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THE ROLE PLAYED BY INTERNATIONAL LAW IN ENDING THE KENYAN POST ELECTION VIOLENCE OF 2007/2008

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SUPERVISOR

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AUGUST 2015

DECLARATION

I **CHRISTINE ACHIENG KUNGU** hereby declare that this research project is my original work

and has not been presented for a degree in any other University.

Signed…………………………….. Date…………………………..

CHRISTINE ACHIENG KUNGU **AUGUST 2015**

REG.NO.R50/69695/2013

The project has been submitted for examination with my approval as the appointed supervisor.

Signed ………………………………… Date…………………………

MR. FELIX ODIMMASI **AUGUST 2015**

SUPERVISOR

DEDICATION

This project is dedicated to the families of the victims of the Kenyan post-election violence of 2007/2008 who suffered immensely and whose lives have changed drastically and irrevocably since the crisis.

ACKNOWLEGEMENT

This research paper has been conceivable due to my interface with the various Civil Society Organizations in Kenya whose key objectives are to advance the legal protection and enforcement of Human Rights in Kenya. I wish to express my gratitude to my Project supervisor, Mr. Felix Odimmasi for his expertise on the thematic fields of International law and International Relations without his guidance, this research would not have been possible.

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I owe my biggest debt to my family members, my parents Vitalis and Pamela Kungu, my siblings Caroline, Robert, James, Thomas, Paul and Michael for their immense support and encouragement.

ABSTRACT

In 2007/2008, post-election violence escalated in Kenya in a magnitude that has never been experienced before in the country. At least 500, 000 people were displaced and 1,500 died as a result of the conflict. The conflict led to an international response which culminated into a mediation response initiated by the African Union in early 2008.The mediation was successful as it played an instrumental role in ending the post-election violence. In this regard, this research paper will endeavor to address the effective role played by the international law in ending the Kenyan post-election violence of 2007/2008.

The research will examine whether the International legal principles were adhered to in resolving the conflict witnessed during the Kenyan post-election violence and analyze whether it was justified for the international community to intervene in the affairs of Kenya during the conflict. The study will focus on identifying the International legal principles applied by the international actors during the Kenyan post-election violence.

The research paper will conclude by examining the international community's involvement in violence mitigation, lessons learned during the Kenyan post-election violence and the significance of the international community intervention more generally, in order to identify and replicate best practices in similar conflicts and specifically towards evolving political settlements within the continent.

ACRONYMS

R2P	Responsibility to Protect
CIPEV	Commission of Inquiry into Post-election Violence
UN	United Nations
AU	African Union
ODM	Orange Democratic Movement
PNU	Party of National Union
UNSC	United Nations Security Council
TJRC	Truth Justice& Reconciliation Commission
NARC	National Alliance Rainbow Coalition
KANU	Kenya African National Union
NGOS	National Government Organizations
ECK	Electoral Commission of Kenya
APRM	African Unions Peer Review Mechanism
KJAS	Kenya Joint Assistance Strategy
ICISS	International Commission on Intervention and State Sovereignty
UNSG	United Nations Security General

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

In Kenya, the phenomenon of election violence erupted into the political scene in the early 1990s. The cycles of violence occur so closely in line with the election cycle that one is well justified to call it electoral violence. There has in fact been no large-scale conflict in Kenya that has not been directly related to elections, nor has conflict even constituted an actual civil war, unlike the events in most of its neighbor countries and further afield within the continent. Kenya cannot thereby usefully be labelled a post conflict country.[1]

The period following the 2007 general election remains one of the darkest moments in Kenya's history. The Presidential, Parliamentary and Civic elections were held on the 27th December 2007. This election being the most contested in Kenya's electoral history, was followed by approximately two months of killing, sexual gender based violence and destruction of property. As a result of the violence over 1,500 lives were lost, there was widespread destruction of property and over 500,000 people were displaced.[2]

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[1] Stephen Brown, Lessons Learned and Forgotten: The International Community and Electoral Conflict Management in Kenya.

[2] Human Rights Watch, Kenya: "Opposition officials helped plan Rift valley violence", January 23, 2008.

One of the main causes of the violence was the claim that the Presidential Election had been rigged in favor of the Party of National Unity (PNU) Presidential candidate. The aggrieved parties made up of members of the opposition party, the Orange Democratic Party (ODM) refused to resolve the matter through the court because they did not trust the judiciary as an institution. At this time, impunity was rife in the country not because of the lack of legislation, but because of the unwillingness of the relevant state agents to enforce the law and prosecute the law breakers.[3]

The officially-declared victory of the presidential election by the then incumbent President Mwai Kibaki was disputed by the opposition, civil society, domestic and international observers alike. The international community stood united and refused to endorse the Presidential Elections and instead piled pressure on the Kenyan political leaders to solve the crisis. It is noteworthy that the African Union (AU) as a regional body did not directly participate in the conflict resolution and mediation process, instead it participated through the then incumbent chair John Kufuor, former Heads of States in Africa and other prominent leaders in their individual capacities. Kofi Annan having been sanctioned to be the AU chief mediator, arrived at a point when the violence in Kenya was turning to inter-ethnic militia warfare.

Annan employed his enormous reputation with the political sides in Kenya, equipped with great deal of diplomatic skill, and brought the two warring parties together for direct talks on the mediation table. On the 28th February 2008, he brokered a compromise signed by the two Kenyan leaders, Mwai Kibaki the then incumbent president and leader of the PNU political party

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[3] Stephen Brown, Lessons Learned and Forgotten: The International Community and Electoral Conflict Management in Kenya

and Raila Odinga leader of the ODM political party in the context of a grand coalition Government that basically ended the political impasse and the violence witnessed during the 2007/2008 Kenyan post-election crisis.

1.1.1 International Response to halt the Spread of Violence in Kenya.

On 31st December 2007, UN Secretary-General Ban Ki Moon issued a statement expressing concern for the ongoing violence, calling for the Kenyan citizens to remain calm and restraint to be exercised by Kenyan security forces. On the same day, then UN High Commissioner for Human Rights, Louise Arbor, called on the Kenyan Government to abide by its International Human Rights Obligations The severity of the crisis in Kenya further led French Foreign and European Affairs Minister, Bernard Kouchner, to appeal to the United Nations Security Council (UNSC) in January 2008 to react under the banner "Responsibility to Protect" before Kenya plunged into a deadly ethnic conflict.

Efforts to peacefully resolve the crisis through dialogue began in the first week of January 2008, firstly by South Africa's Archbishop Desmond Tutu, on 2nd January, and quickly followed by US Assistant Secretary of State for African Affairs, Jendayi Frazer, on 5th January 2008. On 8th January 2008, former African Presidents Benjamin Mkapa (Tanzania), Joaquim Chissano (Mozambique), Ketumile Masire (Botswana) and Kenneth Kaunda (Zambia) arrived in Kenya ahead of African Union Chairman, Ghanaian President John Kufuor, for talks with President Kibaki. Despite all mediation attempts, none of the leaders was able to broker a successful peace agreement.

On 10th January 2008, former UN Secretary-General Kofi Annan heading the African Union Panel of Eminent Personalities was accepted by both the ODM and the PNU political parties as the African Union Chief Mediator. Mediation efforts led to the signing of a power-sharing agreement on 28th February 2008. The agreement established Mwai Kibaki as President and Raila Odinga as Prime Minister, as well as the creation of three Commissions; the Commission of Inquiry on Post-Election Violence (CIPEV), the Truth, Justice and Reconciliation Commission and the Independent Review Commission on the General Elections. This rapid and coordinated reaction by the international community was praised as a model of diplomatic action under the Principle of Responsibility to Protect.

1.2 STATEMENT OF THE RESEARCH PROBLEM

The crisis that unfolded in Kenya in 2007/2008 was not exclusively a reaction to the dispute over the election results, it was entrenched in long term fundamental issues that have remained unaddressed since Kenya gained independence in 1963.

The international community participated effectively towards ending the Kenyan post-election violence of 2007/2008. The mediation efforts led to the signing of a power-sharing agreement on 28th February 2008. The agreement established Mwai Kibaki as President and Raila Odinga as Prime Minister. This prevented what many feared could have been the commencement of a much worse crusade of mass atrocities.

This research paper aims at exploring the role and effectiveness of International Law in ending the Kenyan post-election violence of 2007/2008.Whereas various international actors were keen and prompt to intervene in ending the Kenyan conflict, were the legal principles of International Law adhered to ending the conflict?

1.3 OBJECTIVES OF THE STUDY

1.3.1 Overall objectives

In addressing the research problem, the study will explore the general objective of examining the role and effectiveness of International Law in ending the Kenyan post-election violence of 2007/2008.

1.3.2 Specific Objectives

I.   To examine the history and causes of the Kenyan post-election violence of 2007/2008.

II. To ascertain the International legal principles applied in ending the Kenyan post-election violence of 2007/2008

III. To assess whether the International legal principles applied by international actors were effective in ending the Kenyan post-election violence of 2007/2008.

1.4 Research Questions

1) What factors contributed towards the Kenyan post election violence?

2) Were there any International Legal principles applied by international actors in ending the Kenyan post election violence?

3) Were the international legal principles applied by international actors effective in ending the Kenyan post election violence?

1.5 Justification of the study

This research paper is significant since it contributes to both current academic and policy literature on the role played by the international community in respect of building political settlement in Kenya in 2007/2008 by applying legal principles of International law. A number of studies have examined how the violence in Kenya was halted and how the mediation process unfolded but very little analysis of whether international law was applied has been expounded.

1.5.1 Academic Justification.

The Kenyan situation was the first instance in which the United Nations employed a responsibility to protect lens in shaping its responses to an ongoing crisis in Africa. The basis of this study is to examine the application of the Principle of Responsibility to Protect (RtoP) in the context of African conflicts since much of the focus has been accorded to conflicts within other regions. This project will strengthen the understanding of the said principle, viz a viz the Principle of Non-Interference in the Internal affairs of a sovereign state to establish whether Kenya is indeed a notable success of the application of RtoP.

The findings of this research project will be useful in assessing the relevancy of the principle of Responsibility to Protect as an International norm and the role the international community has to play in implementing the same. In this regard, this study will be a source of reference material to scholars, researchers and academicians of International relations and International law, to obtain insights in the cultural, history and environmental forces that contributed towards the significance of the international community intervention during the Kenyan post-election violence of 2007/2008.

1.5.2 Policy Justification

This study will be a source of reference material to policy analysts, policy makers and researchers to identify and replicate good practices in similar conflicts. It moves the debate beyond the theoretical considerations, providing insights into the political challenges and possibilities that arise when translating political settlement theory into practice. The experience of Kenya has broader relevance to the region as it reveals what sort of institutional failures led to the violence and reflects policies that could be taken to reduce recurrence of similar conflicts in Kenya.

The study will conclude by outlining the important lessons, Kenya's experience provided for the peace process initiatives within the region, including the need for early diplomatic intervention in the face of ethnic conflict as well as international coordination to resolve such disputes.

1.6 LITERATURE REVIEW

In terms of the qualitative literature analyzed in this paper, relevant literature covering aspects of the intervention by international actors during the post-election violence in Kenya in 2007/2008 and the application of the legal principles of international law to end the conflict have been reviewed.

1.6.1 The origin of the Kenyan Post-election violence

Prior to the Post-election violence in Kenya, donors lacked analysis and full understanding of the country's historical, political, and economic dynamics. Mueller[4] argues that

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[4] Mueller S, The Political Economy of Kenya's crisis, Journal of Eastern African Studies, 2008.

the international community did not understand the prevalence of informality and neo patrimonialism within Kenyan politics. They focused more on formal institutions rather than on the political actors themselves and the informal powers they had acquired. This led to a false optimism within the international arena that Kenya was indeed an island of stability within the Eastern African Region.

In contextualizing the Kenyan post-election violence of 2007/2008, it is critical to highlight all the factors that contributed to the crisis. Barkana J[5] has contributed to this debate by illustrating that the key institutions that were crucial for the implementing and overseeing the political transition were perceived as partisan and leaning towards the Executive rather than maintaining their independence as dictated by the Constitution and other relevant statutes. Ethnic and regional disparities penetrated the country as the key Governance Departments such as Finance, Defense, Internal security, Justice and information were held and controlled by officers from the President's ethnic community.

Accordingly, the crisis that unfolded in Kenya was not solely a reaction to the dispute over elections, but was entrenched in deeply foundational issues that had remained addressed since independence. Kenya having been long considered as a haven of peace and stability in a violence prone continent, it had however been facing a host of its own local problems. According to Horowitz[6], Kenya ethnic diversity commenced under the British colonial rule. The colonial policies of divide and rule introduced ethnic divisions in the country which has persisted to date.

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[5] Barkana J, Breaking the stalemate in Kenya, Centre for Strategy and International Studies.

[6] Jeremy Horowitz, Power sharing in Kenya, Centre for the study of Civil wars,2008

1.6.2 Role of mediation in ending the Kenyan conflict of 2007/2008

International law has been regarded by the international community primarily, as a means to ensure the establishment and preservation of world peace and security. Accordingly, Malcolm Shaw analyzes the pacific settlement of disputes under international Law and argues that mediation is the most preferred mode within the international setting.[7] This sets the pace for an in depth analysis of why mediation was preferred in ending the Kenyan conflict.

According to Mohammad Naqib[8], the means for the pacific settlement of international disputes, which include diplomatic and legal means, are laid down in International law. This is the law that basically regulates the relations among States. The author examines mediation purely from an International Law perspective and argues that it is a diplomatic means of dispute resolution which is effective in resolving international disputes. The conclusion drawn is that, if mediation is taken seriously and utilized in good faith it may help to achieve the desired result, being pacific settlement of international disputes settlement that would help to ensure world's peace and security.

