

**MEDIATING VIOLENT ELECTORAL CONFLICT:
A CASE STUDY OF KENYA, 2008**

By

**MURIUKI SYLVIA WAKENE
R50/70382/07**

**A Project Submitted to the Institute of Diplomacy and International Studies,
University of Nairobi in Partial Fulfillment of the Requirements for the
Award of the Degree of Master of Arts (MA) in International Conflict
Management.**



October, 2009

122 122 122

AF12

12

5534

11164

5'2

Dedication

To my family,

For the pain that the electoral conflict has caused.

May time be a healer.

Table of contents

Chapter One

Background of the Study

1.0 Introduction.....	1
1.1 Research Problem.....	2
1.2 Objectives of the Study.....	3
1.3 Literature Review.....	3
1.3.1 Introduction.....	3
1.3.2. Context Variables.....	4
1.3.2.1 The Timing of Third party Intervention.....	5
1.3.2.2 Literature of the Ripeness of the Conflict.....	5
1.3.2.3 Issues in Conflict.....	7
1.3.2.4 Characteristics of the Parties and their Relationships.....	7
1.3.2.5 The Mediators Acceptance by the Parties in Conflict and their Allies.....	9
1.3.2.6 The Mediation Environment.....	10
1.3.3 The Process Variables Influencing the Mediation Process.....	10
1.3.3.1 The Characteristics of a Mediator.....	11
1.3.3.2 The Strategies used by Mediators.....	12
1.3.3.3 The Role of Leverage in Mediation.....	12
1.3.3.4 The (Un) importance of Mediators Impartiality.....	13
1.3.3.5 The Mediation Outcomes.....	14
1.3.4 Gaps in the Literature Reviewed.....	14
1.4 Hypotheses.....	15
1.5 Theoretical Framework.....	15
1.6 Justification of the Study.....	16
1.7 Methodology.....	16
1.7.1 Interview Method.....	16
1.7.2 Secondary Data.....	17
1.7.3 Data analysis.....	18
1.8 Chapter Outline.....	18

Chapter Two

Conceptual Issues in Mediation Process

2.0 Introduction.....	19
2.1 The Mediation Process.....	20
2.2 Pre-Negotiation Phase.....	22
2.2.1 Analyzing the Issues in Conflict.....	23
2.2.2 Identifying the actors.....	23
2.2.3 Assessing whether the Timing and Conflict Ripeness.....	24
2.2.4 Setting the Agenda.....	25
2.2.5 Establishing the Rules of Procedure.....	26
2.3 Mediation Phase.....	27
2.3.1 Issues in conflict.....	27
2.3.2 The Mediators role in the Mediation Phase.....	28
2.3.3 The Mediators Strategies.....	29
2.3.4 The Negotiation Process.....	32
2.3.5 The Mediators Influence.....	33
2.4 Post Negotiation Phase/ Implementation.....	36
2.4.1 Implementation Challenges Facing Peace Agreements.....	36

Chapter three

Pre-Negotiation Phase of the Electoral Conflict Mediation Process

3.0 Introduction.....	38
3.1 Pre-Negotiations by the Panel of Eminent Africans.....	50
3.2 The PNU and ODM Agendas.....	51
3.3 The Pre- Negotiation Agreement.....	54

Chapter four

The Mediation Phase

4.0 Introduction.....	57
4.1 Mediation Phase One on Preliminary Issues and Agenda One and Two.....	58
4.2 Mediation on the Immediate Action to Stop Violence and Restore Fundamental Rights and Liberties and how to Address Humanitarian Crisis, Promote National Reconciliation, Healing and Restoration. 61	
4.3 Mediation of the Disputed Presidential Election Results.....	63
4.4 The Retreat at Kilanguni Lodge.....	69
4.5 Towards an Agreement.....	74
4.6 The Power Sharing Agreement.....	76

Chapter five

The Post Mediation Phase: Implementing the Peace Agreements

5.0 Introduction.....	78
5.1 Implementation of the National Accord and Reconciliation Act and the Agreement on the Principles of Partnership of the Coalition Government.....	80
5.2 The Constitution of Kenya (Amendment)act(2008).....	85
5.3 The National Accord and and Reconciliation act 2008 (The Accord).....	86
5.4The Making of the Grand Coalition Government.....	87
5.5 The Politics of the Size of the Cabinet.....	87
5.6 The Politics of Interpreting ‘Power Sharing’.....	90
5.7 The Appointing of Ministers and the Politics of Portfolio Balance.....	91

Chapter six

Summary and Conclusion

6.0 Introduction.....	98
-----------------------	----

Bibliography.....	104
-------------------	-----

Acknowledgement

First and foremost is to thank the almighty God for bringing me this far. My second sojourn at the University of Nairobi has been worthwhile.

I also want to appreciate the help I got from various people whose contribution enabled me complete my studies. Special gratitude to my supervisor Professor Makumi Mwagiru for sharing his abundant wisdom and knowledge as a Guru in conflict management. I immensely benefited from his insights, guidance and advice.

To my classmates, it was a great year to meet and know all of you. As the pioneer class in Conflict Management we had alot to learn from each other. Mercy you are not only a friend but an inspiration you encouraged me every step of the way. I will forever be indebted. William, Kegoro, Kahara. Tim. Wamela. Njenga and Gikambi of Nation media. I will always be grateful for the assistance I got from each one of you.

I acknowledge the assistance of my family to my endeavour. I want to thank my father Mr Moffat Muriuki who encouraged me to enrol for this course. George for walking with me every step of the way. If I had to do it again, I would not ask for more. To my beloved son Arnold for accepting that mum has to be away to study even when you did not want to. Your support and understanding is without measure.

Abbreviations

African Union	AU
European Union	EU
Former Presidents Forum	FPF
Orange Democratic Party	ODM
Orange Democratic Party-Kenya	ODM-K
Party of National Unity	PNU
United States of America	USA

Abstract

One of the major attribute of a democratic political system is holding of free and transparent elections periodically. Holding of elections is viewed as the most peaceful way of changing political leadership and the highest expression of people's choice of how they want to be governed. However, in africa violent electoral conflicts have become prevalent.Indeed, whenever there is an approaching elections in Africa save for some relatively stable countries like Ghana,South Africa, Tanzania and Botswana there is always a high risk that the elections might lead to violence or civil war.In the past few years electoral related conflicts have ocured in Nigeria, Zimbabwe and Kenya. In Kenya which is the focus of this study violent conflict broke out after the presidential results were announced on 30th December.2007. The declaration of Mwai Kibaki as the winner was challenged by his closest rival Raila Odinga.Consequently Odinga's supporter started to protest violently and in less than a week after the electoral results were announced, the violent protests had all the indicators of a well organized and coordinated ethnic conflict.In reaction to the violent conflict various local and international efforts were commenced with an aim of making the parties agree to a mediated outcome.The effort were fruitful and eventually an African Union led mediation process was initiated.

This study has analysed the AU-led Kenya post electoral conflict.It has analysed the three phases of the mediation process. These are the pre-mediation, mediation and post mediation phases. It has examined at conceptual level the activities which takes place at every stage and applied the same to the Kenya's post electoral violent conflict mediation process.In addition it has examined the factors which influenced the mediation process. Factors analysed include the issues in conflict, the mediation environment, the actors involved, the mediator and the strategies he used among others.

In this analysis the study has utilized both primary and secondary data sources.Primary data has been gathered through personal interviews using open ended questionnaires.The sample for the interviews has been purposively selected from person who either were participants, observers or knowlegdeable of the Kenya's post electoral conflict mediation process. Secondary data has been sourced from news papers, electronic media, websites and text books focusing on mediation in general and Kenya's post electoral violent conflict mediation. The adoption of two methodologies has enhanced the richness of the study for primary data has augmented the secondary sources which had not covered all the details of the process.The study is qualitative in nature and this has determined the method of data analysis which has been done qualitatively.

The analysis of the post electoral violent conflict mediation process has shown that each phase of the mediation process is of critical importance. The phases are inter linked and failure in one phase will inevitably lead to failure in the subsequent phase.Further the study concludes that the mediation process is influenced by multiple factors and hence cannot be explained by one factor let say the mediator or the mediation strategies.Instead the process is contingent on the conflict itself, parties in the conflict, the identity of third parties and the nature and degree of their involvement, the mediator's attributes and his relationship with interested third parties especially those with enough leverage, whether there are rival mediation processes and so on.

Chapter One

Back Ground of the Study

1.0 Introduction

On December 29th 2007 after the announcement of the incumbent president Mr. Mwai Kibaki as the winner of the closely contested presidential election, Kenya witnessed unprecedented violent conflict that claimed over 1,000 lives and more than 350,000¹ people were uprooted from their homes and property worthy billions of shillings destroyed.

The post-election crisis shattered the myth that Kenya is an island of peace, democracy, stability and development in a conflict ridden region.² Scenes of violence were aired both in local and international media internationalizing the conflict. For two months Kenya was in the international limelight as a state on the precipice of civil war. This prompted the interest of various third parties from within and without who offered to mediate between the conflicting parties: The parties were the Orange Democratic Party and Party of National Unity. Earlier offers to mediate by retired Arch bishop of South Africa Desmond Tutu, president Yoweri Museveni of Uganda and Kalonzo Musyoka were futile. The former president of Ghana John Kufuor who was the chair of African Union then played a facilitation role which eventually led to the appointment of a team of eminent persons by African union as mediators in the conflict. The African Union appointed a team of eminent persons comprised of the former president of Tanzania Benjamin Mkapa, Graca Machel and then former United Nations secretary general Kofi Annan who was the chair. The panel was mandated to negotiate a peaceful resolution to the conflict. The team had the full support of the United Nations and the international community. On the 28th February 2008, after six weeks of intense negotiations between Orange Democratic Movement (ODM) and the Party

¹ *Saturday Nation*, December, 27, 2008, p. 1-2.

² Mghanga, Mwandawiro. 'The myth that Kenya is an island of stability'. *The Saturday standard*, February 2, 2008, p. 12.

of National Unity (PNU) the two principals President Mwai Kibaki and honorable Raila Odinga signed an Agreement on Principles of Partnership of coalition Government.

1.1 Research Problem

Electoral conflicts are becoming common in Africa .Countries such as Kenya, Nigeria and Zimbabwe have experienced electoral related violence. At times this conflict becomes violent when the losing side does not concede defeat or when the electoral process is deemed as not transparent. There is need to resolve such conflicts in a peaceful manner .Mediation is one of the preferred methods of conflict management since it is non-coercive³.

On 29th December 2007, Kenya faced a political crisis that emanated from the disputed presidential results. President Mwai Kibaki was hurriedly sworn into office to serve his second term as the third president of Kenya. The Orange democratic Party rejected the results on the grounds of mass rigging and the Party of National Unity insisted that if there was any dispute ODM should go to the court. The Orange Democratic Party refused to seek any legal redress claiming that they would not get any justice. The Orange Democratic Movement leader, Raila Odinga maintained that he had won the elections and Kibaki should step down⁴. This positions threatened to push the country into civil war. While the disputants engaged in public rhetoric and grandstanding ,violence continued to occur in different parts of the country carried out by supporters from both sides of the political divide. In some parts of the country, violence was spontaneous while in others it appeared to be part of 'coordinated attack'.⁵ The violence created a humanitarian crisis leading to loss of lives estimated at 1300 and internal displacement of more than 350.000 people. Some crossed the borders into the neighbouring countries like Uganda and in effect internationalized the conflict. This drew the

³ M. Mwangi, *Conflicts: Theory, Processes and Institutions of Management*. Nairobi: water mark.2006.p.110.

⁴ *The Standard*, (Nairobi). January 14, 2008.

