision-making team and were only informed 10 days after the final decision to cross the border had been taken. The rest of the cabinet was presented with a *fait accompli*. (*Throup, David W.2012. “Kenya’s Intervention in Somalia.” Center for Strategic and International Studies (Commentary February 16).*)

Excerpt 2

The official reason for launching the invasion was that Kenya's national security was threatened by the Somalia-based Islamist militant group, al-Shabaab, that had carried out a number of cross-border raids into Kenya during the months ahead of the operation. A number of kidnappings of tourists and foreign aid workers inside Kenya became the final argument authorities needed to decide to launch a military operation into Somalia. The minister for internal security, George Saitoti stated ‘Kenya has been and remains an island of peace and we shall not allow criminals from Somalia [...] to destabilize our peace’ (*Branch, Daniel. 2011. “Why Kenya Invaded Somalia.” Foreign Affairs, November 15; (Gorm Rye Olsen (2018) The October 2011 Kenyan invasion of Somalia: fighting al-Shabaab or defending institutional interests? Journal of Contemporary African Studies, 36:1, 39-53)*

Thus, on the face of it, there is little doubt that the Somalia invasion was motivated by national security interests.

Hence in light of the two excerpts above, it can be argued that international law is about national and international interests. National security policy is about national values. Can these be reconciled? Discuss with reference to the challenges of national security decision making more so in the context of the Kenyan Intervention in Somalia.

QUESTION 5 (20 marks)

Through the United Security Council Resolution 2699 (2023), the Security Council authorized deployment of a Multinational Security Support Mission, headed by Kenya, in close cooperation and coordination with the Government of Haiti. This is with the primary responsibility being restoring security and stability in Haiti for an initial period of 12 months, with a review after nine months. There is currently confusion as to the nature of Kenya's involvement in this Mission in the context of maintaining international peace and security:

- This was a declaration by the President of Kenya without the involvement of the National Security Council as provided by the Constitution under Article 240.
- This was a deployment of the Kenya police beyond Kenya's border.
- This was a commitment of Kenya's Police for an international mission without the approval of Parliament.
- The Military should have been involved instead of the Police considering the language of the Resolution.

Using the provided four parameters, offer your critique of Kenya's role:

- a. In the maintenance of international peace and security within the parameters of the UN Charter. **(8 marks)**
- b. Kenya's involvement in the Multinational Security Support Mission within the context of national security interests. **(5 marks)**
- c. The difference between the aforementioned international deployment of the Kenya Police and the deployment of the Kenya police in handling bandits in Baringo in Kenya. **(7 marks)**