Linden Mayer and Kaye[9] provide a detailed narrative account of the efforts to mediate the post-election violence in Kenya in 2008. Their emphasis is on telling the story of the mediation effort in a straight forward and careful manner by illustrating the role and comparative advantage employed by the many stakeholders from the international community. This paves the way in

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[7] Shaw.M.N,International Law,(Cambridge University Press 1977)

[8] Dr. Mohammad Naqib Ishaan Jan ,The Role of Mediation in the Pacific Settlement of International Disputes

[9] Elizabeth Linden Mayer and Josie Liana Kaye, "A choice for Peace? The story of forty one days of mediation in Kenya. International Peace Institute, August 2009

appreciating that the Kenyan situation was the first instance in which the United Nations employed the responsibility to protect lens in shaping its responses to an ongoing crisis. Trevor Keck[10] describes the international response following the post-election violence in Kenya. He focusses on the Kofi Annan led African Union mediation in early 2008 and analyzes whether the mediation in Kenya should constitute success as well as what lessons may be learned from the mediation within the international sphere. He concludes by outlining important lessons Kenya's experience provided for peace process within the region, including the need for early diplomatic intervention in the face of ethnic conflict and a well international coordination in support of one fully empowered mediator.

The debate over what qualifies as a successful mediation stems from a larger disagreement over what should be achieved in mediation. Bercovitch[11] argues that the success of mediation should focus on short term or long term conflict resolution. If one adopts a realist view that conflict is a natural part of the international system then resolution of the conflict in a comprehensive manner may not be realistic and hence short term resolutions ought to be the goal. If the conflict is unnatural due to structural discrepancies then the resolution should focus on long term goals. Marieke[12] concurs to the foregoing and further contributes that in appraising mediation success, it is critical to consider whether the goals and objectives of the mediator and the parties were met in the final deal. However, Marieke highlights the facts that in mediation the

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[10] Trevor Keck, Mediating Ethnic conflict in Kenya,http://works.bepress.com/trevor_keck/2

[11] Jacob Bercovitch, Mediation Success or Failure, a search for the elusive criteria,Cardoaza Journal of conflict Resolution 7,no 2(2006)

[12] Marieke Kleiboer, Understanding Success and failure of International Mediation, Journal of Conflict Resolution 40, 1996.

goals are often vague, implicit and liable to change hence the same has to be framed into the party's interests and positions.

The appointment of a single empowered mediation panel has been underscored as being the critical factor that led to the success of the mediation process in Kenya. Karuti and Walker uphold that this ensured that the parties would not be able to adjust the mediators with unwarranted intervention and derail the process. The mediation panel equally ran a highly pragmatic process that cajoled the parties towards a power sharing arrangement rather than focusing on which side worn the elections. In this regard, the Kofi Annan led mediation has however been criticized for emphasizing a power sharing arrangement rather than a process to determine who actually won the elections. This has provoked the debate that democracy was sacrificed at the altar of convenience for purposes of restoration of peace in Kenya.

1.6.3 The International Community's approach to the Kenyan crisis

According to Stephen brown[13] the role of international actors in preventing violence from erupting in Kenya and seeking a peaceful solution to bring it to an end is debatable. He argues that Western countries and their representatives in Kenya have a very poor record of conflict management, with the exception of their contributions to the crafting of the National Accord of Reconciliation Act in February 2008, which ended the most serious bout of election-related violence. International actors were much more willing to intervene in early 2008 compared to previous electoral years. The author concludes that had Western donors acted more effectively

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[13] Stephen Brown, Lessons Learnt and Forgotten, the International Community and Electoral Conflict Management in Kenya

when faced with the violence of the 1990s, replicated best practices, they would have been in a much better position to prevent the post-election violence of 2007.

Stephen Brown's[14] contribution in analyzing Western governments' responses to the 2008 Kenyan crisis has been considered. He argues that while donors' reactions to the crisis were a vast improvement over their responses to previous elections and eruptions of political violence, they failed to learn some important lessons from the past and take a more proactive role in preventing violence, notably because they disregarded key governance problems that made violence easily imaginable, if not utterly predictable. Moreover, by focusing on ending the violence as quickly as possible, donors placed greater priority on peace than on justice or democracy, a trade-off that undoubtedly saved many lives but compromised the political reform agenda and carries significant future risks for Kenya and other countries within the region.

In this regard, the region has witnessed countries wherein change of power was inevitable after elections, defeated incumbent political leaders contest the results of the elections and use that as the basis for remaining in power. In other instances, the actual winner of the election is turned into a junior partner in an emergent form of democracy that is in reality an aberrant kind of power sharing formula on the continent. This new fad in African Politics was witnessed in Kenya and Zimbabwe.[15]

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[14] Stephen Brown, Donor response to the 2008 Kenyan crisis: Finally getting it right? Journal of Contemporary African Studies,vol.27 no 3 (July 2009)

[15] The Mantra of African Solutions to African Problems: Professor Isaac Olawale Albert, Inaugural Lecture delivered at the University of Ibadan Trenchard Hall, February 2011.

According to Nic Cheeseman[16], the importance of the Kenyan crisis for the African continent was not that Kenya may become 'another Rwanda', but that it revealed how fragile Africa's new multi-party systems may be when weak institutions, historical grievances, the normalization of violence, and a lack of elite consensus on the 'rules of the game' collide. This paper provides an overview of the election campaign and the results, highlighting the major areas of continuity and change with Kenya's recent past, and identifying the key dynamics within the presidential and parliamentary contests.

Liam James Spalding[17] critically analyzes the International Relations theories that underpin the debate of Humanitarian intervention. He argues that the notion of intervention derives from the concepts of morality and human rights and focusses on the justification of international actors in times of conflicts. The writer introduces a third debate by demonstrating that it is possible to re conceptualize the debate through combining the principle of sovereignty with human rights which establishes that states have a duty to engage in humanitarian intervention.

Barkan Joel introduces a debate on the strategic importance of Kenya which justifies the role played by international actors in ending the Kenyan crisis in 2007/2008. This is in respect of democracy, renewed economic development, and the continued emergence of Kenya as arguably the most significant country in Africa after South Africa and possibly Nigeria. As the anchor

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[16] Nic Cheeseman, The Kenyan elections of 2007: An introduction. Journal of Eastern African Studies, vol. 2,no 2;166-84,2008

[17] Liam James Spalding: A critical investigation of the IR Theories that underpin the debate on Humanitarian Intervention, School of Public Policy , University College London 2012/2013

state of the region of greater Eastern Africa, Kenya matters. A stable and prosperous Kenya raises the prospects for peace and development in Uganda, Rwanda, Eastern Congo, and Southern Sudan.[18]

1.6.4. The Effectiveness of International Law in ending the Kenyan post-election violence.

The application of various legal principles of international law in ending the Kenyan post-election violence of 2007/2008 can be appreciated by critically analyzing the said principles. Evans and Sahnoun[19] have analyzed the background of the principle of Responsibility to Protect emerging from the post-cold war period. This period has perceived progress on building up of institutional barriers to genocide, mass killings and ethnic cleansings. Initially there was expansion of the UN peace keeping and peace building capacity. Subsequently, there was mounting demand of those responsible for committing mass atrocities and violating international law to be held accountable leading to the establishment of Special International War Crimes Tribunals and the Permanent International Criminal Court. However the most discernable transformation in international institutional structure emerged when the UN General Assembly adopted the concept of Responsibility to Protect in 2005.

Deng[20] asserts that the R2P principle eludes the national sovereignty versus Humanitarian intervention argument by establishing that a fundamental responsibility of the sovereign is the protection of human beings within its borders. The principle therefore established the norm that

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[18] Barkan Joel D "Breaking the stalemate in Kenya "Centre for Strategic and International Studies Online Africa Policy forum, January 8th 2008.

[19] Gareth Evans and Mohamed Sahnoun, the Responsibility to Protect, Foreign Affairs 81, No 6 2002

[20] Francis Deng, Secretary General's special Advisor for the prevention of Genocide 2010.

sovereignty is not the authority to violate the rights and physical integrity of the individual but rather the obligation to provide protection for its citizens. A new understanding of the concept of sovereignty where the state does not control but primarily protects citizens has emerged from the R2P principle.

In regard to its application, Bellamy[21] embraces the view that R2P can be observed as a policy agenda focused on the upstream prevention of genocide and mass atrocities through capacity building and international cooperation. There is need to focus on developing the institutions and capacities for effective response within the prevailing network while balancing the need to respond timely and decisively to atrocities when needed. Under the Kenyan situation, Bellamy argues that the international community was therefore fortunate that Kenyan authorities accepted regional and international involvement during the post-election violence of 2007/2008, thereby the notion of sovereignty was never challenged as has been witnessed in the application of the R2P Principle in other countries. This endorsed a consensus whereby the international community exhibited that it had a legitimate role to play in the Kenyan post-election crisis in 2007/2008.

It is noteworthy that the R2P application to the Kenyan crisis was equally not marked with any kind of sanction nor military intervention. According to Cohen, this enabled the UN Secretary General to invoke the principle as a solution without the authorization of the UN Secretary Council. This was imperative as it contributed to the success of having a joint undertaking by the UN and other multilateral and regional organizations which contributed to the success of the mediation process. This has stimulated the debate of the need to place military

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[21] Alex J Bellamy, The Responsibility to Protect-five years on.

intervention as a last resort while applying the Principle of R2P.Political and diplomatic interventions should be prioritized in any application of R2P similar to the Kenyan conflict.

The international community's rapid and swift response helped turn the crisis into an opportunity for long term response to deter future cycles of violence in Kenya. Karuti and walker[22] affirm that the international actors approached the crisis with a unity of purpose and a highly legitimate response by totally backing the African Union led mediation. Collectively they embraced an unwavering position of no business as usual. This led them to politically strategizing on how to reach a political settlement which sent a strong signal to Kenya's political actors that international actors were no longer prepared to accept the status quo. The intervention by international actors further provided a platform for global-regional partnership by providing constructive cooperation between the United Nations and the African Union on an urgent and sensitive matter. This technically provided an opportunity of aiding the parties to the conflict to seize viable peace at an early opportunity.

1.7 GAPS IN THE LITERATURE REVIEW

Relevant literature encompassing the role played by international actors in ending the Kenyan post election violence of 2007/2008 and how the mediation process unfolded have been covered by various scholars within the national, regional and global framework.However,there has been very little analysis of how International Law was effectively applied in ending the Kenyan post-election violence. In this regard, the research paper will endeavor to examine the role played by international actors in applying International Law to the Kenyan post-election violence of 2007/2008.

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[22] Karuti Kanyinga and Sophie Walker, Building a political settlement: The International approach to Kenya's 2008 post-election crisis.

1.8 CONCEPTUAL FRAMEWORK

The research paper employs a conceptual framework which analyzes the perceived undercurrents of the Kenyan post-election violence of 2007/2008 as similar to many electoral conflicts within the African Continent. Electoral process in Africa has mostly been characterized by violence at various stages from pre-election, during elections and post-election. The dependent variable post-election violence in Kenya ranged from killing and maiming of people and livestock, looting and destruction of property and arson. The conflict witnessed ethnically motivated massacres, sexual and gender based violence and police brutality resulting in at least 1000 deaths and 500,000 Kenyans displaced. The study uses the conceptual framework both to organize analysis and to provide a basis for empirical research.

1.8.1 Identifying causes of electoral violence

Electoral violence has received increasing international attention in recent years due to the devastating effects of outbreaks of violence in Kenya, Zimbabwe, Cote D'Voire and Afghanistan around elections. The notion of violence-free elections is encapsulated in the term 'free and fair' elections, serving as a benchmark for determining the legitimacy of elections. Efforts by local and international actors include electoral assistance, peacekeeping and monitoring missions, civic and voter education. However, understanding of the consequences of specific strategies and how their returns can be maximized, remains limited.[23]

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[23]Thomas Markussen, Kitavi Mbuvi, When Does Ethnic Diversity Lead to Violence? Evidence from the 2007 Elections in Kenya

Elections are key elements of the democratic processes. They provide for transparent and peaceful change of government and distribution of power. In this regard, a strong emphasis on democratization as a means to durable peace emerged among international policy circles in the early 1990s. The notion of supporting peacebuilding in tandem with democratization developed as a consequence of the recognition that political repression and discrimination often is the very reason groups took to arms in the first place. Hence, democratization does not only open up for manifestations of political rights, but is also seen as a response to addressing the root causes of conflict.[24]

Preservation to reinforce institutional capacity to promote democratic norms and to ensure democratic rule of law is now seen as crucial for peacebuilding. Elections and democracy promotion have thus become central strategies to build peace in countries shattered by violent conflict. Nevertheless, experiences and recent research suggest that democratization in transitional or war-torn countries, and elections in particular, can become a hindrance rather than a solution to peacebuilding.[25]

A fundamental bed rock of democracy is the election of political leaders through the electoral box since it gives the citizenry the right to elect their preferred political leaders. Electoral process in Africa have mostly been characterized by violence at various stages from pre-election, during elections and post-election. It is important to examine the factors that instigate electoral violence in all the foregoing three stages. First and foremost, electoral violence in Africa is caused by poverty which is very alarming and occasions an opportunity for the unemployed majority to be manipulated to propagate all forms of electoral violence. In the

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[24] Ibid
[25] Samuel Monday Atuobi, Election related violence in Kenya, Reuters 2010.

Kenyan situation, the local politicians took advantage of the unemployed youth and influenced them to proliferate electoral violence especially in the slum areas.

The culture of impunity has significantly contributed to electoral violence in Africa. This has been accelerated by the ineffectiveness and malfunctioning of security agents giving the people the impetus to stage electoral violence. The Security agents have continuously failed to prosecute the offenders of election violence hence creating a culture of impunity and motivation for recurrence of crimes and violence in Africa. Weak penalties or sentences for violators of electoral process has accorded room for electoral crimes. Most countries in Africa lack legislation against perpetrators of certain electoral offences contributing to the prevalence of electoral violence in Kenya. Fragile governance and corruption has also contributed in instigating electoral violence. Corruption creates a platform for structural violence and incidences of small arms proliferation in Africa. This leads to the perpetuating of violent conflict and the creation of new cycles of violence and crime in the region.

1.8.2 Sustainable Interventions

A number of approaches are applied to manage and prevent electoral violence. These strategies are to a varying degree applied by different actors. The actors involved in managing and preventing electoral violence include local and international monitoring and observer missions, national, regional and local dispute resolution and mediation missions. The bodies involved in these activities range from public authorities, political parties, an electoral commission, religious organizations, Civil Society, Non-governmental organizations (NGOs) and traditional authorities such as chiefs or clan leaders.