⁵ Commission of Inquiry into Post-election Violence Report. Nairobi: Government Printers. October, 2008, p.70.

attention of the international community who moved swiftly to try and bring the protagonists to negotiate and end the violence.

The research critically analyses the mediation process of the Kenya's post electoral conflict. It assesses the context and process variables that influenced the mediation process. It focuses on the pre-mediation, mediation and the post-mediation phases of the post-electoral conflict mediation process.

1.2 Objectives of the Study

The overall objective is to critically analyse the mediation process of Kenya's post-election conflict. The sub-objectives are:

- To find out the linkage between the characteristics of a mediator and the influence it has on the mediation process.
- To investigate the environmental factors that influence the mediation process.

1.3 Literature Review

1.3.0 Introduction

The literature review covers the key debates in mediation that influence the mediation process. This will be done by using the contingency model which analyses the context and process variables that affect a mediation process. These are the environmental factors, issues in conflict, the characteristics of the conflict, the parties and other actors, the relationship between them, acceptance of a mediator, timing and the ripeness of the conflict. On the other hand the process variables are the characteristics of the mediator, the strategies they use, the mediation environment, impartiality and leverage. Bercovitch and Langley views mediation as an adaptive process with different mediators doing different things in different situations and that its particular form in any situation depends on who the parties are, what the conflict

is all about and who is the mediator .⁶ According to Mwangi how those actors and issues interact determines the strategies that are used in management of the conflict.⁷ Mediation is and can only be context specific.⁸ This means that the conflict management approach is influenced by the environment which mediators find in a given conflict. Mediation has been defined as a form of conflict management, related to but distinct from the parties own effort, where the conflicting parties or their representatives seek the assistance or accept an offer of help from an individual group, or organization to change or influence their previous perceptions or behaviour without resorting to physical force or invoking authority of law.⁹

As a form of conflict management mediation is voluntary. It does emphasize consensus, autonomous decision making and mutual gains. It is cheap, flexible and offers the prospects of the satisfactory outcome. It cannot be enforced and so does not threaten or endanger the inherent right of actors to act as they see fit.¹⁰ This means that the parties in conflict must agree on the outcome in order to legitimize it .That is why the best view of a mediator is one who helps the parties to continue with the negotiation process until they reach a mutually acceptable and sustainable outcome. According to Okoth, mediation assists disputants to shift focus of the dispute from rights to interests and from the past to the future.¹¹

1.3.1.0 Context variables.

The process of mediation is influenced by the context which it takes place. The context variables include the timing of third party intervention, the ripeness of conflict, the issues in

⁶ J. Bercovitch and J. Langely. 'The Nature of the Dispute and the Effectiveness of International Mediation' . *Journal of Conflict Resolution*. Vol. 37. No. 4.1993. p. 672.

⁷ M. Mwangi, *Conflicts in Africa: Theory Processes and Institutions of Management* .Nairobi: Watermark. 2000. P. 101.

⁸ J.Bercovitch. 'International mediation' *Journal of peace Research*, Vol.28 No 1. P.3.

⁹ J. Bercovitch and J.Z. Rubin. *Mediation in International Relations: Multiple Approaches to Conflict Management* .New York: St. Martins Press.1990. p.7.

¹⁰ J. Bercovitch, 'International Mediation' . *Journal of Peace Research* Vol. 28. No. 1. 1991, pp. 3-6.

¹¹ See P.G.Okoth. *Peace and Conflict Studies in a Global Context*. Kakamega:Masinde Muliro University Press.2008

conflict, characteristics of the conflict, the previous relationships between the parties and the mediation environment.

1.3.1.1 The Timing of Third Party Intervention

Timing relates to the importance of undertaking action in a certain sequence.¹² The timing of intervention has traditionally been defined in terms of early or late intervention. Advocates of early intervention such as Edmead, believe that the third party intervention is more likely to succeed when embarked upon after the breakout of hostilities.¹³ Houston and Bercovitch on the other hand advocate that intervention is more likely to be successful when following a “test of strength” between the disputants.¹⁴ Kreisberg emphasizes the dependant nature of timing upon other variables such as mediators’ strategy, the party’s relationship and domestic and the international contexts.¹⁵

Keashly and Fisher elaborate a comprehensive normative approach to the timing. They argue that there are subjective elements related to the progressive escalation of conflict which determines right timing. They propose a series of strategies to be used sequentially as the conflict escalates from one stage to the other.¹⁶ This means that third parties have to constantly change strategy at different phases of the conflict.

1.3.1.2 Literature on the Ripeness of the Conflict

The timing of intervention is closely related to the the concept of conflict ripeness. Conflict ripeness refers to the appropriate set of circumstances needed for conflict to be

¹² J. Rubin, ‘The Timing of Ripeness and the Ripeness of Timing’, in L. Kriesberg and Thorson ,S. J (eds), *Timing and the De-escalation of International Conflicts* .Syracuse: Syracuse University Press, 1991. p. 237.

¹³ F. Edmead, *Analysis and Prediction in International Mediation*. London: Unitar. 1971, pp.12-24.

¹⁴ J. Bercovitch and Houston, ‘The Study of International Mediation: Theoretical Issues and Empirical Evidence’ in Bercovitch, J.(ed), *Resolving Conflicts: The Theory and Practice of Mediation*. Boulder : Lynne Reinner, 1996, pp. 22-23.

¹⁵ L. Kriesberg. ‘Timing Conditions, Strategies and Errors’ in Kriesberg. L and Thorson .S.J (eds) *Timing the Descalation of International Conflicts* .Syracuse: Syracuse University Press. 1991. pp. 1-24.

¹⁶ L. Keashly and R.J. Fisher. “A Contingency Perspective on Conflict Interventions: Theoretical and Practical and Practical Considerations”. in Bercovitch. J. (ed) *Resolving International Conflicts: The Theory and Practice of Mediation*. Boulder: Lynne Reinner. 1996. PP. 239-249.

amenable to resolution.¹⁷ The notion of conflict ripeness is associated with Zartman in his idea of that conflicts are ripe for resolution when parties in conflict reaches a mutually hurting stalemate. Zartman argues that there are two important conditions that make conflict ripe. First, parties must reach a hurting stalemate or plateau in which neither one can reach its objectives through continuing confrontation.¹⁸ The Plateau phase creates a permanent feeling of discomfort between the parties. This permanent feeling of discomfort according to Zartman should be coupled by the threat of an imminent catastrophe, as each party perceives the continuation of conflict as posing an imminent change to any of the gains they might have attained so far.¹⁹ Based on a rational actor framework the mutually hurting stalemate model assume that actors finding themselves in pain producing situations will seek more advantageous alternatives to the conflict.

Mitchell focusing on subjective factors claims that conflict ripeness exists when the conflicting parties realize that they can better attain their goals by finding alternatives to costly struggle.²⁰ This realization creates an enticing opportunity. As a result the occurrence of a dispute between rivals that result in fatalities may provide the rivals with a sense that relations are on the verge of becoming significantly worse and that mediation may be the last chance to improve rivalry relationship before circumstances spiral out of control.²¹

Mitchell considers ripeness as the moment when the parties recognize that the resolution of the conflict represents an opportunity to transform their social relations. However, this is possible only when the appropriate communication channels, the shift in

¹⁷ J. Rubin, *The Timing of Ripeness*, op cit, P. 234.

¹⁸ I. Zartman *Ripe for Resolution*, op cit, pp. 230-232.

¹⁹ I. Zartman, "Ripeness: The Hurting Stalemate and Beyond", in Stern, P.C and Druckman, D.(eds) *International Conflict Resolution After the Coldwar* (Washington D.C: National Academy Press, 2000), pp. 228-229.

²⁰ C. Mitchell. 'Cutting Losses: Reflections on Appropriate Timing', Institute for Conflict Analysis and Resolution of George Mason University. ICAR Working Paper 9, January 1996. pp. 5-6.

²¹ M. Greig, 'Moments of Opportunity: Recognizing Conditions of Ripeness of International Mediation Between Enduring Rivals'. *Journal of Conflict Resolution*, Vol. 45. No. 61' 2001. pp.691-718.

mindsets and principles, the necessary resources and the alternative fields of investment are all present enabling the parties be able to perceive the enticing opportunities.²²

1.3.1.3 Issues in Conflict

The nature of the issues leading to conflict influences the process of mediation. According to Bercovitch and Langley tangible issues involving territorial and security issues are more likely to succeed than those involving ideological or self-determination.²³ Barash and Webel argue that issues concerning ideology, moral, religious beliefs and personal values tend to be rigid since they are based on fundamental assumptions that cannot be proved right or wrong.²⁴

Fisher, Ury and Rubin support this view by identifying the difference between interest based conflict which can be addressed through the use of certain techniques²⁵ provide a win-win outcome for contending parties and value based conflicts which are of by nature Zero sum and non-negotiable.²⁶ The presence of many issues allows mediators to use different strategies during the process of mediation. In any conflict according to Burton, the underlying cause of struggle rests on the inability of the people to fulfill their basic human necessities.²⁷ People rebel in institutions where they feel their social contract is not respected.²⁸

1.3.1.4 Characteristics of the Parties and their Relationship

The nature of the parties and their relationship are treated as crucial in contingency model. For mediation to take place. The identification of actors/parties in conflict is important since the management of a conflict is influenced by the strategy adopted in the process of mediation. This would not be easy if the parties are not identified.

²² C. Crocker. *High Noon in Africa. Making Peace in a Rough Neighborhoods*. London: W. Norton. 1992. pp.46-471

²³ J.Bercovitch and Langley, *The Nature of the Dispute and the Effectiveness of International Mediation*, Op.cit, pp.676-689.

²⁴ D.P.Barash and C.P.Webel. *Peace and Conflict Studies*. California: Sage Publication, 2002, pp.233-234.

²⁵ R.Fisher, W.Ury and B.M.Patton. *Getting To Say Yes*. Newyork: Penguin. 1991.

²⁶ J.Z.Rubin, 'Models of Conflict Management', *Journal of social Sciences*, Vol. 50. No 1

²⁷ J.Burton, 'World Society and Human Needs', in Light, M.and Groom A.j.R. (eds) *International Relations : A Handbook of Current Theory*. London: Pinter, 1985, pp.44-55.

²⁸ T.R.Gurr, *Why Men Rebel* . Newjersey: Princeton University Press, 1970, p.24.

The cohesiveness of the intra-group is important. Putman defines cohesiveness in terms of the relationship between the core party and its constituencies. Steadman believes that group leaders commanding high levels of legitimacy are more likely to compromise regardless of their ideology.²⁹ Putman argues that agreement made by leaders needs to be ratified by their respective constituencies. Cohesiveness therefore can be measured in terms of the party's ability to find agreements that are acceptable at both levels. Having identified the negotiators from the parties in conflict the mediator is faced with the task of convincing them to negotiate.

A good mediator should be tactful in changing the perceptions of each party so that they can move from their hard-line positions and come closer in finding a solution. Evidence reveals that parties may refuse to negotiate because they reject the form of the proposed negotiations or they feel that entering into a mediated negotiation is a sign of weakness or the cost far exceeds the potential rewards of negotiated agreements.³⁰ Lewicki and Whitekoff on the other hand associate historical relationship with binding trust. History, they argue teaches parties whether or not their opponents are trustworthy and under what circumstances their trust might become compromised.³¹

The contingency model also identifies the issues of balance of power as being central to mediation. Zartman identifies difficulties associated with resolving conflicts under conditions of power asymmetry.³² The more powerful parties will systematically attempt to subdue their opponent by force. The mediator has to balance the power asymmetry by giving each party equal recognition.