Various types of strategies can be identified. First, the presence of monitors can be instrumental in preventing electoral violence through naming and shaming mechanisms and by creating awareness of tensions building up. Second, mediation can be carried out in high-tension situations to solve an ongoing election-related dispute. Third, the legal framework and institutional design provides the basis for combating impunity and for creating conditions discouraging violence. Fourth, law enforcement highlights the deterring function of security forces. Fifth, voter-focused strategies emphasize the importance of long-term prevention though the cultivation of democratic norms and tolerance in society at large.[26]

For several reasons, violence can be an attractive option to influence the electoral process and outcome. In transitional and war-torn countries, incumbents are often manipulating or believed to be tampering with the electoral processes. The opposition parties also have incentives to further their strength through the use of violence. Spoiler groups intent on disrupting the election may use violence to prevent the election from taking place or to make sure that the election outcome is declared invalid. Such violence is potentially damaging for democratic processes and can undermine progress towards democratization. Electoral violence has indirectly effects such as hindering people from casting their vote and preventing candidates from participating in the election. These can have long-term effects of causing disillusionment and frustration with politics. The absence or presence of political violence during an electoral process is also central to determining the legitimacy of an election. [27]

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[26] Friedrich Ebert Stiftung and Centre for conflict research, 2001,political and election violence in East Africa, working papers on conflict management no 2,p1

[27] Ibid.

1.8.3 Resultant output

The Research paper concludes that the future of general elections in Kenya lies in a careful appraisal of pertinent issues with a view to prescribing lasting solutions. While Kenya has set up various Commissions premised on essentially critical issues that afflicts the country, it has botched to implement their findings thereby compounding rather than resolving the problems that the Commissions have been established to investigate. The Commission of Inquiry into Post-election Violence (CIPEV) is one of the key Commissions that has made far reaching recommendations which and when adopted, will shape Kenya's future and perhaps stop further election-related conflict.

1.9 HYPOTHESIS

1. During the Kenyan post-election violence of 2007/2008, various international norms and legal principles were identified by international actors.

2. During the Kenyan post-election violence of 2007/2008, international norms and legal principles were applied and adhered to by international actors

3. During the Kenyan post-election violence of 2007/2008, certain International norms and principles were applied which effectively ended the Kenyan crisis in 2008.

1.10 RESEARCH METHODOLOGY

This section will provide a discussion of the outline of the research methodology that will be used in the study. The project paper will be based on library research. It will employ secondary sources of information that also serve as useful source of International law. They will provide the status of International law and its interpretation through State practice which will

include reports, relevant articles, academic papers and journals. Reports from key institution such as United Nations, American Medical Association, Human Rights Watch and Action Aid will be analyzed.

The project will also rely on research studies conducted by other notable individuals and institutions, other sources will include precedents and case law from United Nations Treaties and Declarations, judgments of the Permanent Court of International Justice (PCIJ) and International Court of Justice (ICJ), legal instruments and International Treaties such as African Union Constitutive Act.

1.11 CHAPTER OUTLINE

Chapter one: Introduction

This chapter comprises the research proposal. It is the skeleton framework of the entire project. The chapter will introduce the topic of our research study by setting the broad context of the research study, the statement of the problem, justification, theoretical framework, literature review, hypothesis and the methodology of the study.

Chapter two: Contextualizing the Kenyan post-election violence of 2007/2008

Provides the historical background of what transpired leading to the Kenyan post-election violence of 2007/2008 and how the political impasse and violence ended.

Chapter three: A synopsis of the international legal principles applied in ending the Kenyan post-election violence of 2007/2008.

This chapter highlights the various principles of international law applied to end the Kenyan post-election violence.

Chapter four: The efficacy of International law in ending the Kenyan post-election conflict of 2007/2008

This chapter will analyze the role played by international law in resolving the Kenyan post-election violence of 2007/2008 and whether the basic principles of international law were adhered to. It will also focus on whether it was justified for the international community to intervene in the affairs of a sovereign country during the Kenyan conflict under the principle of Responsibility to Protect

Chapter five: Conclusion and Recommendations

This chapter will prove or disprove the research hypothesis. It will also provide conclusions of the study, give pragmatic recommendations and provide suggestions on areas of improvement in the resolution of similar conflicts within the region.

CHAPTER TWO

CONTEXTUALIZING THE KENYAN POST ELECTION VIOLENCE OF 2007/2008

2.1: Background on Kenya

Kenya being a diverse country hosting 42 ethnic communities has witnessed political violence taking an ethnic dimension which can be attributed to the fact that in rural areas the population is relatively homogeneous which significantly contributes to the thinking in ethno-geographic terms. Kenyan politics is equally influenced by ethnicity. The ethnic connection and not the political program basically determines the votes in any election year as was reflected in the 2007 power struggle between the Party of National Unity (PNU) and the Orange Democratic Movement(ODM).[28]

Kenya has experienced a history of ethnic violence in most election years but not in the magnitude witnessed in the 2007/2008 general elections. It is noteworthy that prior to the first multi-party elections in 1992, the Kalenjin ethnic group clashed with the Kikuyus ethnic group resulting in 1500 people and displacing 300,000.[29] During the 1997 polls, ethnic violence in the Rift valley and Coast province took the lives of 4000 people and displaced 400,000 wherein in both cases local politicians were heavily implicated in the violence.

The first fair multiparty elections seemed feasible only when the Kenyan 2nd President, Daniel Arap Moi elected not to run for another term in 2002 paving way for real political change

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[28]Report of CIPEV Commission of Inquiry into Post-Election Violence, October 15,2008 pp 31-32htttp:www.dialogue kenya.org/docs/PEV Report

[29] Human Rights Watch (HRW), Divide and Rule: state sponsored Ethic violence in Kenya, 1993

in Kenya. The two largest opposition parties formed the National Alliance Rainbow Coalition (NARC) party formed by Mwai Kibaki from the Kikuyu community and Raila Odinga from the Luo community. The opposition swept to power and defeated the ruling party KANU.

President Kibaki did not live up to the expectations of the electorate as corruption persisted and the alliance fell apart by failing to produce the real power sharing. However, President Kibaki's legacy is credited to having successful delivered on education, healthcare, access to water and basic infrastructure in certain areas of the country. A legacy of broken promises on the governance front, failure to deliberately bring an all-inclusive administration and the rampant corruption of state apparatus contributed to creating a situation whereby recognition became more important than development.[30]All these factors significantly contributed to the Kenyan post-election violence of 2007/2008.

The Rift valley province, one of Kenya's seven administrative provinces at the time, in particular has had a long history of election related violence and accordingly experienced much of the violence after the 2007 election cycle. In a pattern that is not only unique to Kenyans, most efforts by NGOs, media and international agencies focused on monitoring the election and campaign fraud and paid less attention to the informal organization of violence before the elections, which created the atmosphere for mass violence in 2007/2008.[31]The perceived arrogance of the political, bureaucratic and commercial elite surrounding President Kibaki had endangered an overwhelming number of nationwide sense of alienation, which amounted to a

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[30] Ibid

[31] Jackline M.Klopp,Patrick Githinji and Keffa Karuoya, "International Displacement and Local peace building in Kenya: challenges and Innovations: United States Institute of Peace Special Report #251

sense of exclusion and loss of dignity among the majority of Kenyans who were not from the Kikuyu ethnic group or from associated communities.[32]

It is noteworthy that prior to the 2007/2008 post-election violence, the key institutions that were crucial for implementing and overseeing the political transition were perceived as partisan and leaning towards the executive rather than maintaining and jealously safeguarding their independence. Ethnic and regional inequalities infiltrated not only the Kenyan politics but also the society. Accordingly, between the year 2000 and 2007, inter-ethnic rivalry and bitterness grew as the presidency rewarded personalities from his ethnic community and culturally related communities such as Meru and Embu communities with power and authority at the expense of other communities.[33]Majority of positions in the civil service were held by officers from the president's community and a small group of ministers from the same community known as the "mount Kenya mafia" held an overwhelming proportion of power that controlled the key Governance Departments of Finance, Defense, Internal security, Justice and Information.

Accordingly, the crisis that unfolded in Kenya in early 2008 was not solely a reaction to the dispute over the election result but was deeply rooted in long term, foundational issues that had remained unaddressed since Kenya gained independence in 1963.Powerful political elites had established support using state resources post the independence period causing widespread grievances over inequalities and long standing perceptions of exclusion in the distribution of resources. This patronage had weakened key state institutions and hence by the time of the post-election crisis in 2007/2008, the Judiciary and Legislature had lost their independence and were

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[32] John Githongo, Multi-party Elections in Africa, :Michelson Institute Report 2010 p76

[33] Barkana J (2008b) Breaking the stalemate in Kenya: Centre for Strategy and international Studies.

under the control and influence of the Executive totally in blatant disregard of the doctrine of Separation of powers.

These long term political trends created the conditions for political instability in Kenya. The combination of historically poor governance and weak institutions, entrenched politics of exclusion and patronage, ethnicization of the Kenyan Society established in the fragile atmosphere significantly contributed to the Kenyan post-election violence in 2007/2008.

2.2: The origin of the Kenyan post-election violence of 2007/2008

Kenya has long been considered a haven of peace and stability in a violence prone continent. Due to this stability, it has hosted numerous initiatives to resolve several conflicts within the continent including Southern Sudan, Sudan and Somalia and has been a hosting ground for humanitarian operations within the continent. The East African Nation has therefore been perceived as an island of political and economic stability and an essential hub for international activity.

Despite this esteemed reputation, Kenya has been faced with a host of its own local problems. It is a diverse country hosting forty two tribes. Under British colonial rule, Kenya's ethnic diversity became highly politicized. The colonial policies of divide and rule left ethnic divisions in Kenya.[34] Accordingly, the advent of multiparty political system in Kenya has witnessed political parties becoming champions for different ethnic blocks. This has turned electoral contests into an ethnic battle for control of the state and the resources that come with it.

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[34] Jeremy Horowitz, Power sharing in Kenya, Centre for the study of Civil wars .March 2008.

Ethnic tensions were further reinforced by all three of Kenya's former presidents who deliberately promoted members of their ethnic group to power, and instituted policies that favored their constituencies.[35]Accordingly, each election period since the advent of Multi-party elections in 1992, has been orchestrated with violence and voting irregularities. However, despite violence and voting irregularities, each round of election has improved with less violence and fraud than the last.[36]

On the 27th December 2007, Kenya went into the polls wherein the elections appeared free and fair at the initial stage. Election observers witnessed signs of manipulation within forty eight hours of the closing of the voting stations. On December 31st 2007, despite allegations of voter irregularities and fraud, the Electoral Commission of Kenya (ECK) announced that the incumbent, Mwai Kibaki had won the elections. Consequently, within minutes of the announcement violence broke out in several parts of Kenya. While some of the violence was spontaneous, it was observed that in some areas, opposition parties and local elders planned and organized ethnic based violence in opposition based areas.[37]

The violence perpetrated by the opposition specifically targeted members of the Kikuyu ethnic group who came from President Kibaki's constituency. Consequently, Kikuyu militias committed revenge attacks against members of the Kalenjin and Luo ethnic groups who were

[35] Maina Kiai, Kenya Change we can: Video Recording. Voxcom production. Accessed at http://video.com/4839384

[36] Joel Barkan, Will the Kenyan settlement hold, current history 107,No 708 (2008) 9

[37] Human Rights Watch, "Kenya: Opposition officials helped plan Rift valley violence," January 23, 2008

largely supporters of the opposition leader Raila Odinga.[38] The next two months following the eruption of violence, witnessed ethnically motivated massacres, sexual violence and police brutality resulting in at least 1000 deaths and 500,000 Kenyans displaced.[39]

2.3 The International community's approach to the Kenyan crisis

Prior to the post-election violence in 2008, critics have noted that donors lacked analysis and full understanding of Kenya's historical, political and economic dynamics. Indeed the international community did not understand the prevalence of informality and neo-patrionialism within Kenyan politics. Instead they focused on formal institutions rather than on the incentive systems guiding the behavior of political actors themselves and the enormous informal power they had acquired.[40] Consequently a false optimism developed amongst the international community that Kenya was an island of stability within the Eastern Africa region.

The international community further failed to recognize and address the growing signs of violence in the pre-election period in Kenya. There was potential for political violence during the 2007 elections but donors missed the signs of rising violence having prematurely consigned political violence to the dustbins of Kenyan history. Accordingly, the international actors did not have a collective view of the Kenyan context. There were several formal governance and conflict analyses carried out prior to the crisis by various donors but were not systematically shared mainly because of their sensitivity.[41]

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[38] Ibid

[39] The Economist, December 22, 2007 "Down to the wire: Kenya's election," Accessed December 10, 2009.

[40] Mueller, S (2008) ,The Political Economy of Kenya's crisis, Journal of Eastern African Studies 2(2):185-2010
[41] Ibid.

The African Unions Peer Review Mechanism (APRM) report of 2006 and the Kenya joint Assistance Strategy (KJAS) were the most prominent formal analyses. The APRM report having been compiled through a participatory approach, after the Constitutional Referendum in November 2005 correctly forecast that there would be violence if Kenya did not prioritize institutional reforms and address ethnic divisions, corruption and poor governance.[42]However, the international response to the crisis itself did demonstrate some contextual understanding of the causes of violence by virtue of Grace Machel being one of the mediation panelist. Machel, had a thorough indulgent of the long term causes of the conflict having led the APRM IN 2006. Accordingly, as the crisis played out there was a refocus amongst the international community towards comprehending and addressing the root causes of the Kenyan electoral conflict.