²⁹ S.J. Steadman, *Peace in Civil War: International Mediation in Zimbabwe, 1974 – 1980*. Boulder Co: Lynn Rienner. 1991. PP. 235-242

³⁰ J. Bercovitch and G. Snider. 'Who Mediates?' *Journal of Peace Research*. Vol. 37, 2000, pp. 145-165.

³¹ R. Lewicki and C. Whitehoff. 'Trust Development and Trust Repair', in Deutsch. M. and Coleman .P.T (eds) *The Handbook of Conflict Resolution Theory and Practice* . Sanfrancisco: Jessey Bass. 2000, pp. 88-90

³² W. Zartman, "Dynamics and Constraints in Negotiations in Internal Conflicts" in *Elusive Peace: Negotiating and End to Civil Wars*. Washington D.C.: The Brooklings Institutions, 1995, P.7

The perceptions parties have when agreeing to participate in mediation activities are an important factor. Kressel identifies each party's ideology, sense of justice and psycho-emotional situations as important determinant of mediation process.³³ Zartman³⁴ and Mwangiru³⁵ contend that the divergence of the parties perception about their relationship is important for mediation process. If their perception about the relationship diverges, it becomes difficult for them to reach a consensus about their post conflict or post-mediation relation.

1.3.1.5 The Mediator's Acceptance by the Parties in Conflict and their Allies

Mediator's acceptance has traditionally been regarded as the basic threshold of any successful mediation process.³⁶ Traditionally it was assumed that parties are compelled to accept mediation by a natural desire to reduce violence and resolve conflict.³⁷ Based on these assumptions, the traditional approaches have lost ground to rational cost-benefit model. Zartman and Touval for instance claim that actors will accept mediators who bring with them the expectations of a better settlement or at least an assurance that the settlement will not be violated.³⁸ Richmond believes that the motives for accepting mediation are related to the attainment of pre-negotiation objectives, rather than to resolution of the conflict itself. Actors he argues, tend to accept mediators on the basis of the empowerment or legitimacy they provide, the role they might play as allies or scapegoats and the time they give parties to regroup and strategically reorganize.³⁹

³³ K. Kressel, "Mediation", in Deutsch, M and Coleman ,P (eds), *The Handbook of Conflict Resolution Theory and Practice* .Sanfrascisco: Jossey Bass. 2000. P. 527

³⁴ I. W. Zartman, "Conflict and Resolution Contest Cost and Change" in I.W. Zartman (ed) *Resolving Regional Conflict International Perspective* .Newbury Park: Sage Publications, 1991, pp. 11-22

³⁵ M. Mwangiru, *Conflicts: Theory processes and Institutions of Management*. op.cit. P. 55.

³⁶ J.B. Stephens "Acceptance of Mediation Initiatives: A Preliminary Framework:." in Mitchell C.R. and Webb. K (eds) *New Approaches to International Mediation* . New York: Greenwood Press. 1988. P. 60

³⁷ J. Bercovitch . "The Structure and Diversity of Mediation in International Relations" in Bercovitch J. and Rubin. J.Z. (eds) *Mediation in International Relations: Multiple Approaches to Conflict Management*. New York: St Martins Press. 1992. P.8

³⁸ S. Touval and W. Zartman (eds). 'Mediation in Theory'. in *International Medition Theory and Practice*, Boulder West view Press. 1985. P. 9

³⁹ O. Richmond, "Devious Objectives and the Disputants View of International Mediation: A Theoretical Framework." *Journal of Peace Research*, Vol. 35. No. 6, 1998" pp. 707-722

Bercovitch observes that even if the parties in conflict have considered third parties intervention, this may not take place unless a suitable mediator acceptable to all is available. This is *sine qua non* in international mediation.⁴⁰

1.3.1.6 The Mediation Environment

The environment where mediation takes place is important. The venue should be carefully chosen. A neutral ground is preferred so that both parties can be contented.⁴¹ Wall suggested a mediation paradigm in which the environment for mediation includes not just the parties to the conflict but also the mediator and the constituents of both the parties and the mediator. These include the third parties who affect or are affected by the process and outcome of management process. Mitchell⁴² enlarged the mediation environment to include the sources of the benefits that parties and especially the mediator derive from the whole process. The involvement of different actors according to Vayrynen transforms the conflict into a dynamic process.⁴³ A conflict manager should hence be aware of this dynamism and must be reflected in the analysis of conflict and its management processes.⁴⁴ This means that conflicts are constantly being transformed. It is important to keep watch of this transformation otherwise the conflict manager will manage the wrong conflict.

1.3.2 The Process variables Influencing the Mediation Process

During the negotiation phases in the mediation process, the mediator's role is very evident. Much emphasis is put during this phase because the issues to be implemented later on are agreed upon during this phase. The strategies they employ are important to deliver a successful outcome. The issues to be discussed under this section include: the type of mediators

⁴⁰ J. Bercovitch, *Resolving International Conflicts*. Op. cit.

⁴¹ J.A. Wall. 'Mediation : An Analysis Review and Proposed Research'. *Journal of Conflict Resolution*, Vol. 25, 1981. pp. 157-180

⁴² C.R. Mitchell 'The Motives of Mediation in Mitchell C.R and Webb, K. (eds) *New Approaches to International Mediation*. Westport. CT: Greenwood Press. 1988. pp. 29-51

⁴³ R. Vayrynen, "To Settle or to Transform? Perspective on the Resolution of National and International Conflicts" in Vayrynen. R.(ed) *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation*. London: Sage Publications 1991. 1-25

⁴⁴ M. Mwangi, *Conflicts: Theory, Processes and Institutions of Management*. Op.cit p. 97.

and their characteristics, impartiality, leverage, strategies and tactics that mediators use in order to deliver a successful outcome.

1.3.2.1 The characteristics of a mediator.

The contingency model singles out the nature of the mediator as a crucial factor in mediation. Nevertheless, concepts such as impartiality, leverage and status remain elusive and result in different explanations on their role as determinants of mediation success. This is a gap that this research will endeavor to fill. Mediation as a form of conflict management involves an outsider or a third party who enters a conflict and helps the parties in conflict to continue with the negotiation.⁴⁵ It transforms the conflict relationship that was initially dyadic into a triadic relationship of some kind by increasing the number of actors from two to three.⁴⁶

This means that the mediator becomes one of the parties to the conflict. Thus instead of having a two way negotiation, it become three or more. Contrary to the traditionally widely held belief that a mediator is interested in helping the parties to manage their conflict, it is now without doubt that no one mediates for purely altruistic purposes.⁴⁷ This view is supported by Mitchell and Webb.⁴⁸

Mwagiru adds that importantly, these interests define the roles the third parties choose to play. They will choose those roles that enables them to reap rewards that they expect to gain in their involvement as third parties.⁴⁹ Similarly, the rewards expected define the strategies and roles that are chosen by third parties as they engage in conflict management.⁵⁰ This may complicate the mediation effort since the mediator must balance their interests,

⁴⁵ M. Mwagiru, *Conflict: Theory Processes and Institutions of Management*, Op.cit,p.115.

⁴⁶ J. Bercovitch and J. Rubin, *Mediation in International Relations: Multiple Approaches to Conflict Management* .New York: St. Martins, 1992, pp. 1-51

⁴⁷ J.Bercovitch and J.Rubin, *Mediation In International Conflict Management: Multiple Approaches to Conflict Management*, Op.cit.

⁴⁸ C.R. Mitchell and K. Webb (eds), *New Approaches to International Mediation* .Westport, CT: Greenwood Press, 1988, pp. 29-51

⁴⁹ M. Mwagiru, Op.cit. P. 56.

⁵⁰ Ibid

those of the parties in conflict and their constituents in seeking an acceptable win-win outcome.

Mediator's attributes such as their nature, level of capabilities, resources skills and experience are important. He should possess personal qualities such as being friendly, Patient, a good listener and a sense of humour.⁵¹ The status of a mediator also plays a key role in mediation. According to Botes and Mitchell, the status of the mediator relates to their organizational hierarchy. Persons higher in organizational posts have more authority therefore more room to maneuver when acting as mediators.⁵²

1.3.2.2 The Strategies used by Mediators

The strategies adopted by the mediator are crucial. According to Bercovitch and Houston mediators' strategies can be characterised as communication facilitation, procedural and directive.⁵³ In communication facilitation the mediator adopts a passive role, channeling information to the parties, facilitating cooperation. Procedural strategies enable the mediator exert more formal control of the process and the environment of mediation. In directive strategies a mediator affects the content and substance of negotiation process by providing incentives for the parties to negotiate and by issuing ultimatums. The choice of any strategy is meant to change, modify, or affect aspects of the conflict or the interactions between the parties.

1.3.2.3 The Role of Leverage in Mediation

Leverage refers to mediator's ability to pressure one or both conflicting parties to accept a proposed settlement.⁵⁴ He can make promises of tangible benefits or he may issue threats of sanctions against the parties. The control and possession of resources is a major

⁵¹ J. Bercovitch, "International Mediation", op.cit.

⁵² J. Botes and C. Mitchell. 'Constraints of Third Party Flexibility'. *The Annals of the American Academy of Political and Social Sciences*, vol. 542, No. 3, 1995, PP. 168-184

⁵³ J. Bercovitch and A. Houston, 'Why Do They do it like this? An Analysis of the Factors Influencing Behaviour in International Conflicts', *Journal of Conflict Resolution*, Vol. 4, No.2 April 2000, p. 175.

⁵⁴ M. Kleiboer, "Understanding Success and Failure of International Mediation". Op. cit.

determinant of the mediator's ability to achieve a favorable outcome. These resources may take the form of money, status, expertise, access and prestige that can be used to effect a change in the behaviour or perceptions of the conflicting parties.⁵⁵

1.3.2.4 The (Un)importance of Mediator's Impartiality

Scholars have debated on whether a mediator needs to be impartial or not in order to be successful. Initially it was assumed that the mediator need to be impartial. This view has been challenged by scholars such as Touval who argued that a mediator possesses certain resources that parties value therefore impartiality is not important.⁵⁶ Mwangiru et al argue that mediators have resources that parties value regardless of their impartiality such as knowledge, a persuasive ability, and certain leverage.⁵⁷ The possession of resources valued by the parties make it unimportant for the mediator to be impartial.

Mitchell believes that the promise of material influence, security and status rewards conditions mediator's behaviour. According to him, mediation will be more or less successful depending on the type of rewards present and how these relate to the outcome of the mediation process.⁵⁸ However, according to J.D Smith⁵⁹, impartiality or rather the appearance of impartiality must and is *Sine qua non* of pure mediation who lacks resources to influence the parties. Without the appearance of impartiality 'pure mediators' would not be in a position to mediate.

⁵⁵ J. Bercovitch and J.Z. Rubin, *Mediation in International Relations: Multiple Approaches to Conflict Management*. Op.cit, p.19.

⁵⁶ S. Touval, 'Biased Intermediaries. The Theoretical and Historical Consideration' . *Jerusalem Journal of International Relations*. vol. 1. 1975. pp.51-70

⁵⁷ M. Mwangiru. M. Munene and N. Karuru. *Understanding Conflict and its Management* . Nairobi: Centre for Conflict Research. 1998. PP. 64-65

⁵⁸ C. Mitchell. 'Multilateral Negotiation: An Analytic Approach'. *Negotiation Journal*. Vol. 5 NO. 2. 1989, P. 263

⁵⁹ J.D. Smith, 'Mediator Impartiality: Banishing the Chimera', *Journal of Peace Research*, vol.45,2000, pp.445-450.

1.3.2.5 The Mediation Outcomes.

Mediation outcome refers to the product of the negotiation process. It is the agreement arrived at during the negotiation phase. Bercovitch⁶⁰ suggests the use of subjective and objective criteria in evaluating whether mediation process was successful or not. The subjective criteria cannot be assessed empirically but refers to the parties or mediators perception that the goals of mediation have been achieved. Using this perspective mediation can be said to be successful when parties express satisfaction with the mediation process or outcome.⁶¹ Objective criteria relies on indicators assessed empirically by an observer or any of the participants of the mediation process. This includes the behaviour of the parties after the mediation. If they continue to act in a dysfunctional manner it can be termed as a failure. If there is a cessation of violent behaviour and opening dialogue between the parties, it can be said to be successful.⁶² Kriesberg posits that a successful outcome is one which there is further movement in the course of the conflict from escalation to de-escalation or where negotiations have moved towards the agreed upon settlement or the settlement contributes towards an enduring solution.⁶³

1.3.3 Gaps in the Literature Reviewed

The following gaps were identified in the literature review. There are different views on whether the characteristics of a mediator such as his status and personal attributes are important or not to deliver a successful outcome. This study will investigate how the team of eminent persons led by Kofi Annan who were sent by African Union with the support of the international community impacted on the mediation process.

⁶⁰ J. Bercovitch and J. Rubin. *Mediation. International Relations: Multiple Approaches to Conflict Management*. New York: St Martin's, 1992. pp 22-25.

⁶¹ Ibid.

⁶² J. Bercovitch and J. Z. Rubin. *Mediation in International Relations: Multiple Approaches to Conflict Management*, Op.cit, pp.22-25.

⁶³ L. Kriesberg, 'Formal and Quasi Mediators in International Disputes: An Explanatory Analysis' *Journal of Peace Research*, vol.28, 1991, pp.19-27.

There is no consensus on the specific time when mediation should take place. Whether it is immediately violence breaks out or after it has gone on for a while. This is the "ripeness" of a conflict which is subjective. Further there is no agreement on which strategies a mediator should employ at different stages of mediation. Thus the study enriches the mediation scholarship by filling these gaps.

1.4 Hypotheses

- The timing of the initiation of mediation is important for a successful outcome.
- Mediation process is dependent on the actors, issues and the nature of the conflict.
- Mediation process is influenced by the characteristics of the mediator and the strategies they employ.

1.5 Theoretical Framework

There is lack of a comprehensive paradigm for the study of mediation. The study has used the contingency model. According to this model, mediation success has been attributed to two factors; mediation context and mediation process. The contingency model put forth by Bercovitch, Anagnoson and Wille is nested on the idea that mediation takes place and proceeds depending on the environment mediators find when they enter a conflict. The mediation process relates the mediation activities to the environment which they take place.⁶⁴ The mediation process is dependent upon the dynamics generated by the mediator's behaviour. Contingency model examines the relationship between the conflict, the actors and the strategies that mediators use to deliver a successful outcome. This means that mediation is dependent on the environment which mediators find as they intervene in a conflict. It also implies that the strategies they employ will be influenced by the transformation of the conflict

⁶⁴J. Bercovitch, J. T. Anagnoson and D. Wille, 'Some Conceptual Issues and Empirical Trends in the Study of Successful Mediation in International Relations' *Journal of Peace Research*, Vol. 28, No. 1, 1991, p. 11.

since conflicts are not static. They are dynamic, and keep on growing and transforming themselves.⁶⁵

The contingency model has been useful for to the study for it focuses on different aspects of the mediation process. Unlike other approaches which are partial in the sense that they deal with one or two aspects of the mediation process, the contingency approach look into aspects such as the identities of the third parties, the parties to the conflict and their previous relationships, the mediation environment, the mediator and the strategies he uses and how they impact on the mediation process.

1.6 Justification of the study.

The study deserves to be undertaken because it will inform future mediation attempts elsewhere in Africa and beyond where intra-conflicts centred on disputed presidential election are becoming common. The power sharing arrangement negotiated by the team of eminent persons is the first one of its kind in Africa.

Academically this study is also important because every conflict provides an opportunity for learning about that particular conflict. There is no research carried out on the mediation process of the Kenya post-election conflict. Hence this research will provide a systematic investigation of the mediation process.

1.7 Methodology

The research has used two methodologies. These are interview and content analysis methodology. Interview method has been used to collect primary data while content analysis has been used to collect secondary data.

1.7.1 Interview Method

The primary data was gathered through interview method using open ended questionnaires. The advantages of this method is that it enables the interviewer to seek

⁶⁵ M. Mwangi, *Conflicts: Theory processes and Institutions of Management*, op.cit, p.92.

clarification from the person being interviewed and to observe other forms of non-verbal communication. Those interviewed include members of parliament who were in the negotiating team. This formed an important sample for they are members of the parties who were in conflict. These sample was representatives for it focused on the members linked to the ODM, ODM-K and PNU parties and possessed first hand information of what actually happened during the mediation process.

Other resource persons interviewed are experts on legal matters. Their views are relevant to this study since they provided insights from a legal perspective into understanding the various positions of the parties and the outcome of the mediation agreement which created power sharing between the ODM and PNU parties. In addition to legal experts members of the civil society organisations were also interviewed. The Civil Society played a key role in the mediation process as the voice of the people. Kofi Annan consulted various such groups during the mediation process as part of his strategy to make the process more participatory. Their views are important in assessing the mediation process, how their constituents were affected by the conflict and the outcome of mediation. The current chair of the Kenya National Commission of Human Rights was interviewed as a representative of the civil society organisations. Also the researcher interviewed representatives of religious groups. The interviews focused on the representatives of the National Council of Churches of Kenya, the Catholic and Anglican churches.

1.7.2 Secondary Data

The primary data collected was augmented by secondary data. This was obtained from the published reports by local and international scholars and observers, Journals, articles, books, magazines, newspaper columnists and other media reports both electronic and print.

1.7.3 Data analysis

The data collected from the field has been qualitatively analysed. Qualitative analysis has been used because the subject of the study and data gathered are not amenable to statistical analysis. The findings are critically analysed and the findings measured have been tested against the study objectives and hypotheses.

1.8 Chapter Outline

The study is divided into six chapters.

Chapter One provides the background of the study.

Chapter Two, the Mediation Process concerns with the conceptual issues related to the various phases of the mediation process.

Chapter Three, the Pre-Mediation Phase focuses on the pre-mediation phase of the post-electoral conflict.

Chapter Four on Mediation Phase covers the mediation phase and how issues and actors interacted on the around-the-table negotiations.

Chapter Five the Post Mediation Phase is on the implementation of the outcome of the mediation phase.

Chapter six the Conclusion wraps up the study.

Chapter Two

Conceptual Issues in Mediation Process

2.0 Introduction

Mediation is necessary in conflicts where parties are engaged in destructive unilateral actions and are locked in public postures which appear to make compromise impossible without a major 'loss of face'. It is also appropriate where parties have distrust of each others intention and where at least one of the parties refuses to recognize the other.¹ Mediation can only be understood as an aspect of the general structure and process of negotiation. According to Mwangi mediation is the continuation of negotiations by other means with the assistance of a third party.² Third party intervention as an extraneous aspect of bargaining and negotiation is associated with problem solving workshop, and other supportive techniques of conflict management.³

For mediation to occur the conflicting parties must request or permit a third party to mediate and the third party must agree to mediate. Parties agree to have a certain mediator because they have the expectation that it will be effective in helping each secure a more favorable outcome than would otherwise be possible.⁴ Bercovitch notes that parties in conflict may seek mediation with the expectation that it would help bring to an end quickly a conflict or a crisis that would otherwise persist.⁵ On the other hand, a party may want to use the mediator as a scapegoat and protect its reputation and image for any

¹ G. R. Berridge, *Diplomacy, Theory and Practice*. Harvester Wheatsheaf: Hemel Hempstead, 1994, p. 99.

² M. Mwangi, *Conflicts Theory, Processes and Institutions of Management*. Nairobi: Watermark, 2000, p. 115.

³ J. Bercovitch, 'A Case Study of Mediation as a Method of Conflict Resolution: The Camp David Experience', *Review of International Studies*, Vol 12, No 1, 1986, pp 43-65.

⁴ S. Touval and I. W. Zartman, *International Mediation in Theory and Practice*. Boulder, Colorado: Westview, 1985, pp.7-17.

⁵ J. Bercovitch. 'The Structure and Diversity of International Mediation' in Bercovitch, J. and Rubin, J.Z. (eds). *Mediation in International Relations*. New York: St Martins. 1992. pp.1-29.

unpopular concessions made as part of the final agreement.⁶ More so parties seek mediation with the hope that the mediator will act as a guarantor of the agreement arrived at. When the third party enters the negotiating relationship, she/he has his/her own motives, perceptions and interests which he wants to protect. Their identity and behavior acts as a catalyst in changing the interaction between the conflicting parties. The actions they take, the influence they exert and the inputs they give are all done within the structure of negotiations.

2.1 The Mediation Process

In its simplest form, mediation involves three parties: two conflicting parties and the mediator or the third party. The mediator interacts with each party and with both together and in turn they communicate to each other and at times through him. The mediator hence becomes an interested party in the negotiations. Wall's mediation paradigm captures the mediation negotiation system. It comprises of the mediator, the two negotiators and the relationship between them.⁷ This environment includes the negotiators constituents, the mediator's constituents and other third parties who affect or are affected by the process and outcomes of the mediated negotiation. Wall's model provides a suitable structure within which the relationship between a mediator, other third parties and the negotiation is analyzed. It suggests that the mediator has influence over the negotiators and over the parties' constituent relationship. The first form of influence implies such functions as control of communication, establishment of basic rules and norms for negotiating and giving information. The second form of influence implies

⁶ J. Wilkenfeld et al, 'Mediating International Crises', *Journal of Conflict Resolution*, Vol. 47 No. 3, June 2003, p. 279-301.

⁷ J.A.Wall, 'Mediation: An Analysis, Review and proposed Research', *Journal of Conflict Resolution*, Vol. 25. No. 1, 1981, p. 159

functions such as convincing constituents and persuading the negotiators that a proposal may be acceptable to their constituents.⁸

There are three stages in the process of mediation. These are pre-mediation, mediation and post-mediation phases.⁹ For the purpose of this research, the terms mediation and negotiation will be used interchangeably. In the pre-negotiation phase the situation is diagnosed and the decision to try negotiations is made. According to Zartman and Berman, the negotiation phase comprises of a formula or common definition of the conflict in terms amenable to a solution. The post-negotiation phase identifies the details to implement the formula on precise points of interest.¹⁰ Bercovitch classifies the phases as antecedent, concurrent and consequent.¹¹ This classification is shared by Druckman.¹² The three phases are intertwined in the sense that one stage leads to the other. There is no fast demarcation of each phase but for the purpose of making the analysis neat, the distinctions are useful.

The analysis of the three phases of negotiation brings out two aspects of negotiation: Negotiation is a process comprised of the interplay between local and international politics. Negotiation is therefore depicted as a step by step process of moving towards an agreement or a set of alternative agreements. The stages provide the structure to negotiation process and bring out the various influences on negotiation which the parties with stakes in the process and outcome bring on board. and the tactics used by

⁸ J. Bercovitch, *Ibid* p. 47

⁹ G.R. Winham, 'Practitioners View of International Negotiation' 32, *World Politics*, 1979, pp.111-135

¹⁰ I. W. Zartman and M. R. Berman, *The Practical Negotiator* .London: Yale University Press 1982, p.9

¹¹ J. Bercovitch, 'A Case study of Mediation as a Method of Conflict Resolution: The Camp David Experience' *op.cit.*p. 45.