The onset of the 2007/2008 post elections violence led to numerous prominent African figures visiting Kenya to intervene with the objective of trying to resolve the political crisis and end the violence. The prominent personalities from the region included Archbishop Desmond Tutu, Graca Machel, John Kufuor, Benjamin Mkapa, Joachim Chisano and Kenneth Kaunda. The prominent personalities were however unable to break the deadlock since the wrangling parties refused to negotiate and remained entrenched within their hardline positions. John Kufuor who chaired the African Union (AU), requested Kofi Annan to chair an AU mediated mediation. Annan arrived in Kenya on the 24th January 2008, upon accepting the offer initiated by the African Union and his initial monumental achievement was to get the parties on the mediation table.

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[42] African Peer Review Mechanism (2006) Country Review Report of the Republic of Kenya

When Raila Odinga and Mwai Kibaki shook hands publicly on January 24th 2008 for the first time since the commencement of the crisis, the sigh of relief that swept across the country was short lived. Kofi Annan had in two days, managed to accomplish what no one else had managed. He convinced the parties to agree to a direct meeting, thereby recognizing each other formally, no longer as an enemy but as a negotiating partner, however the parties were still not fully committed to the process. On the very same day the two leaders shook hands and agreed to engage in dialogue, they also took steps which increased the gap that existed between them and accelerated the conflict.

Kibaki used the high-profile handshake to highlight the legitimacy of his presidency, using his speech to emphasize that he was the "duly elected president "and that the crisis could be resolved internally. Odinga, reacting to these comments, warned of the possibility of mass action once more. Accordingly, what should have been a unifying event for the country swiftly became a divisive one. Kibaki restated that the government could not share power with those whom it had accused of engaging in mass killings and Odinga insisted once more that the only way to restore confidence would be through a rerun of the presidential elections, ruling out any possibility of forming a government of national unity with President Kibaki. As positions solidified and tensions rose, violence erupted again on the streets: mourners and police clashed in Nairobi, fifty more houses were burned in the Rift Valley, and people in Nakuru were forced to dodge bullets and use cardboard to protect themselves from flying poisoned arrows. [43]

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[43] Elizabeth Linden Mayer and Josie Liana Kaye, "A choice for Peace? The story of forty one days of mediation in Kenya. International Peace Institute, August 2009

During the initial stages, President Kibaki attempted to consolidate his legitimacy by emphasizing that he was the duly elected president and that the crisis could be resolved internally. Raila Odinga responded by threatening mass action and advanced the argument for forming an interim Government and schedule another round of elections. Insignificant progress occurred during the first week of negotiation as both parties restated their positions to each other and stuck to their guns. The principals subsequently agreed to enter into mediation on four agendas otherwise known as the Road Map. Rather than negotiate themselves the principals appointed a negotiating team that left a vast amount of power lay outside the negotiating room, a dynamic that would prove to be both a challenge and an opportunity within the peace process.[44]

The immediate discussions included first and foremost, to stop violence and restore fundamental human rights and liberties, secondly to take immediate measures to address the humanitarian crisis, thirdly, to overcome the political crisis and lastly to work on long term solutions such as poverty, inequality and unemployment as well as the need to confront impunity, tackle land reform and consolidate national cohesion and transparency.[45]

2.4 The Road Map to ending the Kenyan post-election violence

The negotiations commenced on a swift and positive start with the mediation team having made the important decision to separate the short and long term issues at hand. The objective was to stop the violence to enable the negotiations take place within a constructive framework and a peaceful environment. This gave the peace talks momentum by providing a platform for

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[44] Ibid.

[45] Ibid.

the parties to agree on issues with relative ease first, before moving on to the more contentious issues.

The arrival of UN Secretary-General Ban Ki Moon on February 1st 2008, was further proof of the undivided support of the international community. The Secretary-General made several clear and unconditional statements of support for the work of Kofi Annan and the mediating team, while also making it clear that responsibility for peace lay with the leaders themselves. Ban emphasized the need for Kibaki and Odinga to "do everything possible to resolve the sources of the crisis peacefully, while also calling upon all African leaders present at the summit "to urge and encourage the leaders and people of Kenya to calm the violence and resolve their differences through dialogue and respect for the democratic process." [46] Furthermore, in the shadows were the warnings and perceived threats of possible alternative action on behalf of the United States, which issued an ambiguous statement on the need for an "external solution," without giving any details of what such a solution would entail.[47]

The Kenyan government insisted that the statement from the US was unnecessarily threatening. However, this combined with the international pressure from other sources as well as the pressing need for a solution to end the violence led to two major agreements on agenda items one and two, to end the violence and address the humanitarian situation on the ground. These agreements, made on February 1st and 4th February 2008 respectively, involved concrete measures to hold joint meetings to promote peace, ensure freedom of expression and the right to peaceful assembly; investigations into crime and police brutality, assisting the safe return of

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[46] United Nations Secretary General ,addressing African Union Summit, underlies Kenya's leaders responsibility to resolve sources of conflict peacefully, UN Doc, SG/SM11396(January 3,2008)

[47] Ibid

internally displaced persons; and the establishment of a Truth and Reconciliation Commission. The Panel and the parties made substantial progress within a record of 10 days setting the pace for Agenda Three.

Upon the rapid progress on the less contentious agenda items one and two, the obstacles and challenges that arose with respect to agenda item three was how to resolve the Political Crisis. In this regard, agenda item three can be divided into two phases, which are intrinsically linked under the banner of the political crisis. The first dealt with the flawed election process and what could be done to address this, while the second was linked to the nature of power sharing to form a transitional government. As such, the first looked at the past, the second looked to the future, but only if they were undertaken together would they constitute a peaceful solution that would ease tensions in the present.[48]

The mediation quickly lost momentum when talks moved to Agenda three. Upon several weeks passing without no concrete achievement, the Kenyan media began reporting that the talks were on the verge of failure. Kofi Annan quickly moved to deflect the negative press by accepting an invitation to brief Kenya's Parliament on the mediation progress. This provided a platform for dialogue between the mediators and the members of parliament. Accordingly, Annan skillfully used the occasion to accelerate the process by floating a formula on the grand coalition. This raised public expectations and set the stage for the eventual power sharing agreement.

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[48] Elizabeth Linden Mayer and Josie Liana Kaye, "A choice for Peace? The story of forty one days of mediation in Kenya. International Peace Institute, August 2009

Consequently after the parliamentary briefing, the mediation team moved to the talks to a more neutral environment. This changed the dynamics of the mediation considerably which led to a more substantive discussion of the issues. The parties agreed to comprehensive reforms and mechanisms including comprehensive Constitutional reforms, comprehensive Electoral reforms, a Truth and Reconciliation Commission, and Legal and Judicial reforms, among many others. The idea of having a Prime Minister appeared to evolve organically throughout the negotiations; at other times, it appeared as if it had been the only solution all along, one toward which the Panel of mediators attempted to steer the parties. This was premised in the decision to pass on the issue of the electoral crisis to a review process in order to focus on finding a political solution whereby the two parties would come together with a view of implementing a package of social and economic reforms.[49]

During this stage in the negotiations, Annan insisted that this was a major crisis requiring an extraordinary response, and that the focus should be solutions, not problems. The Panel asked both the ODM and PNU sides to prepare papers outlining the irrespective stances on solutions to the political crisis, After three days of extensive closed working-group sessions, the group returned to the session with a Draft National Accord and Reconciliation Act 2008 containing provisions on the appointment and functions of a Prime Minister and two Deputy Prime Ministers, the formation of a coalition government, and details on how the coalition could be dissolved. Substantial disagreement however remained. There was no agreement on the power and responsibilities of the Prime Minister, the process for nominating ministers, the security of tenure, what would happen upon dissolution of the coalition, nor whether the changes should be brought into being by an Act of parliament or through changes to the Kenyan Constitution.

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[49] Trevor Keck, Mediating Ethnic conflict in Kenya 2011:http://works.bepress.com/trevor_keck /2

On February 26th 2008 in consultation with former President Mkapa, Annan decided to temporarily suspend the talks with the negotiating teams in order to engage directly with the two leaders, Kibaki and Odinga. The gap between the positions of the parties, and the desires of their leaders, as well as the lag between the speed of progress in the room and the crisis happening on the ground, could no longer be tolerated. Behind closed doors, Annan expressed his extreme disappointment at the parties' lack of progress, and at the fact that talks were no longer contributing to the resolution of the crisis.

The parties, he implied, had given him no other choice. In a crescendo that was well orchestrated, Kofi Annan asked that President Jakaya Kikwete of Tanzania join him, along with former President Mkapa, for the final stage of negotiations with President Kibaki and Mr. Odinga. Having suspended the talks so abruptly, the leaders were most probably not only in shock but also absorbing the very clear message that the moment for agreement could no longer be postponed. The decision to bring in President Kikwete at this point was double-edged: a respected figure on the continent and at the time chairperson of the African Union.[50]

The international community, voiced its statements through Condoleezza Rice, who emphasized that failure was not an option; the future of the relationship of the US with both sides and their legitimacy depended on their cooperation to achieve this political solution. More importantly, less appealing alternatives UN Security Council sanctions or US unilateral action,

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[50] Ibid.

for example were still on the table, and the US was "exploring a wide range of options."[51] President Kibaki seemed increasingly cornered since the prevailing perception was that the impasse lay directly on the shoulders of the Government of Kenya and PNU but if failure lay on their shoulders, the possibility for success was in their hands. Annan was handing the possibility to create peace in the country over to Kibaki.[52]

2.5 Reaching an agreement to resolve the political crisis.

On February 28th 2008, after hours of intense negotiations with President Kibaki and Mr. Odinga, an agreement was reached on all the issues of contention in the draft Act of Parliament. Later that same day, a ceremony was held at Harambee House situated in Nairobi, Mwai Kibaki and Raila Odinga signed the Agreement on the Principles of Partnership of the Coalition Government. The agreement outlines the position of a Prime Minister charged with coordinating and supervising the execution of the functions and affairs of government; each member of the coalition was to nominate someone from the National Assembly as Deputy Prime Minister.

The agreement on the Principles of Partnership of the Coalition Government was premised on the principle that the coalition government would take into account the principle of portfolio balance and reflect their relative parliamentary strength. In this regard, the removal of any minister would be subject to consultation and concurrence in writing by the principals. The draft National and Reconciliation Act was submitted to Parliament and incorporated into the

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[51] Martin Griffiths, "The Prisoner of Peace: An Interview with Kofi Annan," (Geneva: Kofi Annan Foundation and the Centre for Humanitarian Dialogue, May 9, 2008), p. 12.

[52] D. Lucas Barasa and Bernard Namunane, "Talks Suspended as US threatens to act," Daily Nation, February 27, 2008

constitution. This transitional form of government was in place for five years from February 2008 until 2013.

2.6 Towards identifying the Legal Principles of International law applied in ending the Kenyan Post election violence.

The post-election violence that erupted in Kenya in 2007/ 2008 not only occasioned the loss of lives and displacement of population but was catastrophic in respect of the scale of the social and economic destruction. A plethora of international actors were keen and prompt in intervening by applying various Legal Principles of International law to end the conflict which included an international sanctioned mediation and the application of the Principle of Responsibility to Protect (R2P) vis a vis the concept of State sovereignty.

The international community collectively recognized the need for a mediation process to end the Kenyan crisis and the need for the process to be an African led effort with international backing. It is noteworthy that the leadership of the African union, UN's involvement and support of the AU led mediation process and the appointment of the highly respected Kofi Annan through the panel of eminent personalities also greatly deepened the legitimacy of the entire mediation process. International actors applied existing donor and diplomatic coordination mechanisms effectively to respond to the crisis by collectively placing pressure for agreed reforms and actualization of a new constitutional dispensation in Kenya.

The international community spoke with one voice as was illustrated in early 2008, when the international actors adopted the strong stance of no business as usual towards the Kenyan Government. This played out primarily through the suspension of ongoing development

programs whilst bringing in new humanitarian and mediation support. This approach enabled the international community to work with greater legitimacy on the political settlement in Kenya and enhance its leverage by confronting some of the operational constraints posed in the Kenyan political troubled environment.[53] The dynamics on the ground contributed to the perception of a hurting stalemate whereby it was increasingly accepted by both parties that dialogue was the only way forward. This factor contributed to help create a ripe atmosphere for the international sanctioned mediation process in Kenya.

The response by the international actors in Kenya's post-election conflict in 2008 can be premised on the basis that despite the many growing bodies of International Human Rights Law, many governments in many countries have harassed, persecuted, tortured, starved and killed a large segment of their own population under the guise of State Sovereignty. The Sovereignty principle has been highlighted among the principles considered by the classical international law as a basis of relations among states. It has been enriched with a formulated principle, the principle of non-intervention that encompasses the non-interference in internal affairs of states. The international community was therefore fortunate that Kenyan authorities accepted regional and international involvement during the post-election violence of 2007/2008. Consequently the intervention in respect of sovereignty in Kenya was not challenged as has been witnessed in the application of the R2P principle in other countries that have faced similar conflicts.

Responsibility to protect is an international security and human rights norm to address the international community's past failure to prevent and stop genocides, war crimes, ethnic cleansing and crimes against humanity. It is not aimed at every conflict but in situations where

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[53] Barkan, Joel D (2008B), Breaking the stalemate in Kenya; Centre for Strategy and International Peace.

the violence reaches the levels of crimes against humanity that demands and requires international response.R2P is widely accredited with having helped diplomatic efforts to stave off the escalation of post-election violence in Kenya in 2007/2008 by galvanizing the international actors to end the crisis. The Kenyan situation provided a platform for exhibiting the extent to which R2P has capacity to generate the compliance pull in international society and help the local actors in ending the conflict within the state.

The R2P application in Kenya was neither challenged nor marked with any kind of sanction or military intervention, enabling the UN secretary general to invoke the principle as a solution without the authorization of the UN Security Council. The applicability of the principle to the Kenyan conflict exhibited not only the Responsibility to prevent mass violence but also the responsibility to follow up on the intervention and hence rebuild a state which has been in a conflict situation.

2.7 Summary and Conclusion

The violence that broke out in Kenya in 2007/2008 affected at least, one out of three Kenyans which encompassed the volatile outcome of a combination of factors including, historical, economic and political factors. Old grievances and emotive issues such as land disputes became entangled in the outbreak of electoral violence. In this regard, chances of being a victim of violence were higher in areas with land conflicts and where political gangs operated. Institutional failures at the macro level regarding the electoral commission, police and judiciary system contributed to the conflict and led to the deterioration of trust in institutions that would have helped in resolving the conflict.