¹² D.Druckman, 'A Case Study of Mediation as a Method of Conflict Resolution: The Camp David Experience' *op.cit.*p.45.

the parties at each stage. According to Bercovitch¹³ mediators operate in a complex environment where personal goals, roles and interactional factors affect the behavior, choice of strategy and likelihood of success. Conflict management effort is aimed at modifying these variables.

2.2 Pre-Negotiation Phase

According to Stein in his examination of the importance of the pre-negotiation phase. if there is no success in pre-negotiation phase. negotiations do not occur, and this substantially affects the outcome of negotiation process. If it goes wrong, the whole negotiations will have little chance of success.¹⁴ Mwangiru characterizes this phase as essentially concerned with negotiations about negotiations. There are a lot of internal and external activities that happen during the pre-negotiation phase. The external things (those done by the third parties) include doing some background work on the conflict, developing strategies for the negotiation. and carrying out informal dialogue with the parties.¹⁵

It also entails analyzing the issues in conflict, the development of the conflict and identifying the benefits to be derived from the negotiation. Parties in conflict their constituents and allies should be clearly identified at this stage. In addition it is important to decide whether the conflict is ripe for resolution, if not deciding what can be done about it. This calls for ripening of the conflict which can be done by empowering the

¹³ J. Bercovitch. 'A Case study of Mediation as a Method of Conflict Resolution: The Camp David Experience' op cit, p. 48.

¹⁴ J. Gross-Stein 'Getting to the Table: Process of International Pre-Negotiation', *International Journal*, XLIV, Spring 1989, pp.231-236

¹⁵ M. Mwangiru, *Waters Edge: Mediation of Violent Electoral Conflict in Kenya*. Nairobi :Institute of Diplomacy and International Studies, pp. 95-96.

weaker party. There is also the need to assess the resources and leverage available for third parties to play their roles effectively.¹⁶

2.2.1 Analyzing the Issues in conflict

Mediators must conduct a background study of the conflict so that they can be able to understand what the real issues are. The identification of values and interests in conflict and whether the problem is a political or legal one is important. On one hand, conflicts about values are non-bargainable and therefore impossible to resolve by judicial or adjudicatory means. Values are non-negotiable and what is required for their fulfillment is not in short supply.¹⁷ On the other hand, disputes are about interests and hence negotiable. Further disputes are amenable to settlement, while political conflicts are amenable to and in fullness demand resolution.¹⁸ In each conflict there are values and interests which the mediator should clearly identify. This calls for an analysis of the history of the conflict, otherwise the mediator may end up managing the wrong conflict. Also conflicts are dynamic and transform themselves every time and this requires the conflict manager to discern the dynamism for his intervention to be fruitful through a clear understanding of each parties concerns and shaping these concerns into a common understanding.

2.2.2 Identifying of the Actors

Drawing a map of all the actors is essential for successful mediation. This is not easy for there are visible and invisible actors. A mediator should be able to identify who the relevant actors are, their constituents, allies and the relationship between them, their

¹⁶ M.Mwagiru, *The Water's Edge*, ibid, p.96

¹⁷ M. Mwagiru, 'Isolating the Wolves from the Sheep', IDIS Papers on Diplomacy and International Studies, No.1, 2009, p.9

¹⁸ Ibid, p.10

needs and interests. He should do this against his own interests, constituents and allies since he/she is not a disinterested party in the conflict for no one mediates for purely altruistic purposes. A careful study should extend to the previous relationship between the parties. The identity of the parties in a conflict is an essential part of mediation. Those involved primarily in the negotiations are listed down. This is not an easy task since the relationship between the conflicting parties, their constituents and allies is intricate making the role of the mediator a mediator a complex one.

2.2.3 Assessing the Timing and Conflict Ripeness

In the pre-negotiation phase, it is important to consider the “ripeness” of the conflict for it is at moment that conflicts are amenable to resolution. According to Zartman conflicts ripeness is associated with two sorts of intensity called plateaus and precipice which produce different sorts of pressure called deadlocks and deadlines respectively. A plateau and its deadlock begin when neither side is able to achieve its aim by itself. Each party begins to feel uncomfortable and trapped in a costly dead-end. A plateau must be perceived by both parties not as a momentary resting ground, but a hurting stalemate, a flat unpleasant terrain stretching into the future, providing no later possibilities for decisive escalation or for graceful escape.¹⁹ For the mediator, this means emphasizing the dangers of the deadlock to each party and dissuading it from persisting on a unilateral course.

A precipice can be an impending catastrophe or one that has been encountered narrowly and just missed such as loss of lives in violent conflicts.²⁰ There is therefore a need for the mediator to create an artificial deadline. Conflict resolution depends on a

¹⁹ I. W. Zartman, *Ripe for Conflict Resolution*. New York: Oxford University Press, 1989, p.268

²⁰ Ibid

sense of urgency, without a deadline or a sense of urgency, parties become accustomed to living with the conditions they are in. windows of opportunity can be identified in conflict and exploited before they close. They can also be created incase a conflict is not 'ripe'. According to Zartman if a conflict is not ripe for resolution, it is possible to ripen it. This can be done by supporting the weaker party hence disempowering the stronger party.²¹

2.2.4 Setting the Agenda

Agenda setting is a crucial part of pre-negotiation phase. This is because it outlines the items to be discussed during the negotiation phase. Therefore what does not appear on the agenda is not a subject for discussions that emerge. Hence whoever controls the agenda controls the decision making process.²² Agenda setting is controversial since it involves not only agreeing on what will be discussed but on the order in which the agreed items will be negotiated. Agenda content might encounter some difficulties because agenda content is sometimes used as a weapon of propaganda. The parties to potential negotiations can suggest agenda items which they know will never produce concessions from their rivals in order to advertise their own priorities.²³ Parties to any negotiation generally approach the agenda with the expectations that they will have to give concession on some items.

Parties may have unresolved competition over the agenda issues. This can linger and prevent transition to the next stage. Once the agenda is agreed upon the mediator may choose to fractionate the issues or handle them together. Further the mediator may choose

²¹ I.W. Zartman, 'Ripening conflict, Ripe moment, Formula, and Mediation', Bendahmane ,D.and Mcdonald, J.W (eds), *Perspectives on Negotiation: Four Case Studies and Interpretations* .Washington D.C: Foreign service Institute,U.S Department of State ,1986,pp205-206.

²² G.R. Berridge, *Diplomacy Theory and Practice*, op.cit p. 125

²³ G.R. Berridge, *Diplomacy, Theory and Practice*, op.cit, p.125

to begin with the most or less contentious issues. The advantage of fractionating the issues is that the negotiators are able to find common ground on various issues hence realize that they can actually reach mutually favorable agreements. It also gives hope to the constituents of the parties that a favorable outcome will be in place soon. Control over the agenda enables the mediator to execute a plan towards the resolution of the conflict.

2.2.5 Establishing the Rules of procedure

Once the content of the agenda is agreed the final task of pre-negotiations is agreeing on the procedure. The factors to be considered are the format, venue, composition of delegations and timing.²⁴ The mediator has to choose whether the format for negotiation will be direct (face to face) or indirect. Direct talks have many advantages such as enabling the disputing parties to engage each other in the presence of the mediator. Through the use of problem solving strategy, they are able to discuss their problem and arrive at a mutually acceptable solution or an agreement.

The venue for negotiation should be carefully chosen. A neutral ground is preferred for it makes both sides to the conflict feel that they are equally recognized in the negotiation and none of the parties is favored. It is advisable to allow negotiations to take place in a neutral setting where neither party has any potential for territorial or psychological dominance.²⁵

In addition to the venue agreeing on the nature of the delegation, its composition and size is important. Delegation refers to those who make up the negotiating team. This involves agreeing on issues such as what level /rank should they be, whether they should be official or non-official, should they be men or women and how many. Large numbers

²⁴ G.R. Berridge, *Diplomacy, Theory and Practice*, ibid, p. 126

²⁵ J. Bercovitch, 'A Case study of Mediation as a Method of Conflict Resolution' op.cit. p. 54

increases the complexity of the situation and limit its comprehension reducing the likelihood of successful outcomes. Finally it is important to determine when the talks commence and whether there should be a deadline. Having a deadline gives the negotiations a momentum and the urgency to conclude the process. The imposition of time limits operates as a force in bringing the parties together in search of a solution fast.

2.3 The Mediation Phase

With the successful conclusion of the pre-negotiations, the next task for the negotiators is to move into 'around-the-table tasks. This is the most visible phase of the mediation process. It is here that the interaction of the mediator with the mediation environment more visible. This phase begins with setting the basic rules of engagement. However, Gulliver notes that at times these rules are broken by the parties.²⁶ Such rules include confidentiality on what is discussed. This is a very important phase because whatever is agreed upon during this stage will be implemented in the next phase.

2.3.1 Issues in conflict

When negotiations begin issues are presented. The classification and specification of issues is important. In making the opening bids, parties have to state their claim clearly. It has to provide evidence and arguments in support of their issues. There is a probing of the validity of presented facts. It is necessary for the parties to reach an agreement on the matter in conflict even if they may not fully agree on what the real conflict is about. Negotiations are guided by the items of the agenda set in the pre – negotiation phase. Negotiations cannot go any further until the parties agree what the particular issues are. These are often definable in more than one way and each party seeks

²⁶ P.K. Gulliver, 'Negotiation as a Mode of Dispute Settlement: Towards a General Model', *Law and Society Review*, Vol. 7 No. 4 ,1973, pp. 667-692

the definition and covering rules which best suits its own advantage.²⁷ During the negotiations, it is important to focus on the difference between the parties on the issues and narrowing down of differences. The task starts by separating the disagreements and trying to reach a mutually acceptable settlement. After the core differences have been isolated, mediators can make tentative suggestions for modification of or shift on issues.

2.3.2 The Mediator's Role in the Mediation Phase

The mediator's role is important in all the phases of negotiation process. However, more attention is given to the mediator's role during the mediation phase because the issues to be implemented later are agreed during this phase.²⁸ The mediator is engaged in many activities ranging along a discernible continuum. The roles range from relatively passive to active involvement in a dispute. At the passive end the mediator role is limited to making it possible for the parties to communicate with each other by providing secure channels of communications. However a good mediator is not just a conveyer belt but an interpreter of messages. He is able to communicate the message from one party in a less offensive manner. He should be able to provide reassurance that each party is sincere and committed to seeking a negotiated settlement.

On the other end mediator's influence may be considerably active especially if the support of other important actors is available. This is so for a mediator with leverage. In such negotiations the mediator chairs the talks, puts forward substantive threats and promises to one or both parties in order to get a settlement. They can use threats or manipulate the parties in order to obtain the outcome they want. When targeting the disputant –disputant relationships mediators can take steps to smooth the relationship by

²⁷ Op cit

²⁸ M. Mwagiru. *Water's Edge* op.cit p. 109

convincing the disputants to accept mediation, building trust between them and calling for consideration and apologies.²⁹

At times mediators control the agenda by establishing or enforcing the rules of mediation. They can push their own interests since they are an interested party in ending the conflict. Often they separate parties, caucus separately with them, bring their representatives together and on occasion adjourn the mediation session. Caucusing with the parties entails holding private sessions with them. This is important as it allows the mediators to understand their perceptions of issues at hand. Adjourning the mediation gives time to the parties to cool down their emotions and to consult their principals and constituents.

The mediator may also side with one party and seek an integrative solution by proposing specific agreement points. At times, the mediators will use other third parties to bring pressure on the parties.³⁰ According to Zartman, each mediator should have a fairly clear idea of where the negotiation is going to end.³¹ This in turn influences the choice of strategies and tactics a mediator will use to arrive at the desired outcome.