The international intervention was instrumental in ending the political impasse created by the Kenyan post-election violence of 2007/2008.Their swift action was a key element that contributed to halting the ethically motivated mass violence. The rapid strategic collaboration was replicated with funding efforts particularly for the international sanctioned mediation. The lives already lost and the families torn apart are irreversible tragedies; but the extent of the violence could have spread so much further, the number of deaths could have spiraled out of control and the crisis might have escalated from Kenya to the rest of the region, with devastating consequences for the entire African continent. The mediation efforts in Kenya prove that when the international community has unity of purpose and stays the course, peace stands the very best chance of success.

CHAPTER THREE

A SYNOPSIS OF THE INTERNATIONAL LEGAL PRINCIPLES APPLIED IN ENDING THE KENYAN POST-ELECTION VIOLENCE OF 2007/2008

3.1 Introduction

The international political climate is distraught with unresolved interstate and intrastate disputes which if not monitored and resolved peacefully may lead to armed conflict. Such conflicts may have devastating effects, not only to the disputants but also to the international community. The means for the pacific settlement of international dispute are laid out in International Law which basically regulates the regulations among States.

Article 33 of the UN Charter outlines the various conflict management mechanisms that parties to any dispute may resort to. One of the key objectives of the UN is to maintain international peace and security through peaceful means including the settlement of international disputes.[54] Accordingly, Article 33 of the Charter enjoins parties to an international dispute to first seek a solution to their dispute by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.

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[54] Article 1.1. Charter of the United Nations, 24th October 1945,1 UNTS XVI

The term interstate dispute refers to a specific disagreement between two or more states that reaches a point of sufficient definition and clarity where the use of certain established means of dispute resolution mechanisms under international law such as negotiation, mediation, conciliation, arbitration and adjudication might be utilized in resolving the dispute.[55] The term intrastate dispute means a specific disagreement for instance between a ruling party or government in a state and its political dissident or separatist movement. Such a dispute may even lead to civil war but its resolution is not basically the concern of international law. The solution of the intrastate dispute normally falls within the domain domestic law. This however does not mean that internal disputes cannot be solved through peaceful means such as mediation.[56] Accordingly all the diplomatic methods for the international settlement of disputes can be utilized to solve internal disputes. This research paper will consider mediation as the preferred mode of settlement of dispute applied during the Kenyan post-election violence of 2007/2008.

3.2 Mediation

Mediation is an effective mechanism of settlement of international disputes and is recognized as such by international law. Article 33(1) of the UN Charter has named mediation as one of the preferred mechanism for the settlement of international dispute. The term mediation is defined as a confidential facilitated negotiation, substantially controlled by neutral third parties but with no authority to impose an outcome. It is a diplomatic means of dispute resolution in which the parties to a dispute with the assistance of a neutral third party, identifies the disputed issues, consider alternatives and try to reach an agreement.

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[55] Dr. Mohammed Naqib Ishan Jan ,The Role of Mediation in Pacific Settlement of International Disputes:

[56] In the 2008 internal dispute of Kenyan post-election violence, Kofi Annan, the former UN Secretary General successfully mediated and settled the dispute between Kenya's President and the opposition leader.

The involvement of an impartial third party facilitator also known as the mediator is a key element in negotiation. The mediator has to be acceptable to the disputants and hence needs to be neutral. A biased mediator can never be an honest peace broker. The mediator as a facilitator, reconciliatory educator or resource expander, interpreter creates a positive tone and establishes behavioral guidelines to control the proceedings and the flow of communication between the parties. The mediator not only transmits and interprets the proposals of the parties to the dispute in order to find consensus among them but also may advance proposal for settlement of the dispute.[57]

The mediator's proposals are not binding upon the parties to the dispute. Mediation being a voluntary process can only be successful if the parties are agreeable to the settlement dispute in good faith. This comprises entering into the process with the intent to work towards a resolution, taking reasonable steps towards it and not using the process for ulterior motives.[58] The confidentiality of mediation is a key element since keeping the proceedings confidential is crucial in the sense that it give the parties some quiet and uninterrupted times to contemplate over the issues and find a common ground order to resolve the dispute. Confidentiality deters media speculation and prevents self-centered third parties who benefit from the dispute to cause obstacles in the mediation process.

The concept of mediation has been said to be elusive since its success depends on a combination of factors including; fairness, effectiveness and satisfaction of the party's interest

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[57] Dr. Mohammed Naqib Ishan Jan, The Role of Mediation in the Pacific settlement of International Disputes :

[58] Ibid

with effectiveness considered as the most important element.[59] Effectiveness in this regard encompasses the measure of results achieved, change brought about or behavioral transformation. Accordingly mediation is intertwined with conflict management since they both involve a process of change as witnessed in Kenya's mediation process that ended the post-election violence of 2007/2008 which set the country on a path towards peace and stability.

The debate over what qualifies as a successful mediation stems from a larger disagreement over what should and can be achieved in mediation and hence whether mediation should focus on short term or long term conflict resolution. If one adopts a realist view that conflict is a natural part of the international system then resolution of conflict in any truly comprehensive manner may not be realistic and a short term resolution of the crisis should be the goal.[60]However if one believes that conflict is unnatural and a result of structural discrepancies then one is inclined to believe that mediation should focus on more than just a settlement and hence mediation should seek to provide a long term resolution to the conflict.[61]This analysis demonstrates that disagreements over what mediation success is stems from uniquely disparate world views.

In appraising mediation success, it is important to consider whether the goals and objectives of the mediator and the parties were met in the final deal. It is noteworthy that mediation rarely results in achieving all the participant's goals. During a mediation process,

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[59] Jacob Bercovitch, Theodore Anagnosonn, Donnette L Wille "Some Conceptual Issues and Empirical Trends in the Study of Successful Mediation in International Relations "Journal of Peace Research78 (No 1)1998.

[60] Jacob Bercovitch, Mediation Success or Failure: A Search for the elusive Criteria, "Cardoza Journal Of Conflict Resolution 7, no 2(2006):296

[61] Ibid

goals are often vague, implicit and liable to change.[62] The objective of getting the parties to sign an agreement depends on the mediator's skills and ability to reframe the parties' positions into interests and hence a successful mediation can result into a cease fire, a partial or full settlement.

3.3 The Principle of Responsibility to Protect vs. Sovereignty

The post-cold war period has since perceived progress on building up of institutional barriers to genocide, mass killings and ethnic cleansing. First and foremost, there has been expansion of the UN peacemaking, peace keeping and peace building capacity. Secondly the demand that those responsible for committing mass atrocities and violating international law must be held accountable has led to the establishment of special international war crimes tribunals and the permanent international criminal court. Indeed the expansion of the UN activities after the cold war was enormous and helped to improve preventive diplomacy as a tool to stop violent conflicts. Despite the institutional developments in the 1990s, tragic atrocities around the world contradicted the naïve belief that international action would stop armed violence. Notable failures in Somali, Rwanda and Bosnia was perceived as too little too late, misconceived, poorly resourced, poorly executed or all of the above.[63]

Finally the most discernable and hopefully far reaching transformation in International institutional structure came when the UN General Assembly in September 2005 adopted the concept of "responsibility to protect" in a special session after pressure from hundreds of Non-Governmental Organizations(NGOS) around the world. This came from the background that

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[62] Marieke Kleiboer "Understanding Success and Failure of International Mediation" Journal of Conflict Resolution 40, No 2 (1996);362

[63] Gareth Evans and Mohamed Sahnoun, The responsibility to Protect: Foreign Affairs 81, no 6 (2002) 100

efforts to justify intervention on behalf of the victims of human rights was defeated for many decades against the claim that the national sovereignty protected states from any international interference in their internal affairs.[64]

The Responsibility to protect doctrine eludes the National Sovereignty versus Humanitarian intervention argument by establishing that a fundamental responsibility of the sovereign is the protection of human beings within its borders. In this regard, the State's primary responsibility is to prevent human right abuses within its territory. The principle established the norm that sovereignty is not the authority to violate the rights and physical integrity of the individuals but rather the obligation to provide protection for those under its protection.[65]The 2005 World Summit document made it clear that in extreme cases when genocide, war crimes ethnic cleansing and crimes against humanity occur and the nation state either is unable to prevent their continuation or itself complicit then the responsibility shifts to the wider community.[66]

The Responsibility to protect has become a prominent feature in international debates about preventing genocide and mass atrocities and about protecting potential victims since its adoption at the 2005 UN World Summit. It has presented the novel idea that the international community should assist states in this endeavor and situating armed intervention within a broader continuum of measures that international community might take to respond to genocide

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[64] Mark Schneider, Implementing the Responsibility to Protect in Kenya and Beyond:, International Crisis Group 2010

[65] Francis Deng, the Secretary General's Special Advisor for the Prevention of Genocide 2010

[66] The World Summit Outcome Document, September 2005 executed by Heads of States and Governments attending the 60th Session of the UN General Assembly

and mass atrocities. In this regard, the principle has become part of the diplomatic language of humanitarian emergencies used by Governments, international organizations, NGOs and independent Commissions to justify behavior, cajole compliance and demand international action.[67]

Responsibility to Protect is an international security and human rights norm to address the international community past failure towards preventing and stopping genocide, war crimes, ethnic cleansing and crimes against humanity. Accordingly, when the violence stretches to the level of crimes against humanity then international response is required not only because of the violation of universal values but because it poses direct threat to National security interests and international peace.

R2P can be broken down into three pillars; Pillar one states that states have the primarily responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Pillar two addresses the commitment of the international community to provide assistance to States in building capacities to protect the populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assist those which are under stress before crises and conflicts break out. Pillar three focusses on the Responsibility of the international community to take timely and decisive actions to prevent and halt genocide, war crimes, ethnic cleansing and crimes against humanity when a state is manifestly failing to protect its populations.[68]

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[67] Alex J Bellamy: The Responsibility to Protect-Five years on :http://www.responsibiltyto protect.org/index.php/about-rtop

[68] Ibid

The first pillar can be summarized as the responsibility to prevent which implies making every effort to address both root causes an immediate sparks of internal conflict and other man made crises placing the populations a risk. This requires sufficient early warning to enable the international community to engage with the national Government. Early warning systems must have the capacity to identify the structural, root cause of conflict and the proximate factors that can ignite deadly violence. The 2nd element of R2P is responsibility to react. In situations of compelling human need there is still no automatic response guaranteed from the international community to immediate diplomatic actions, humanitarian response, special envoys and special rapporteurs, Commissions of inquiry, arms embargos, targeted sanctions on responsible government officials, economic and financial sanctions or preventive deployment of military forces.[69]

The most serious challenge in the implementation of this doctrine is ensuring acceptance of the responsibility to react. This is because there is no automatic mechanism that demands naming of a special envoy or a mediation team when the potential for serious conflict exists such as witnessed in Kenya or Somalia. Only in the extreme should coercive military force be applied. The seriousness of the consequences of military force requires a consensus that it must take place under legitimate authority, be proportional, assure strict adherence to international humanitarian law, operate under the vigorous political oversight and have reasonable prospects of success without producing worse consequences in its wake.[70]

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[69] Ibid

[70] Ibid

The third element of the concept is the responsibility to rebuild that provides in the aftermath of a successful international reaction. This embraces a continued commitment for recovery, reconstruction and reconciliation addressing the foundations of the harm that the intervention was designed to halt or avert. It encompasses a sustained engagement rather than short term involvement followed by a rapid exit strategy. However while the norm has been enunciated and formally adopted, it has not been embedded in the routine conduct of nations or the United Nations itself. This has been witnessed in the absence of an effective response to protect civilian's lives in Darfur, DRC, and Afghanistan or in Somalia. However there has been enormous optimism on how far the international law has come in overshadowing those who asserted for decades the absolute nature of National Sovereignty.

3.3.1 The Emergence of R2P

In the year 2000, the Canadian sponsored International Commission on Intervention and State Sovereignty (ICISS) was set up to finally resolve the dilemma between Humanitarian Intervention and State sovereignty. This was premised on the background that humanitarian intervention was seen by states as an unjust interference into internal affairs of states whereas the concept of state sovereignty was attacked by humanitarians as being used as a safe haven to commit atrocities against innocent civilians. ICISS published its report on the Responsibility to protect in December 2001 and accordingly three pillars were developed; prevent, react and rebuild.[71]The three pillars of R2P have to be reflected as an aggregate set of approaches forming

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[71] International Commission on intervention and State Sovereignty (ICISS), The responsibility to Protect(Ottawa:IDRC,2001)

a toolkit to tackle gross humanitarian emergencies, particularly genocide, war crimes, ethnic cleansing and crimes against humanity.

R2P has made four key contributions to the humanitarian intervention debate. First and foremost, turning the focus of the debate from humanitarian intervention to a responsibility to protect citizens trapped in conflict situations. Secondly, developing a new understanding of sovereignty where the state does not control but primarily protect its citizens. Thirdly setting up clear criteria of what R2P in practice should mean clarifying that it consists of much more than just military intervention and lastly, mandating that if coercive action is seen as necessary it must be legal and legitimate.[72]The R2P supporters promoted the idea across the world, particularly to Africa which had been shaken by the most conflicts. In 2003, the Constitutive Act of the newly set up African Union drastically altered Africa's efforts concerning management. Although the principle of non-intervention was reaffirmed in the aforesaid Act, Article 4(H) provided the AU the right to intervene in a member's state, in case grave circumstances like genocide or crimes against Humanity should force the AU to do so.[73]

During the world summit in 2005, the then UN Secretary General published a report wherein he hard-pressed the need for embracing the responsibility to protect. His main concern was coming to an agreement concerning the coming to an agreement about R2P since he desired to witness the transition from principle to operational action. By the end of the summit, the

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[72] Gareth Evans, The Responsibility to Protect: Ending mass Atrocity Crimes once and for all (Washington, DC: Brookings Institution Press,2008) 41-43

[73] Paul D Williams, from Non-interference to Non Indifference. The origins and development of the African Union's Security culture

outcome document, which explicitly endorsed R2P was adopted by consent of all the heads of States. However the principle of R2P was significantly watered down from the original ICISS proposal. The obligation of the State to protect those living within its borders was stressed whereas the second part of R2P addressed the case in which a third party state fails to protect its own citizens from the threat of mass atrocities within its borders.[74]The overall effect of the outcome document on R2P was therefore a mixture of political and legal considerations which reflect the continuing division and confusion about the meaning of the concept.[75]

R2P can be considered as a concept, a principle or a norm. In regard to the normative perspective there is a large discrepancy in the interpretation of the concept among the actors. As a principle R2P would need to be seen as a fundamental truth with a status of shared understanding leading to action if necessary.R2P still needs further developments in order to be operationalized. There is still an enduring debate between R2P activists and its critics about the responsibilities to halt mass atrocities in the future.