2.3.3 The Mediators Strategies

In mediation not all strategies are equal. Different strategies are appropriate at different times. Mediators should decide what strategies to use in order to arrive at the desired outcome. A strategy is an overall plan or method a mediator has for resolving a conflict.³² It is the way the mediator intends to handle the case, the parties and the issues. The strategies chosen are meant to modify or affect aspects of the conflict or even the

²⁹ J.A. Wall et al, 'Mediation: A current Review and Theory Development' , op.cit p. 366

³⁰ J.A. Wall et al, Op.cit. 366.

³¹ I. W. Zartman, *The Negotiation Process: Theories and Application* (London; Sage Publications 1978) p. 20

³² J. Bercovitch, and J.Z.Rubin, *Mediation in International Relations: Multiple Approaches to Conflict Management*, Op.cit.p.16.

character of the interaction between the parties. The choice of which strategy to use is influenced by the character of the conflict and the resources available to the mediator. The resources available to the mediator include status, expertise or knowledge, access to leaders or even prestige.³³ Which resources will be used and how they will be used depends sometimes on the character of the third party. This in turn affects the mediation outcome. Pruitt identifies three types of mediation strategies. These are light, moderate and heavy strategies.³⁴ Light strategies entail enhancing communication between the parties, arranging meetings and transmitting information between the parties. Moderate strategies are formulation, structuring the agenda and making suggestions to the parties while heavy strategies involve the use of threats and manipulation of parties for them to make concessions. According to wall, et al, the mediator may choose to use heuristic or compensatory strategies. Heuristic strategies involve the use of minimal information and time as well as the consideration of few alternatives to the problem to get an outcome. Compensatory strategies employ extensive amounts of information and time, herein many alternatives and solutions are considered.³⁵

Mediators do not automatically favor a heuristic or compensatory strategy but rather is determined by the conflict. Some conflicts are unemotional and characterized by discussion of ideas and solutions. Others by contrast are highly emotional. In the emotional situation, mediators are motivated to arrive at a reasonable solution quickly. Thus, heuristic strategies are more attractive in this volatile setting as they allow mediators to examine alternatives quickly with the information at hand. The techniques a

³³ M.Mwagiru, *Water's Edge*, Op.cit, p.75

³⁴ D. Pruitt, 'The Tactics of Third party Intervention' *Orbis*, Vol.44, 2000, pp.245-254.

³⁵ J. A. Wall et al, 'Mediation: A Current Review and Theory Development', *Journal of Conflict Resolution* Vol 45. No. 3. 2001, pp 370 – 391.

mediator uses in such a situation include pressing, monitoring the dispute or quickly siding with one party.

Closely related to the choice of strategy is the assessment whether the mediators has enough leverage to help parties move from their positions towards an agreement. Leverage refers to the mediator's ability to put pressure on one or both conflicting parties to accept a proposed settlement.³⁶ Leverage in this case means the application of diverse resources in order to exercise control of the mediation process and its outcome. It involves coercion or persuasion to accept compromise and it is believed to lead to a settlement that could become unstuck once power relations had changed.³⁷ The mediator and their constituents must use their resources in order to induce a change in behavior motivation and perceptions of parties. This means that the choice of resources and hence of the strategies of mediation is not random exercise but carefully calculated activity aimed at making parties yield to each other's and to mediator's interests. The mediator has interests in the process that he wishes to protect and preserve and uses leverage to ensure those concerns are realized as much as possible. The essence of leverage is to reduce parties' room for unilateral maneuver and keep them searching for a solution. Therefore the more powerful a mediator is, the more the resources he can employ and change the attitudes and perceptions of the parties.

³⁶ M. Kleiboer, 'Understanding Success and Failure in International Mediation', *Journal of Conflict Resolution*, Vol. 40 No. 2, 1996, pp. 360-389

³⁷ D.B. Bendahmane and J.W. McDonald, *Perspectives on Negotiation: Four Case studies and Interpretations*. op cit, p.230.

2.3.4 The Negotiation process

Negotiation involves bargaining. Bacharach and Lawler³⁸ portray bargaining as a game of managing impressions or manipulating information. It is based on bargaining power. In this regard each party comes to the negotiation table with a certain level of power. Each party hence analyses its bargaining power in relation to that of the other party. This in turn determines the tactics each party will adopt. In the negotiation process, each party tries to maximize on its interests in order to reach a settlement on terms favorable to them.

However Zartman contends that power alone does not explain the structural dilemma whereby weak parties negotiate with strong parties and gain favorable outcomes. Zartman identifies power with resources and asserts that actors with an overwhelming imbalance of resources frequently do well but also poorly in negotiations.³⁹ He asserts that negotiation among unequal parties tend to be more efficient. He attributes this to the parties' notion of justice. In the process of negotiation the exchange and division of items contested between them, parties come to an agreement on the notion of justice that will govern this disposition. If the parties do not agree on this, the negotiation will stalemate.⁴⁰ To Zartman, justice means equality and impartiality that is equal exchange of equal concessions.

Negotiation is about making concessions. But how much should each side concede remains a dilemma. Concessions ought to be decided without making references

³⁸ B. Bacharach and E. J. Lawler, *Bargaining: Power, Tactics and Outcomes* .San Francisco: Jossey-Bass, 1988. p.42

³⁹ I. W. Zartman, 'Conflict and Order: Justice in Negotiation', *International Political Science Review*, 1997, Vol. 18, No. 2, pp. 121 - 138

⁴⁰ Ibid

to some factor extraneous to the negotiation process itself.⁴¹ At the bargaining table the mediator employs certain tactics in order to entice the parties to concede or change their perceptions. He may promise tangible gains or make threats to either of the sides. At the same time, the unwillingness to compromise by the parties may sabotage the possibility of any agreement, which may hurt everybody. In the negotiation process, each party should concentrate on achieving the Best Alternative to a Negotiated Agreement (BATNA).⁴² They can achieve this by examining their own BATNA and that of their opponent(s). The primary motive for seeking a negotiated solution to a problem is that parties anticipate a better outcome from the negotiation than they would expect without it. Factors outside the negotiating table not only influence the conflicting parties' decision to participate in the process but also their willingness at a particular stage in negotiation to modify or withdraw some of their initial demands to make concessions and agree on a compromise.

2.3.5 The Mediator's Influence

In mediation it is possible to have more than one mediator active in a particular dispute or several people expressing their willingness to mediate. This is because some people want to be involved for reasons of their own. Some do so for prestige, others to enhance their social status or access to high ranking political leaders. Regional powers play the mediation role for reasons of maintaining the stability in which they flourish.⁴³ It is also within their mandate to do so.

In the negotiation phase, the attributes of the mediator influence the mediation process. According to Berridge they should have influence relative to the parties, the

⁴¹ I. W. Zartman, *The Negotiation Process: Theories and Application*. op.cit p. 21

⁴² Fisher, Ury and Patton, *Getting to Yes: Negotiating an Agreement without Giving in*. London: Arrow Business Books, 1997, p. 143.

⁴³ G.R. Berridge. *Diplomacy, Theory and Practice*, op.cit p. 103

ability to devote sustained attention to the dispute and be perceived as impartial on specific issues dividing the parties in conflict.⁴⁴ A mediator should be able to give continuous attention to the conflict. This means that he should be there from the beginning until he has secured a favorable outcome. Conflicts do not end by themselves, continuous involvement produces familiarity with the problem and key personalities, enables relationships of personal trust to develop which reinforce calculations of interests, fosters a routine, which reduces the likelihood of false expectations being generated, makes possible procedural break through which in turn make seizing an opportune moment for settlement much easier.

According to Touval mediator's impartiality is not necessary.⁴⁵ This is the perception that the mediator is not seen to favor or support any of the parties in conflict. Infact the absence of impartiality is seen as an advantage. The favored party may make concessions to the mediator out of fear of losing the mediator's favour while the other may make them in an attempt either win or at least reduce the intermediary's support for the opposition. The mediator is said to possess certain resources which the parties value, because they value those resources they are less concerned about his impartiality. However the mediator must remain neutral to the conflict.

With the essential identification of core difference, almost certain now modified from their original strength, the final phase of negotiation sets in. It may be prolonged if an agreement has not been reached or if team leader and/or the principals have become involved in interpersonal antagonisms and prestige seeking competitiveness.⁴⁶ On the

⁴⁴ G.R. Berridge, *Diplomacy, Theory and Practice*, op.cit. p.103

⁴⁵ S. Touval, 'Biased Intermediaries: A Theoretical and Historical Considerations', *Jerusalem Journal of International Relations*, 1, pp.51-69.

⁴⁶ P. H. Gulliver, 'Negotiation as a Model of Dispute Settlement', op. cit p. 688

other hand, it may be brief if parties have reached an understanding that is acceptable. The process may be stopped at any point in frustrated disagreements and it may be restarted again at some point, perhaps with a different arena.⁴⁷

UNIVERSITY OF NAIROBI LIBRARY
EAST AFRICANA

In spite of all these, mediation is a resolution process where the parties have significant autonomy. Mwagiru is of the view that mediators' role should not interfere with the party's autonomy. Otherwise the process will stop being a resolution process and become a settlement one.⁴⁸ The mediator should thus not be directive but rather he should help the parties continue with the negotiation process until the parties reach a mutually agreed and sustainable outcome.

Negotiations normally end with a specific outcome which can either be an agreed settlement of the dispute or conflict resolution. It is done in a ritual form such as the signing of agreements and hand shaking. Mediation outcome is dependent on the process and the strategies of the mediators.⁴⁹ Bercovitch and Houston notes that the mediator rank is positively correlated with the settlement of disputes, high status mediators are more apt to obtain agreements when the disputants' power is balanced and when both sides have the support of their constituencies.⁵⁰ Assefa posits that high visibility seems to be detrimental to settlement of conflicts because the disputants do not have "safe space" to openly discuss with the mediator, admit their faults or follow suggestions and cooperate. Rather they seek to appear tough and impress their constituents.⁵¹

⁴⁷ Ibid p. 689

⁴⁸ M. Mwagiru, *Water's Edge*, op.cit p. 100

⁴⁹ J. Wall, et al, 'Mediation; A Current Review and Theory Development', *Journal of Conflict Resolution* Vol. 45, No. 3, 2001, pp. 370-391

⁵⁰ J. Bercovitch and A. Houston 'Influence of Mediator Characteristics and Behaviour on the Success of Mediation in International Relations', *International Journal of Conflict Management*, 4, 1993, pp.297 -321

⁵¹ H. Assefa, 'The Challenge of Mediation in International Wars: Reflections on the INN Experience in Ethiopia /Eritrea Conflict', *Security Dialogue*, vol. 23 pp.101-106.

2.4 Post- Negotiation Phase/ Implementation.

This is last and the most important phases of the negotiation process. It is because it involves the implementation of what was agreed upon in the negotiation phase. It brings in actors not directly involved in the negotiation process. They help in the implementation of the outcome by giving financial assistance or monitoring the implementation of the agreement. These include financiers of the process and other stake holders such as civil society. Several problems associated with this phase include the problem of re-entry and implementation challenges. Problems of re-entry refer to a situation where the parties may not be able to sell the outcome of the negotiation to its constituents. To overcome this problem, it is important that negotiators be given time to consult their constituents constantly during the negotiation phase so that they can sell to them the concessions they make at each stage in the mediation process.

2.4.1 Implementation Challenges facing Peace Agreements.

It is important for the parties who were in conflict to implement the agreement made at the end of the negotiation otherwise the whole exercise would be futile. If the implementation fails there is need to re-negotiate again hence it reverts back to pre-negotiation phase. This shows the importance of each phase of the mediation process. If it is not properly done, the whole process is affected. As such, the phases are interconnected with one stage leading to the other.

It is at this stage that each party discovers whether the other party was acting in good faith in the negotiation and about their willingness to deliver what was agreed upon. During this stage it can also be discovered whether the third parties in the conflict and their constituents had a genuine concern about the substance of the outcome or whether it

was all about the form of the outcome in this case the power sharing arrangements under the umbrella of a grand coalition government in Kenya.

This stage maybe faced with various challenges which range from financial constraints to lack of political goodwill from the parties especially when they want the status quo to remain.

Chapter Three

The Pre-Negotiation Phase of the Post Electoral Conflict Mediation Process

3.0 Introduction

The preceding chapter has delved into the conceptual issues associated with the mediation process. It has shown that the acceptance by conflicting parties to engage in mediation process and the entry of a third party in the management are not a single event. Rather, it is a process which can be analytically divided into various phases and the activities in each stage clearly delineated. These are pre-mediation, mediation and post-mediation.¹ These categories are of critical importance in analyzing the mediation process, for in each stage various external (third party) and internal (conflictants) activities take place. Importantly the phases are interlinked in a way that failure to effectively address issues in one phase inevitably leads to failure of the whole process.²

This chapter focuses on the pre-mediation stage during Kenya's electoral conflict mediation process. Traditionally the analysis of the mediation process primarily focused on the around-the-table phase. However, it is now acknowledged that various important activities take place before and after around-the-table negotiations. Parties do not just agree to sit down and negotiate, neither is conflict ended by signing of documents at the end of around-the-table negotiations. This makes pre-mediation equally important if not more important than the around-the-table mediation.

Pre-mediation phase begins when one or more parties consider mutual engagement as more attractive than unilateral one. It ends when one or both parties abandon considerations of negotiations as a policy option or when around-the-table mediation begin. Pre-mediation phase

¹ G.R. Winhan 'Practitioners view of International Negotiation', *World Politics*, 32, 1979, pp. 111-135

² See Chapter Two, p.21

is important for it functions as a learning process, getting each party to understand the needs, interests and expectations of the other. Importantly it helps in addressing psychological barriers brought about by biases, prejudices and distrust between parties. This makes the parties believe that there is a mutual interest in the process and reciprocity is expected³. As such negotiation helps parties to redefine their relationships, reframe their problems and create an atmosphere of common understanding.

During the pre-negotiation phase various external and internal activities take place. Mwangi identifies these activities as including doing some background work on the conflict, developing strategies of negotiation and carrying out of informal dialogue with the parties. Further third parties analyze the benefits to be derived from the negotiations, analyze the conflict and its development, identify parties and draw a strategic map of actors, examine the relationship between the parties and between them and other actors.⁴ Importantly, it must be decided in this stage whether the conflict is ripe for resolution, and if not, deciding what can be done about it.⁵ Other activities include defining and clarifying of issues, establishing the framework of addressing them, deciding on the venue, identifying actors and so on.

In Kenya post-electoral violence mediation process, various activities were undertaken by both third parties and parties directly involved in conflict (Orange Democratic Movement and party of National Unity). The announcement of the presidential results and declaration of Mwai Kibaki as validly elected led to dispute by the ODM leaders who argued that they had won the elections. In response to this assertion, the PNU insisted that Kibaki had won the election and

³ See R.J. Fisher, 'Pre-Negotiation Problem-solving Discussions: Enhancing the Potential for Successful Negotiations', *International Studies*, Vol 44, Spring 1989, p. 443, also J. Gross -Stein, 'Getting to the Table. The Triggers, Stages, Functions and Consequences of Pre-negotiation', *International Studies*, Vol 44, spring 1989, pp. 498-9

⁴ See Chapter Two, p.21

⁵ M. Mwangi, *Water's Edge: Mediation of violent Electoral Conflict in Kenya*. Nairobi: IDIS. 2008, pp. 95-96

any aggrieved party should go to court to challenge the outcome. ODM rejected the legal process arguing that the judiciary was pro-government and hence they could not get justice there.⁶ The parties' positions, as respondent noted reflected genuine concerns. PNU did not want to undermine the rule of law hence the insistence on the legal process whereas ODM were aware that the legal process was slow and has been used in the past to frustrate those challenging the outcome of elections in the past.⁷ This view is in contrast to another respondent's view that ODM were power hungry and had before the elections decided that any results which did not deliver the presidency to them was unacceptable and they will mobilize their supporters to reject it.⁸

The rejection of the poll results and the demands by the PNU that, any party which is dissatisfied with the results file on electoral petition in courts set the stage for violence as ODM supporters engaged the government and its perceived supporters in violent contestations. By the end of the first week, what had started as an issue of disputed presidential elections took a dangerous turn as supporters mobilized around ethnic identities and started targeting those considered as 'others'.⁹ The reality of ethnic war brought to the international community, the risk of another Rwanda, prompting a flurry of diplomatic activities by both official and non-official actors, in a bid to preempt the emerging anarchy.

On the 2nd of January, 2007, Archbishop Desmond Tutu flew in hoping to mediate in the conflict¹⁰. He had meetings with both Kibaki and Raila and afterwards said that both had shown willingness to engage in the process. This was contrary to their continued public rhetoric as PNU

⁶ Cited, *Ibid*, p 40

⁷ An interview with a respondent on 25th September, 2009

⁸ An interview with a member of ODM-Kenya conducted on 5th October, 2009

⁹ J.M. Klopp, 'Kenya's Unfinished Agendas', *Journal of International Affairs*, vol 62, No. 2, 2009, p 145-147

¹⁰ 'Tutu Begins Mediation Talks with Kenya Leaders' available at www.christianpost.conflict/overseas/2008/01tut-begins

stuck to its earlier demand that ODM go to court and ODM adamantly refused to do so arguing that the court process was slow and dominated by government allies. Consequently, Tutu's attempt at facilitation floundered. The failure can be attributed to the timing for it was too early and neither party had incurred enough costs to consider engaging in mediation.¹¹ Also, the ODM had banked on international support to advance their agenda and Tutu lacked the international weight desired by the ODM.¹²

Tutu departure was followed by a visit by then Ghanaian President John Kufour, in his position as the Chair of African Union. The African Union on the basis of its charter as reflected in article 3(f) and (g) on its objectives mandates it to intervene in maintaining of peace and security and promotion of democratic principles in Africa. In addition article 4(1) calls the organization to intervene incase of gross violation of human rights or crimes against humanity or crimes against humanity whereas article 4 (3) provides member states with a right to request intervention in order to preserve peace and unity.¹³ In Kenya, there was alleged subversion of democratic principles for the elections were characterized as lacking in fairness and transparency and the violence had led to killings and displacements which constituted gross violations of human rights. Hence the AU had a responsibility to intervene.

Prior to Kufour's arrival, ODM dropped its earlier demand for Kibaki resignation. Raila Odinga instead stated that he was willing to participate in an interim government that would organize elections in three months time, that the elections would be conducted by a completely independent electoral commission, that any talks should be based on president Kibaki's acceptance that the elections were compromised and there should be an appointment of an

¹¹ On the importance of timing in mediation process, see A section on timing, chapter two, pp.5-6

¹² An interview conducted on 13th October, 2009

¹³ See the Constitutive Act of African Union, 2002, and Peace and Security protocol, articles 7(e),(f),(g)

internationally constituted and recognized body to examine controversial results of the general elections. William Ruto, a key figure in ODM added that such a body would recommend the modalities and procedures for resolving the conflict and he called on the international community to facilitate its appointment.¹⁴

The ODM demands prominently featured inclusion of international community, indicating that they were only willing to engage in an internationally backed process. To the contrary PNU insisted that the problem was internal. This was despite the fact that the violence has been significantly become internationalized by the media, heightened third parties diplomatic focus on Kenya and the negative economic and security consequences it posed to the regional and international actors. Indeed on 8th January Kibaki invited Raila and together with religious leaders for a reconciliation talks. The presidential press service released a statement outlining the purpose of the meeting as to dialogue on the stoppage of violence in the country, consolidation of peace and national reconciliation. Raila rejected the meeting and his spokesman Salim Lome issued a statement that 'Raila will only participate in a meeting with Mr. Kibaki if it is a part of negotiating process that president Kufour is expected to initiate. Mr. Odinga categorically rules out any bilateral meeting with Mr. Kibaki unless it is conducted through an international mediation'.¹⁵

Further, Kibaki went ahead and named a partial cabinet. In justifying his actions, he argued that,

'the government must continue to function, that the partial cabinet would ensure that the government runs the country as required by the constitution, and that when the

¹⁴ Cited in M. Mwangi, *Water's Edge: Mediation of Violent Electoral Conflict in Kenya*. Nairobi: Institute of Diplomacy and International Studies, 2008. p.47

¹⁵ 'Kenya's Opposition Consider Talks' *New York Times*, 9th January, 2008

government becomes fully constituted following the conflict, it should be broad based and the appointment of the partial cabinet did not rule out that process.¹⁶ This action attracted criticism from various actors. ODM through its spokesman Salim Lome stated that 'You do not pre-empt negotiations by giving away all important posts'.¹⁷ The international community which had clearly demanded a power sharing agreement which included ODM in the post-conflict order also weighed in.

Before Kufour jetted into the country, various third parties had stated their preferences. The British Prime Minister, Gordon brown, had intimated that he 'had talked to Kufour and he expected that Kufour's engagement will give a chance to some people who are at the moment opponents a chance to join the government of national unity'.¹⁸ A position re-affirmed by the Foreign Secretary, who claimed that the presidential system in Kenya was designed to concentrate power, when Kenya's immediate and medium future required the sharing of power'.¹⁹ The United States through its Assistant Secretary of States for Africa Affairs, called for clipping of presidential powers'.²⁰ The European Union, demanded for a lasting solution which reflected the will of the Kenya people'.²¹

The appointment of the partial cabinet aimed at consolidating Kibaki presidency and showing that indeed there was a government in place. Further, by having a partial cabinet, Kibaki was indicating to the ODM that there was a room of them in a broad based government. By this strategic move, the government sought to create an advantage on its side, though Mwagiru doubts the strategy noting that the chicken later came home to roost after the idea of a grand coalition was agreed and the ODM insisted that he had already named half of his share in the

¹⁶ 'Hope as Kuffour Discuss Crisis with Kibaki and Raila' *Daily Nation*, (Nairobi), 10th January, 2008, p. 12

¹⁷ 'Keya Opposition Consider Talks' *New York Times*, 9th January, 2008

¹⁸ 'Thousands Protest as ODM accepts Mediation' *The Guardian*, (London) ,4th January, 2008, p.6

¹⁹ 'Kenyan Leaders Risk Losing Goodwill, warns Britain', *Daily Nation*, (Nairobi), 8th January, 2008, p.6

²⁰ *The Standard*, (Nairobi), 8th January, 2008, p.3

²¹ *The Standard*, (Nairobi), 14th January, 2008, p.3

cabinet. (Further the ODM) argued that the size of the cabinet should be thirty four ministers, half of whom he (Kibaki) had already appointed.²²

Upon Kufour arrival both parties restated their demands, though government was still downplaying his visit. The govern spokesman Alfred Mutua. lightly stated,

'Kufour [is] expected in the country for talks but not to mediate. There is nothing to be mediated. They [Kufour and Kibaki] are age mates and friends and he is coming to have a cup of tea with him'.²³

Nevertheless, in a meeting with Kufour, Kibaki clearly demanded that the ODM must recognize that there was a government in place and that he was the legitimately elected president of Kenya, and [he] was ready to have dialogue with concerned parties once the nation is calm and the political temperatures are lowered enough for constructive and productive engagement.²⁴ Further, he insisted that all leaders must prevail on their people to restore peace before a solution on the election in dispute” and that the ODM should consider a position of a non-executive prime minister.²⁵ The ODM in response demanded that Kibaki should accept his position as illegitimate, that there should be a re-tallying of votes and a re-run of elections between him and Raila. Further ODM it willingness to be a part of a coalition government but not a government of national unity as intimated by the government.²⁶

After two days of facilitation, Kufour stated that, the parties had agreed to engage in a mediation process and that there should be an end to violence. Through the use of AU good offices, he managed to start the process. As such his involvement had two important outcomes as captured by a commentator. who noted that.