3.3.2 Function, Status and Impact of R2P

R2P has been conceptualized as fulfilling two functions which are not complementary. The first is to utilize R2P to describe a political commitment to prevent and halt genocide and mass atrocities accompanied by a policy agenda in need of implementation. This is premised largely on the world summit outcome document resting on two general propositions as agreed by

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[74] Carsten Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm.

[75] Ibid

member states that the principle is universal and enduring. There is no question from this perspective of whether R2P applies to a given situation since it doesn't arise and evaporate with circumstances.[76]The question should be not whether it applies, but how it is exercised. Secondly as a universal and enduring commitment, R2P gives rise to a policy agenda that needs to be acknowledged, articulated and implemented.

The effect of this approach is to emphasize R2P as a broad based policy agenda focused on the upstream prevention of genocide and mas atrocities through capacity building and international cooperation and to focus attention on developing the institutions and capacities for effective response within the prevailing normative framework, while keeping in mind the need to marshal timely and decisive responses to atrocities when needed.[77]

A second function of R2P is for the principle to generate a speech act[78] which has the effect of elevating certain issues above normal politics as a catalyst for decisive international action. Accordingly, R2P is a label that can be devoted to particular crises in order to generate the will and consensus necessary to mobilize decisive international response. The whole point of embracing the new language of responsibility to protect is that it is capable of generating an effective consensual response in extreme, conscience shocking cases in a way that the right to intervene language simply was not.[79]

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[76] Alex J Bellamy, The responsibility to Protect-five years on Pg. 158

[77] Ibid.

[78]Speech act refers to words and sentences that perform specific communicative functions such as promises and warnings

[79] Gareth Evans, "The Responsibility to Protect, International Relations Pg. 294

The principle has indeed been utilized in relation to humanitarian crises. In Darfur, the principle was used to generate political will to intervene whereas in Myanmar and Kouchner the principle was invoked as a catalyst for forcible aid delivery and in Kenya it was used by international mediators to persuade the country's political leaders to step back from the brink and to galvanize international attention. The debate needs to switch from the applicability of R2P to the most appropriate form of realizing the principle in a given situation. Although many commentators and diplomats shift between the first mode of R2P as a policy agenda and the second being R2P as a speech act and catalyst for action, the two are in fact compatible, causing much confusion about the way the principle is applied.

There is a general consensus that R2P is a norm but there is no much agreement on what sort of norm it is. Norms are shared expectations of appropriate behavior for actors with a given identity.[80]This can be attributed to the fact that, on one hand, R2P is not a single norm but a collection of shared expectations shared that have different qualities whereas on the other hand the principle involves expectations about how states relate to populations under their care. These expectations predate R2P and are embedded in international humanitarian and human rights law. The basic proposition that states are legally and morally required not to intentionally kill civilians is well established.[81]

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[80] Ibid

[81] Hugo Slim, killing civilians: Method ,Madness and Morality in war (New York: Columbia University Press 2008)

Accordingly, R2P first pillar is understood as a reaffirmation and codification of already existing norms whereas the 2nd pillar places a demand on states as members of international society to assist and encourage their peers in the fulfilment of their R2P.This leads to pillar three which encourages timely and decisive action in cases where a state has manifestly failed in its R2P function. The test of whether the 2nd and 3rd pillars can be properly described as norms is qualified by three ingredients. First and foremost, the extent to which governments and international organizations will exercise their responsibility, secondly if they recognize a duty and a right to do so and finally if failure to act will attract criticism from the society of states.

In Bosnia vs. Serbia, the International Court of Justice (ICJ) found that states have a legal obligation to take all measures reasonably available to them to prevent Genocide.[82]Article 1 of the Geneva Convention (1949) requires that states ensure respect for international humanitarian law as well as obey it themselves. These legal developments combined with the international society's commitment have given rise to claims that a positive duty to prevent genocide and mass atrocities is clearly emerging.

3.4 SUMMARY AND CONCLUSION

The R2P principle has introduced a unique notion that the international community should assist states to pursue the agenda of placing the primary responsibility of States to protect their own population. The responsibility to prevent being the first pillar encompasses the notion of states having a responsibility to ensure that domestic situations are addressed before they

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[82] International Court of Justice ,The Application of the Convention on the prevention and Punishment of the crime of Genocide(Bosnia and Herzegovina vs. Serbia and Montenegro) Judgement February 26,2007,paras.428-38

escalate. Failure by states to take appropriate action when mass violence occurs results in a transfer of responsibility to the international community. This has therefore turned the focus of the debate from humanitarian intervention to a responsibility to protect and empowered international actors to develop a new understanding of the concept of sovereignty where the state does not control but primarily protects its citizens.

The concept of mediation has been stated to be elusive since its success depends on several factors including fairness, effectiveness and satisfaction of the party's interest. Effectiveness is however considered the hallmark of mediation. This encompasses the measure of the results achieved, change brought or behavioral transformation. It is noteworthy that mediation rarely results in achieving all the participant's goals. The objective of getting the parties to sign an agreement depends on the mediator's skills and ability to reframe the parties' position and interest.

CHAPTER FOUR

THE EFFICACY OF INTERNATIONAL LAW IN ENDING THE KENYAN POST ELECTION VIOLENCE OF 2007/2008

The International intervention was instrumental in ending the political impasse created by the Kenyan post-election violence of 2007/2008.Their swift action was a vital element that contributed to halting the ethically motivated mass violence. In this regard, various international actors were keen and prompt in intervening by applying various legal principles of international law to end the conflict. This chapter seeks to critically explore the various legal principles of international law that were applied by the various international actors present in Kenya and how they engaged with the evolving political settlement to address the conflict.

4.1 The Principle of non-interference in the internal affairs of a State

The relations among states has been based upon the principle resulting from the interpretations of the Westphalia Treaty (1648) which in the doctrine and in practice, particularly under the influence of natural law theory, have been designated as the fundamental rights and obligations of states. These principles have become a basis of the classical international law, the basic assumptions of which are seen by some writers to date prior to the Westphalia Treaty[83].These principles not only determine the principle of one state versus the other but also the position of the states within the international community.

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[83] Allen Sens and Peter Stoet, Global Politics:Origins,Curents,Directions,3rd ed.(Tor Tonto: Nelson, 2005) 48

The Sovereignty principle has been highlighted among the doctrines considered by the classical international law as a basis of relations among states. Accordingly, this principle has also been considered as one of the essential or fundamental characteristics of a state and one of the principles of International law that has been preserved in the international organizations as well. Various fundamental rights and obligations of states have been derived from the sovereignty concept such as the right of survival or self-preservation.

The notion of sovereignty has been enriched with an unusually significant although negatively formulated principle, the principle of non-intervention. This principle embraces the non-interference in internal affairs of states which is valid from the moment the internal competence of states has been clearly derived from the sovereignty. The expression "non-intervention" refers to all measures of states and organizations that disable states to freely regulate affairs that are in their essence within the internal competence of the state.[84]

Although the rules on non-intervention have become the cogent rules of International Law, the very essence of the non-intervention principle has remained relative because of the revitalization of the principle over the last half of this century. Nothing is more clear when prohibition of intervention is in question, in the otherwise insufficiently determined field of internal affairs of states because, one does not precisely know what intervention is. In this regard, the principle of non- interference in the internal affairs stands for or should stand for the most reliable legal protection of the minimum of particularity indispensable to states to survive as

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[84] Momir Milojevic, The Principle of Non Interference in the internal affairs of States: Facta Univeratatis, 2008 Pg. 438

subjects of international law. Whereas the principles of sovereignty such as Non-intervention and Human Rights may seem complimentary, state sovereignty as a result of its theoretical underpinnings, the norms it has established and its practical applications has demonstrably hampered the implementation of human Rights. [85]

State sovereignty was viewed in the 17th Century as a method of facilitating and maintaining peace, it is arguably this assumption that has hampered many attempts to totally revamp the notion of sovereignty.[86]The Principle of State sovereignty is thus derived from the belief that non-intervention in the internal affairs of the state is the best policy to promote or maintain international peace. However, the response by the international actors in Kenya's post-election conflict in 2008 can be viewed from the basis that despite the many growing bodies of International Human Rights Law, many governments in many countries have harassed, persecuted, tortured, and killed a large segment of their own population under the guise of State Sovereignty. States are essentially protected by the UN Charter from any interference in matters which are domestic in nature. Evidently although most states bound themselves to implement the contents of Human Rights Conventions, securing the honoring and enforcement of these instruments of international law has been a difficult task. [87]

This notwithstanding, state sovereignty is one of the most basic and durable foundations of the international system. Premised on the conception that the constitutional and territorial

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[85] Ibid.

[86] International Commission on intervention and State sovereignty, the meaning of Sovereignty, January 22nd 2009.

[87] Momir Milojevic, The Principle of Non Interference in the internal affairs of States:Facta Univeratatis 2008 Pg. 500-520

independence needs to be recognized in international relations. International order is therefore dependent on mutual recognition of state sovereignty as enshrined under Article 2 of the United Nations Charter. In the name of respect of sovereign equality of states, unprecedented privileged have been accorded to abusive Governments such as Chile, Nicaragua, East Timor and Rwanda leaving the United Nations in an ambiguous position as regards its mandate in the Protection of Human Rights.[88]

The international community was therefore fortunate that Kenyan authorities accepted regional and international involvement during the post-election violence of 2007/2008. Consequently the intervention in respect of sovereignty in Kenya was not challenged as has been witnessed in the application of the R2P principle in other countries, providing a platform for consensus that the international community had a legitimate role to play. Consensus in Kenya was possible because engagement was limited to diplomacy and had a host- state consent.[89]

The R2P principle has therefore turned the focus of the debate from humanitarian intervention to a responsibility to protect and enabled international actors to develop a new understanding of the concept of sovereignty where the state does not control but primarily protects its citizens as applied in the Kenyan post-election crisis in 2007/2008.

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[88] Ibid

[89] Alex J. Bellamy ,The Responsibility to Protect-five years on: Pg. 155

4.2 The Role of Mediation in ending the 2007/2008 post-election violence in Kenya

The post-election violence that erupted in Kenya in 2007 and early 2008 not only resulted in the loss of lives and displacement of population but was catastrophic in respect of the scale of the social and economic destruction. The situation would have been worse, were it not for the peace mediation mandated by the African Union (AU). Consequently the AU, with strong international support mandated a panel of eminent African personalities chaired by the former UN Secretary General, Kofi Annan to lead the forty one day mediation process.

The process involved Kenya's lead protagonist, the party of National Unity (PNU) of incumbent President Kibaki and the Orange Democratic Movement (ODM), the main opposition party of Raila Odinga culminating in the Agreement on the Principle of Partnership of the Coalition Government that ended the political violence. The two parties enacted the 2008 National Accord and Reconciliation Act which allowed for a power sharing agreement in which Mwai Kibaki would remain President and Raila Odinga would assume the new position of Prime Minister of the Republic of Kenya.

The mediation process which began in January 2008, three weeks after the eruption of post-election violence was tasked with helping the parties to the conflict to ensure that an escalation of the crisis was avoided and the opportunity to bring about sustainable peace was seized as soon as possible. The team mandate by the AU relied on worldwide diplomatic support and had the technical support of the United Nations including the Department of Political Affairs

(DPA), the United Nations Development Programme (UNDP), and United Nations Office in Nairobi (UNON), as well as the Geneva-based Centre for Humanitarian Dialogue (HD Centre).[90]

During the mediation process, both the Eminent Panel and the broader international community paid great attention to the local domestic stakeholders. The mediation team employed an all-inclusive strategy that would allow a transparent process, involving the civil society, religious leaders and the private sector. Whereas the mediation panel was active in approaching members of the civil society, the National Council of churches of Kenya actually approached the panel to plead for a negotiated solution and was vocal in urging the two warring political party leaders, President Kibaki and Raila Odinga to enter into direct talks.

The mediation panel would draw upon these efforts to move the parties closer to negotiations to ensure that they would speak with one voice. This was significant since it showed that both the international community and the grassroots voices from the Kenyan Society were speaking with one voice. The events prior to Annan arriving in Kenya for the talks were also significant, since the week long delay allowed more time for formation of the Secretariat in Nairobi to provide technical support to the panel. The dynamics on the ground contributed to the perception of a hurting stalemate whereby it was increasingly accepted by both parties that dialogue was the only way forward. This factor contributed to help create a ripe atmosphere for the mediation process in Kenya.

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[90]Elizabeth Linden Mayer and Jose Lianne Kaye, A choice for Peace? The story of forty one days mediation in Kenya, New York International Peace Institute 2009

During the early stages of negotiations, Annan's interventions were short-lived seeking to give much ownership of the process to the parties while keeping the talk focused. In this regard, the mediation team agreed that the process would be referred to as the Kenya National Dialogue and Reconciliation which build on the fact that an International Mediation had been sanctioned by the international community. The ability to reach out to technical experts from thematic areas under the humanitarian, electoral, legal or political fields was as essential part in assisting the parties to understand which solutions were feasible in respect of the explosive environment in which the negotiations were being conducted.[91]

It is noteworthy that during the crisis, diplomatic and development actors were no longer prepared to support the political status quo. The shift was illustrated by the greatly heightened levels of pressure imposed by the international actors upon the incumbent President to cooperate in the mediation process. In this regard, the international community came together and acted in a unified manner. They spoke with one voice and collaborated jointly with the AU panel of mediators and were therefore united in their purpose and determination to end the Kenyan crisis.[92]

The Annan led mediation team has since been credited as being instrumental in ending the Political impasse and preventing Kenya from descending into full scale civil war. However, few of the reforms that the principals agreed to be implemented and the root causes of violence remain to date. This has premised the debate on whether the international mediation in Kenya was indeed successful. This debate can only be explored by necessitating a better indulgence of

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[91] Ibid

[92] Ibid

whether and how the mediation panel and agreement effected change in Kenya. Upon the mediation team leaving Kenya, the Coalition Government immediately stalled on implementing the Accord. Corruption and impunity contributed significantly in slowing the progress of implementation but the Coalition Government survived the ominous warnings of collapse and survived their five year tenure from the year 2008 until 2013.

The coalition government indeed faced numerous obstacles since the mediation process ended, but made some notable achievements. The mediation process significantly resulted in three important achievements. First and foremost, the ethically motivated mass violence was stopped, many Kenyans believe that their country could have slid into a full scale war had the parties failed to reach an agreement. Secondly, a plethora of different justice, accountability and reform minded mechanisms were created as result of the agreement. Lastly the international community has consistently continued to remain engaged in pressing the Government to move forward on the Reform Agenda and was significant in midwifing the birth of a new constitution in Kenya in 2010[93].

The appointment of a single empowered African led mediation panel has been underscored as being the critical factor to the success of the mediation process in Kenya. The African mediation panel ensured the parties would not be able to adjust the mediators with unwarranted intervention and derail the process, thus deterring political elites on either side of the bargaining table from window shopping for a mediation process. International engagement in support of the mediation process was also critical to enhance Annan's leverage.[94] Annan reached

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[93] Trevor Keck ,Mediating Ethnic Conflict: Kofi Annan in Kenya
[94] Ibid

out to the United States, European and African Heads of States to engage the principals at key times to press for an agreement between the two warring parties. The most notably being the United States threat to impose an external solution on Kenya as well as travel bans that proved critical to getting the parties to move towards a power sharing deal. Accordingly, the uncompromising stance displayed by Annan was critical and became the foundation upon which the international community could consolidate.

The mediation panel ran a highly pragmatic process that pushed the parties towards a power sharing arrangement rather than focusing on which side won the election. The team looked beyond short term solutions to address the root causes of the violence, producing an agenda or what was referred to as the Road map for Dialogue. This ensured that the mediation was tackled in sequence of manageable steps.

Agenda one focused on immediate action to stop violence and restore fundamental Human Rights and Liberties. Agenda two focused on immediate action to address the humanitarian crisis, agenda three aimed to overcome the short term political crisis whereas agenda four dealt with the long term underlying issues that had caused the violence.[95]The mediation panel prioritized the most contested and difficult issues through the Road Map for dialogue. All agreements and timelines were swiftly publicized throughout the process and shared with the Kenyan Public, international community and Kenya's political players with a clear framework and indicators of success.[96]

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[95] Karuti Kanyinga and Sophie Walker, Building a political settlement: The International Approach to Kenya's 2008 post-election crisis. International Journal of Security and Development

[96] Ibid.

The Kofi Annan led mediation has however been criticized for emphasizing a power sharing arrangement rather than a process to determine who actually won the elections.[97] In this regard when the National Accord and Reconciliation Act was signed on 28th February 2015, there was no clarity on the flawed elections and the ensuing violence. In the circumstances, it can be safely assumed that democracy was sacrificed at the altar of convenience for purposes of restoration of peace in Kenya. In effect, the international community influenced the political settlement, backing the mediation strategy of prioritizing prevention of conflict by targeting long terms solutions, mobilizing support and funding while maintaining pressure for rapid conclusion of the mediation process.

4.4 The Principle of Responsibility to Protect (R2P)

The Principle of Responsibility to Protect (R2P) was adopted unanimously by heads of states and governments at the 2005 UN World Summit and has since been reaffirmed twice, by the United Nation Security Council. It is premised on three equally weighted and non-sequential pillars which includes first and foremost, the responsibility of states to protect their own populations from the crimes of genocide, war crimes, ethnic cleansing and crimes against humanity as well as from their incitement. secondly, the international community's responsibility to assist a state to fulfill its R2P and thirdly, the international community to take timely and decisive action in accordance with the UN charter, in cases where the state has manifestly failed to protect its population from one or more of the crimes.[98]

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[97] Ibid.

[98] Alex J Bellamy, The Responsibility to Protect-five years on:

The principle has introduced a novel idea that the international community should assist states to pursue the agenda of placing the primary responsibility of States to protect their own population. Accordingly, it has made its way into the international diplomatic agenda. In 2008, UN Secretary General Ban Ki moon challenged the UN Membership to translate its 2005 commitment from "words to deeds"[99] This challenge was taken up by the General Assembly in 2009 when it agreed to give further considerations to the secretary General's proposals.R2P has become part and parcel of the diplomatic parlance in issues regarding humanitarian emergency used by different State and Non-State actors to demand international action.

The Principle has been the subject of impassioned debates and philosophical disagreements about the function, meaning and proper use of R2P and the fact that there has been inconsistency in its application. The principle has been used by Governments and diplomats in the context of Somalia, Afghanistan and Iraq despite the commission of many atrocities against the population of these countries compared to similar situations in France and Russia to justify the actual use of coercive force where there was apparent failure to protect populations from genocide and mass atrocities.

Responsibility to protect is an international security and human rights norm to address the international community's past failure to prevent and stop genocides, war crimes, ethnic cleansing and crimes against humanity. It is not aimed at every conflict or every breakdown in public order or every instance of organized violence. However, when the violence reaches the level of crimes against humanity then international response is required. It is required not only because of the violation of universal values but because it also poses direct threats to national security interests and to international peace. R2P also avoided the legalistic claims that nothing

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[99] Ibid

could be done unless the violence reached the level of genocide and the convention's requirement satisfied of "an intent to destroy in whole or in part a national, ethnical, racial or religious group". The Responsibility to Protect side-stepped that legalistic bar to action by encompassing broader mass atrocity crimes as warranting international response.[100]

R2P is widely endorsed with having facilitated diplomatic efforts to stave off the escalation of post-election violence in Kenya in 2007/2008 by galvanizing the international actors to end the crisis. The Kenyan situation provided a platform for exhibiting the extent to which R2P has capacity to generate the compliance pull in international society. The diplomatic response to the ethnic violence that erupted in the aftermath of the 2007 elections in Kenya has since been hailed by the international community including the chief mediator, Kofi Annan as being the best example of R2P in practice.

The UN secretary General Ban Ki Moon was quick to characterize the situation as relevant to R2P and to remind the Kenyan leaders of their responsibilities.[101] These efforts were supported by the Security Council which issued a Presidential Statement reminding the leaders of their responsibility to engage fully in binding a sustainable political situation and taking action to immediately end the violence. It is imperative that there was little evidence of support displayed among the Security Council members for robust measures in the event that diplomacy

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[100] Gareth Evans, The Responsibility to Protect: Ending mass atrocity crimes once and for all (Washington, DC: Brokings Institution Press 2000 Pg. 41-43

[101] Statement attributable to the spokesperson for the Secretary General on the situation of Kenya, New York, January 2, 2008.

failed. The African members in particular expressed the view that the AU should have taken a greater leadership role in the Kenyan conflict.

The crisis in Kenya was the first time that the Doctrine of R2P was invoked by the International community and remains as the only one since the Adoption of R2P at the 2005 Summit.[102]The UN Secretary General (UNSG) took diplomatic steps to address the violence by encouraging mediation efforts chaired by Kofi Annan from the very early initiatives. One of the main concerns of this principle was whether or not its main tenet, responsibility to halt violence was being applied in reality. Accordingly, it was an important step forward when the UNSG labelled the Kenyan Post-Election violence as an R2P case. International actors responded swiftly to the Kenyan crisis as it appeared to rise to the level of violence that R2P is designed to prevent.

The AU mediation panel was supported by the UN, Kenya's neighbors, key donors and civil society. A deal was brokered after 42 days of exhaustive negotiations on the 28th day of February 2008.It is noteworthy that thanks to the external diplomatic support, no more coercive measures were necessary and the alarming situation was defused by the conflicting parties themselves. The situation was accordingly perceived by international actors to be successful and hence referred to as a model of diplomatic action under the Responsibility to Protect principle[103]

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[102]Johannes Langer, The Responsibility to protect- Kenya's Post Electoral Crisis

[103] Human Rights Watch 2008, Pg. 67

Pursuant to the deal reached, a negotiated settlement was reached through the National Accord and Reconciliation Act consisting of four agenda items to address the root causes of the post-election violence: Implementation of the constitutional reforms, establishment of a Truth and Justice Reconciliation Committee, establishment of an Independent Review Committee to improve the election process and a Commission of Inquiry on the post-election violence to identify and prosecute the perpetrators. The successful implementation of these agreements and resolutions of the underlying tensions were key to breaking the cycle of violence in Kenya.[104] Whereas the international community praised the achievement of the Kofi Annan team, some local Civil Society activists questioned the formation of the coalition agreement and termed it as the results of democratic failures not successes.

The responsibility to prevent being the first R2P pillar, is based on the idea that states have a responsibility to ensure that domestic tensions are addressed before they escalate. Failure by states to take action when mass violence occurs results in a transfer of responsibility to the international community. Ban Kin Moon in characterizing the Kenyan post-election violence as an R2P situation and contrary to the polite diplomatic language used by UN officials took a blunt stance, during a visit in Nairobi in February 2008 and stated "the people and leaders of Kenya particularly political leaders, have the duty and responsibility to wake up and reverse the tragic path, before it escalates into the horrors of mass killings and devastation we have witnessed in recent history."[105] The international community was fortunate that Kenyan authorities accepted

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[104] Horowitz, Donald L, 2009, Electoral Systems and their goals.

[105] Secretary General's Press Conference in Nairobi "United Nations, February 1st 2008, unofficial transcript,http://www.un.org/apps/sg/off the cuff.asp

regional and international involvement. Consequently the intervention in respect of sovereignty was not challenged as has been witnessed in the application of the R2P principle.

The R2P application to the Kenyan crisis was equally not marked with any kind of sanction nor military interventions enabling the UN secretary General to invoke R2P as a solution without the authorization of the UN Security Council. The principle invoked a joint undertaking by the UN and other multilateral and regional organizations which contributed to the success by having a joint effort and piling pressure on the parties to come to the table and reach an agreement. The joint effort by the international actors was imperative in demonstrating to the Kenyan political elite that the international community cares about the crisis in Kenya and had the sole objective of stooping the cycle of violence.R2P provided a platform for diplomatic solution wherein Kofi Annan concluded ***"when we talk of intervention, people think of the military, but under R2P, force is a last resort. Political and diplomatic interventions is the first mechanism and hence we have witnessed a successful example of its application in Kenya***".[106] In this regard, Kenya has since functioned as a model for other countries within the continent such as Guinea, Cote D'ivoire and Madagascar.

It is imperative that the R2P principle implies not only the responsibility to prevent mass violence but also the responsibility to follow up on the intervention which encompasses the responsibility to rebuild. Accordingly enduring peace as the ultimate goal also requires international support which proved to be challenging in the case of Kenya. Consequent to the mediation agreement reached, it became imperative that there was need for the local elites to guarantee coexistence and security to achieve the objectives of nation building. However with

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[106] Roger Cohen, "African Genocide Averted" New York Times March 3,2008

the guidance of the international actors, the two main Kenyan political parties were pressured to work on a new constitution that represents the new realities of Kenya in the 21ˢᵗ Century and avoid concentration of power in the hands of an executive president. Indeed the passing of a new constitution in 2010 has been hailed by the international community as a step in the right direction for democracy for Kenya.

4.5 SUMMARY AND CONCLUSION

The scale of Kenya's post-election violence in 2007/2008 stunned the world since very few non state and state actors if any, expected that Kenya would implode into such a violent and widespread conflict over elections. The Kofi Annan mediation process unveiled the fact that the crisis in Kenya was not solely a reaction to the dispute over elections, but was deeply rooted in long term foundational issues that had remained unaddressed since Kenya gained independence in 1963. The International community's rapid and swift response helped turn the crisis into an opportunity for long term reforms to deter future cycles of violence in Kenya.

The crisis led to an international sanctioned mediation process whose mandate was to help the parties to the conflict ensure that an escalation of violence was avoided and that the opportunity to bring about sustainable peace was seized as soon as possible. The International actors approached the crisis with a unity of purpose and a highly legitimate response by fully backing the AU led mediation. Collectively it adopted an unwavering position of 'no business as usual' and was prepared to embrace a more political strategy than in the past, publicly halting some jointly donor development programs.[107] This acted as a powerful signal to Kenya's

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[107] Karuti Kanyinga and Sophie Walker, Building a Political Settlement: The International Approach to Kenya's 2008 Post Election crisis:

political actors that international actors were no longer prepared to accept the status quo.It required the focused engagement of influential regional and global actors to push and cajole the parties to make the concession necessary for a successful mediation effort. The mediation process further provided a platform for global- regional partnership by providing constructive cooperation between the United Nations and the African Union on an urgent and sensitive matter. Whereas the AU showed some agility by responding in some relatively timely and effective manner, the UN provided political, technical support and capacity building for the AU led mediation without competing for glory in the international arena.

The application of the R2P by the international community as evidenced in the Kenyan case is indeed a challenging task. It implies not only the responsibility to prevent mass violence but also the responsibility to follow up on the intervention which encompasses the responsibility to rebuild that still requires the international actors. Accordingly, long term issues must be addressed, including the political and economic considerations and the development of basic and effective legal institutions.

Further the application of R2P principle in the Kenyan post-election violence was important within the International Law realm since it exhibited that military intervention does not necessarily have to be applied, whereas diplomatic and political intervention should be promoted as the first mechanism under R2P.Overall the Kenyan crisis was not fully resolved. There is a risk that despite all measures to end the political violence in 2008, a reoccurrence of violence may occur in the future general elections.[108]

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[108] Ibid

The Kenyan situation provided a platform that clearly exhibited the need for the international community to influence and positively engage with evolving political settlements in fragile situations, it is crucial that they understand the context of the local politics and conflicts. Indeed international actors now recognize the importance of not only understanding the technical governance issues at hand but also of being attached to the political economy dynamics that underpin a country in conflict.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

The overall objective of this project paper was to examine the role and effectiveness of international law in ending the Kenyan post-election violence of 2007/2008.It has been demonstrated in this project paper, that International actors were keen and prompt in intervening to end the aforesaid violence by application of various principles of International law. This chapter will summarize the important lessons leant from the Kenyan post-election violence, the tradeoffs and the roads not taken to be able to appreciate the intervention by international actors in engaging with the evolving political settlement to address the conflict.

5.1 SUMMARY

The scale of Kenya's post-election violence crisis stunned the world. International actors never anticipated Kenya would implode into such an intense and prevalent conflict over elections. Observers have noted that Kenya's political settlement was very fragile. The international community's response turned the crisis into an opportunity for recommending long term constitutional an institutional reforms and hence creating a platform for shifting the existing political settlement to deter future cycles of political violence. Their swift action was a key element of the success in Kenya.

The lives lost and the families torn apart are irreversible calamities but the extent of violence could have escalated further and the number of deaths could have spiraled out of control and perhaps the crisis might have intensified from Kenya to the rest of the region. This would

have created devastating consequences for the entire African continent. There are various important lessons that emerged from the intervention by international community which will be useful to other countries within the continent and the world working on a political settlement in a fragile state.

The crisis led to an international sanctioned mediation process whose mandate was to help the parties to the conflict ensure that an escalation of violence was avoided and that the opportunity to bring about sustainable peace was seized as soon as possible. The international community approached the crisis with a unity of purpose and a highly legitimate process. It adopted a strong stance of support for the AU mediation team and endorsed Kofi Annan's leadership. Whereas the mediation was initiated by the African Union, the mediation panel realized that to be successful it would require the broader support of the international community including African Nations, the United States, European Union, and the United Nations.[109]

It became clear that all the international actors were walking in the same direction and speaking with one voice. Collectively, the international community developed an unwavering position of "no business as usual". This led to publicly halting some joint donor development programmes within the country. The mediation efforts in Kenya proved that, when the international community has unity of purpose and stays the course, peace stands the very best chance of success. The conflict resolution tool is very critical in appreciating the course of the mediation process in Kenya. Fostering the condition for a single mediation process with international support was necessary in pursuing solutions that were meaningful towards the Kenyan crisis. The process began with multiple mediators, the panel managed to assert authority

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[109] Elizabeth Linden Mayer and Josie Liana Kaye, "A choice for Peace? The story of forty one days of mediation in Kenya. International Peace Institute, August 2009

over the process and generate enough world wide support essential for the parties to accept the mediation process as the only one they would engage in.

The involvement of civil society actors and religious leaders during the process was indeed vital to play in the dialogue. Their consultative involvement helped shape the process and ensured that the people's voice has a voice and necessary pressure was equally applied in the government. Indeed the active involvement of the media, religious groups, business communities and peace activists was crucial in creating an atmosphere that was conducive to fruitful negotiations and generating the vital link between an elite level process and grass root realities.[110]

During the mediation process, splitting the short term and long term issues when drawing the road map proved essential in creating a conducive atmosphere and space for dialogue to proceed. The emphasis on ending the violence, over and above ascertaining the truth regarding the elections, prioritized need for peace rather than a political settlement. This encouraged the parties to compromise and agree on shorter term agenda items, which was without a doubt an important building block for the more difficult long term agenda items to follow.

The application of R2P concept in the Kenyan post-election violence crisis was particularly important because it exhibited that military intervention in not necessarily required in the application of this principle. Whereas R2P advocates have continuously debated that an armed intervention is the last resort, the R2P skeptics have maintained that an armed intervention is automatically implied by the R2P principle. Kenya's situation served as an example of a truly diplomatic intervention that settled the violence without armed intervention.

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[110] Ibid

However, the application of R2P in the Kenyan situation had several flaws. The diplomatic efforts came too late and hence by the time they were implemented, hundreds of people were dead and thousands were displaced. If there was an efficient early warning system, the international community would have been more aware of the ethnic clashes.[111]Donors failed to learn from the occurrence of similar, less intense, electoral violence in the past and missed several warning signs.

5.2 CONCLUSION BASED ON THE SUMMARY

Most donors funding Kenya failed during the previous years, to address in any serious manner the key problems in governance focusing instead on economic, diplomatic and strategic priorities. The strength of Kenyan institutions notably the Electoral Commission was fatally overestimated by donors. The gaps in donor's political analysis and their lack of proactive action to try to prevent the re-emergence of political violence contributed to the Kenyan crisis.[112] In this regard, institutional support and capacity building is of fundamental import but cannot be carried out in a technocrat manner. Donors continued uncritical support to an increasingly partisan Electoral Commission proved to be one of the gravest mistakes of the election since its breakdown was a central event in the political crisis.[113]

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[111] Johannes Langer: The Responsibility to Protect – Kenya's post electoral crisis.

[112] Brown Stephen.2009. "Donor Responses to the 2008 Kenyan crisis: Finally getting it right?" Journal of Contemporary African Studies, vol.27no. 3 (July) 389-406

[113] Brown Stephen. Lessons Learned and Forgotten: The International Community and Electoral Conflict Management in Kenya.

The international community's commitment to democratic electoral outcome is patently less clear. Annan's focus on power sharing during the mediation process in Kenya was never questioned and the issue of determining who really won or holding fresh election to produce a clear winner according to democratic principles was abandoned. Instead the formation of grand coalition was accepted as a win win situation for both parties. The 2008 Kenyan crisis alongside the concurrent case of Zimbabwe produced a very dangerous precedent in respect of democracy for other countries in the continent.

An incumbent government or an opposition party unwilling to accept that it actually lost an election can forement enough violence to ensure that with the blessings of international community it can retain or obtain a power share deal. This is without the penalty for nay abuses committed during the electoral campaign or for any fraudulent practices related to the tallying of votes.[114] In the event that this elite pact model holds, the donor's overreaching desire for stability will trump the basic tenets of democracy.

5.3 RECOMMENDATIONS

5.3.1 Recommendations to the State

There is need to avert the actions and inactions of perpetrators causing electoral violence in Kenya in the last two decades. The time for Kenya to exercise some level of integrity in its electoral process is long overdue. First and foremost Anti-corruption measures must be implemented to ensure accountability and transparency in the electoral process. Corrupt public officers must be prosecuted to serve as a deterrent to others. There is need for pragmatic electoral

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[114] Ibid

reforms and good governance since the underlying problem of political instability in society is substantially the lack of good governance.

It is vital to have an independent and Electoral Commission in Kenya that is equipped with all the capabilities to guarantee free and fair elections. Electoral reforms must include mass education to the public which basically encompasses public awareness campaign. There is need for to the citizenry to understand electoral laws in Kenya and appreciate who is considered as a registered voter and an eligible voter under the laws of the land. Equally important is the need to restore the rule of law and to prosecute electoral malpractices such as instigation of violence by political parties or organized gangs, intimidation and vote buying. Accordingly, to resolve political violence in Kenya, accountability, social justice, transparency, rule of law, gender equality and due process must guide governance and leadership.

5.3.2 Recommendations to the International community.

There was an emphasis on pragmatism that overcame political differences during the mediation process. Turning political questions into technical ones, postponing divisive debates over appellations and focusing on practicalities rather than the big picture can be useful strategies in helping negotiators to work as a team and put peace before political aspirations or concerns.[115]

In Kenya the use of technical experts from the field of humanitarian, electoral, legal and politics was an essential part of aiding the parties to appreciating which solutions were feasible given the volatile setting in which they were functioning. The technical experts were critical in

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[115] Ibid

positioning the parties to a problem saving framework rather than remaining within the position of adversarial situation.

The international community focused intensely for at least two years post crisis on state building in Kenya. This suggests the need for persistent engagement by the international community in long term structural state building issues to address the deep rooted causes of conflicts that make political settlements fragile. Indeed continued engagement in state building issues after every election would establish a strong foundation for sustainable peace and democratic governance.

This was premised on the principle of R2P whose toolkit implies not only the responsibility to prevent mass violence but also the responsibility to rebuild by following up on the intervention. The Kenyan mediation presented the notion that there is need for the international community to ensure that a sustained follow up takes place after a political settlement has been attained. This responsibility has to be in partnership with the local elites to enable them guarantee co-existence and security to achieve nation building.

5.4 CONCLUSION

A mediation process is inherently very unpredictable. It requires a lot of ingenuity, flexibility and skill as observed in the Kenyan mediation process. A mediator must attempt to constantly re-evaluate the process, remain open to new ideas and offer new options if and when necessary. In Kenya, one of the obstacles was finding a solution which would create a Prime Ministerial position that was non-executive but still meaningful. The chief mediator proposition in this regard was to make this a non-executive position with substantial powers and special

responsibility delegated from the powers of the president.[116] It proved to be a creative solution that satisfied both parties and was well incorporated in the final political settlement in February 2008.

The reaction and intervention by the international community does not make political violence any less likely to re-emerge in forthcoming elections in Kenya. Reframing the procedural aspects of elections which included redefining boundaries and appointing a truly independent Electoral Commission and passing a new Constitution will only be effective in the presence of the Rule of Law and strong impediments against using violence as a political tool, issues of which Kenya is still struggling with to date. It is remarkable that political will and mediation skills would have been rendered hopeless without the desire for peace by Kenyans. Whether peace will be sustained in Kenya will depend first and foremost from the people of Kenya. Secondly, Kenya must continue to relish the sustained and undivided support of the international community in the event it is needed in order to consolidate the peace achieved post the 2007/2008 conflict.

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[116] Ibid

5.5 BIBLIOGRAPHY

African Peer Review Mechanism 2006, Country Review Report of the Republic of Kenya.

Alex J Bellamy, The Responsibility to Protect, Five years on: Ethics and International Affairs 24 no 2, 2010

Allen Sens and Peter Stoet, Global Politics, Origins, Currents: Directions, 3rd ed 48

Barkan Joel, Breaking the stalemate in Kenya: Center for Strategic and International Studies Online Africa Policy Forum, 2008

Brown Stephen, Lessons Learned and Forgotten: The International Community and Electoral Conflict Management in Kenya, Journal of Contemporary African Studies, 2009

Brown Stephen, "Donor Responses to the 2008 Kenyan crisis: Finally getting it right?" Journal of Contemporary African Studies, 2009

Carsen Stahn, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm.

Dr. Mohammed Naqib Ishaan Jan, The role of mediation in the pacific settlement of International disputes: Oxford University Press, 2009

Dunne T, Kurki M&Smith International Relations Theory: London Oxford University Press, 2013.

Elizabeth Linden Mayer and Josie Liana Kaye, "A choice for Peace? The story of forty one days of mediation in Kenya: International Peace Institute, August, 2009.

Freiedrich E.S,Political and Election violence in East Africa: Working papers on Conflict Management, Centre for Conflict Research,2001

Forde, Classical Realism in Nardin: Traditions in international Ethics. Cambridge University Press, 1992

Gareth Evans, The Responsibility to Protect: Ending mass atrocity crimes once and for all Washington, DC: Brokings Institution Press, 2010

Hugo Slim, killing civilians: Method, Madness and Morality in war (New York: Columbia University Press, 2008

Human Rights Watch, Divide and Rule: State sponsored Ethic violence in Kenya, 1993

International Commission on intervention and State sovereignty: the meaning of Sovereignty, 2009.

Jackline M. Klopp, Patrick Githinji and Keffa Karuoya, International Displacement and local peace building in Kenya: challenges and innovations, United States Institute of Peace Special Report.

Jacob Bercovitch, Theodore Anagnosnn Donnette L Wille, Some conceptual Issues and Empirical Trends in the Study of successful mediation in International Relations: Journal of Peace Research, 1998.

Jacob Bercovitch, Mediation Success or failure: a search for the elusive criteria, Cardoza Journal of conflict Resolution 7, 2006

Jeremy Horowitz, Power sharing in Kenya: Centre for the study of Civil wars, March 2008.

Joel Barkan, Will the settlement hold: current history 107, no 708, 2008.

Johannes Langer, The Responsibility to Protect: Kenya's post electoral crisis

Karuti Kanyinga and Sophie Walker, Building a Political Settlement: The International Approach to Kenya's 2008 Post-Election crisis, International Journal of security and Development, 2010

Liam James Spalding, A critical Investigation of the IR theories that underpin the debate on Humanitarian: School of Public Policy, University College London, 2012/2013.

Mark Schneider, Implementing the Responsibility to Protect in Kenya and beyond: International Crisis Group, 2010.

Martin Griffiths, the Prisoner of Peace: Kofi Annan Foundation, 2008.

Marieke Kleiber, Understanding Success and Failure of International Mediation: Journal of Conflict Resolution, 1996

Momir Milojevic, The Principle of Non Interference in the internal affairs of States: Facta Univeratatis, 2008

Mueller S, The political economy of Kenya's crisis: Journal of Eastern African Studies 2008.

Nic Cheeseman, The Kenyan elections: An introduction, Journal of Eastern African Studies, Vol 2, 2008.

Paul D Williams, from Non-interference to non-indifference: The origins and development of the African Union's Security Culture, International Peace Academy, 2003

Roger Cohen, "African Genocide Averted": New York Times March 3, 2008

Robert Jackson and George Sorensen, Introductions to International Relations, Theories and Approaches: 4th ed, New York. University Press, 2010.

Stefan D & Roxana G.R, Triggers and characteristics of the 2007 Kenyan Electoral violence: Department for International Development, University of Oxford, 2012

Thakur Ramesh, The Responsibility to Protect: A forward looking agenda, 2011

Trevor Keck, Mediating Ethnic Conflict in Kenya, 2010:http://works.bepress.com/trevor_keck/2