²² M. Mwangiru, *The Water's Edge*, op cit, p. 59

²³ 'Kibaki sends out special envoys' *The Standard*, (Nairobi), 8th January, 2008. P.4

²⁴ 'Kenya in a Stalemate as world Tries to Broker Peace Deal' *LA Times*, 11th January, 2008

²⁵ 'Kibaki and Raila Blame each other in deadlock on Polls Impasse Talks' *Daily Nation*, (Nairobi), 11th January, 2008

²⁶ *Ibid*, p. 2

‘while failing to bring the parties physically together he managed to make the parties agree that there should be an end to violence and there should be a dialogue conducted by a panel of eminent African personalities, and all outstanding issues including constitutional and electoral reforms would be addressed’.²⁷

This observation is similar to one of the respondent’s statement that, Kufour’s managed to make ODM change their mass action strategy which was making it impossible especially on the PNU side to accept engaging them in negotiations.²⁸

Around the same period when Kufour was conducting facilitation talks, other actors were undertaking various initiatives. The attorney General had developed a roadmap for peace in which he suggested a constructive dialogue for a political solution. The dialogue included re-tallying of presidential votes in the face of the alleged irregularities by both sides and due to expression of doubts on the accuracy of votes declared, by some Electoral Commission of Kenya commissioners including the chair. The Attorney General noted that, since the president had already been declared duly elected, it was only an electoral court that can nullify the results. Further, he suggested the need for a recount on the ground that it was important in assisting the parties in reaching any mediation, negotiation or dialogue aimed at achieving legal, policy or political decision. More so, such a process should lead to an all inclusive government anchored by an agreement to be made public.²⁹

The civil societies too were involved in trying to facilitate a dialogue between the parties. The Concerned Citizens for Peace led by Ambassador Bethwel Kiplagat among others, had tabled a seven point plan which included a need for dialogue, formation of government of National Unity, agreement on the timing of next presidential elections, constitutional reforms

²⁷ ‘Remaking Kenya’ Royal African Society, Available at <http://www.royalafricansociety.org/index.php?=&contents&fast=view>

²⁸ An interview conducted on 13th October,2008

²⁹ ‘A Thee Point past-election Mediation plan to help Kibaki and Raila Reclaim our democracy’ *Business Daily*,(Nairobi), 4th January,2008

especially on electoral institutions, devolution of power and resources allocation and an agreement on the global agenda to restore country's standing in the regional and international arena³⁰. Mwangi has criticized these plans characterized as citizen's agenda by noting that if this kind of plan was followed to guide negotiations between the parties, it would have been necessary to begin again the whole constitutional review process in Kenya, which was still incomplete³¹. Indeed ODM responded by dismissing the proposal and stating that we know what Kiplagat is made of and that is pure waste of time.³²

Apart from Citizens for Peace, the Former Presidents' Forum (FPF) did some facilitation. It consisted of former heads of States, Tanzania's Benjamin Mkapa, Mozambique's Joaquim Chissano, Botswana's Katumile Masire and Zambia's Kenneth Kaunda. The group arrived on 8th of January and immediately travelled with Jendayi Frazer to Eldoret to meet with residents whose lives had been devastated by the post-election violence. Importantly, FPF held some secret discussions with moderate members of parliament with an aim of designing a common ground for the mediation and to convince hardliners on both sides to move away from hard-line stances.

The group suggested a power sharing agreement in the face of fact that president Kibaki will neither step down nor allow a repeat of presidential elections.³³ Indeed, Kibaki had clearly stated that 'the vote is fixed and anybody who thinks that they can it around should know that it is not possible and it will never be'.³⁴ The FPF advised that the only way out was either a creation of Prime Minister post for Raila through a constitutional amendment or sharing out of the

³⁰ 'Peace lobby offer seven point guidance' *Daily Nation*, (Nairobi), 10th January, 2008. p. 8

³¹ M. Mwangi, *The Water's Edge*, op cit, p. 50

³² *The Standard* (Nairobi), 1st of January, 2008. p. 6

³³ 'Moderates in Secret Peace bid' *Nairobi Star*. (Nairobi). 23rd January. 2008. p. 1

³⁴ 'Koffi Annan Takes over Kenya Mediation' Associated Press, www.observescom.stories/2008/01/10

five years presidential term with president Kibaki and Raila serving two and a half years each. In the meantime the constitution would be reviewed to strengthen country's institutions and establish an independent electoral commission which could supervise fresh general elections.³⁵

The facilitation efforts by citizens for peace, FPF and other actors who made their position known such as Inter-Religious Forum (IPF) who called for annulment of elections, comprehensive constitution review, resolution of land issues and promotion of national healing and reconciliation helped expand the issues in conflict. However, their involvement did not receive much attention from the parties which still felt that unilateral outcomes were possible. They were yet to reach a mutually hurting statement. However, pointing out the importance of their suggestions, one respondent observed that.

'left to their own devices the politicians were more concerned with been included in the structures of power without addressing the underlying issues of the conflict. Thus there was a need to pressurize them to include issues which had direct benefit to the citizens who suffer more whenever there is violent conflict. Issues which the leaders were aware of but experience had shown that they are not willing to address them. These issues constituted the agenda four of the mediation'.³⁶

The most ambitious attempt at finding a solution to the crisis was by the World Bank. On the final day of Kufour's facilitation, a 'World Bank Agreement', which was to be signed by Kibaki and Raila and witnessed by Kufour, British High Commissioner Adam Wood, US and French ambassadors Michael Ranneberger and Elisabeth Barbier and the Head of European Union Mission in Kenya emerged.³⁷

It was a comprehensive document divided into four parts. The first part of the agreement on the process called for an independent and credible process on the conflict with parties

³⁵ 'Moderates in Secret Peace Bid', op cit, p3

³⁶ An interview with the chair of the Civil Society Organisation conducted on 5th October, 2009

³⁷ For a detailed discussion of the World Bank Agreement. See M. Mwangi, *Water's Edge*, op cit, pp 63-64

agreeing to be bound by its findings and recommendations. The second part aimed at establishing an inquiry into the role of ECK and observers in the presidential elections, the declaration of results, composition of the Electoral Commission and its independence, capacity and effectiveness in discharging its mandate and how it can be reformed to restore voters' confidence. Further, the inquiry was to establish if it was necessary to have a re-run of the election and establish a timetable for it or otherwise. This process was to be headed by a panel of eminent African persons.

The third part of the agreement which dealt with the timeframe for the process and interim arrangements called for the panel to carry out its tasks and make recommendations within thirty days. Further, it called for Kenyans to refrain from actions of violence, maintain law and order and that security agencies should operate within the law pending resolution of the problems. In addition, the agreement aimed at establishing a coalition government based on equal representation both in number and portfolio allocations. This arrangement was to be accepted by both parties and they were required to lobby their parliamentary supporters and parties to enact the legislation required to facilitate the recommendations.

The agreement elicited different responses. Kibaki claimed that he was unaware of it and the government disowned it on the basis that it lacked the input of the coalition government.³⁸ The ODM had no problems with it and it was clear they were participants. It later emerged that, both PNU and ODM had approached the World Bank to facilitate negotiations and indeed the World Bank's country representative Colin Bruce had held secret discussions with both sides.³⁹ The secrecy was supposed to keep off the hardliners in Kibaki government.

³⁸ 'Minister defended Kibaki Claim over he refused to sign peace Agreement', *Sunday Nation*,(Nairobi), 13th January, 2008

³⁹ 'Mystery of a deal that Kibaki Rejected', *Saturday Nation*, (Nairobi), 12th January, 2008, p. 2

The need to keep off the hardliners was the agreement's undoing and right from the outset it was bound to fail. During conflict, as the parties become more intransigent, hardliners usually enjoy unassailable position and remain the single most important source of success or failure during the management. Hence to exclude them, in the hope that by securing an agreement, their influence would have been pre-empted was not only a wishful thinking but a manifestation of lack of clear understanding of management strategies.

The examinations shows that by the time the panel of eminent African persons were to begin their task, the mediation environment was already crowded, by various actors who had rushed to offer solutions to the conflict. Indeed they posed the risks associated with multiple mediations.⁴⁰ By being actively involved in trying to set the agenda, and even offer proposals to break the logjams and reach a settlement they projected differing visions creating confusions and lack of systemic understanding of the conflict. In addition they would have encouraged forum shopping with parties opting to deal with mediator(s) offering best partisan alternative to unilateral strategies. It is upon this realization that Koffi Annan's upon being appointed to lead the mediation panel demanded that there should be only one mediation process.

Further the limited access of these actors indicated that power politics was at play between PNU and ODM. It was a case of let's see who blinks first. Hence, this called for a mediator with enough leverage to be of interest to the parties.⁴¹ The need for a powerful mediator, enjoying international prestige and moral authority was met by the panel of eminent African Persons, chaired by former United Nations Secretary General Koffi Annan and composed of Graca Machel and ex-president of Tanzania Benjamin Mkapa.

⁴⁰ For a good Discussion on Multiple mediation, its benefits and problems See, C.A Crocker ' A Crowded Stage: Liabilities and Benefits of Multiple Mediation, *International Studies* ,2. 2001. pp. 51-67

⁴¹ The role of leverage in mediation has been discussed in Chapter Two, p.28

3.1 Pre-Negotiations by the Panel of Eminent Africans

On his departure on 10th of January, 2007, President Kufour had announced the formation of the panel to lead the mediation process. The panel was expected to arrive on 16th of January, but was delayed by a week after Annan was taken ill. He used the week that he was hospitalized to lay solid international support through speaking to prominent African figures, the US and key European actors. This engagement preempted multiple mediators and helped to craft a common vision by the third parties.⁴² At a local level, then move was reinforced by creating of a transparent process involving civil societies. which Annan made a point of meeting upon his arrival on 22nd January. The strategy meant that both the international community and grass root levels in Kenya were engaged and would speak in one voice.⁴³

In anticipation of Annan's arrival both parties upped the stakes and took more hard-line positions. PNU hardliners such as John Michuki restated earlier position calling ODM to go to court and that they had not invited Koffi Annan because after all they had won the elections".⁴⁴ The ODM too called for a three day mass protest starting from 16th to 18th of January and labeled PNU as thieves.⁴⁵ Hence Koffi Annan found a highly polarized environment with parties acting as if they were not yet ready to engage in mediation.

At the time of panel's arrival powerful third parties were voicing their preferences. The UK Foreign Secretary David Miliband had stated the expected functions of the panel as working toward cessation of hostilities, addressing electoral malpractices and bringing the parties

⁴² 'An Interview with Koffi Annan' available at www.Kofiannanfoundation.org/kenya

⁴³ Ibid

⁴⁴ *Daily Nation*, (Nairobi), 15th January, 2008, p .6. Also 'Kenya Rivals Take off as Annan postpone mediation,' *Sunday Morning Herald*,(London). 16th January, 2008

⁴⁵ 'Annan Arrives today for mediation' *Daily Nation*, (Nairobi), 15th January, 2008. p. 48

together.⁴⁶ The US ambassador Michael Ranneberger called for power sharing and an agenda to reform and a joint effort to end violence and promote reconciliation. To achieve these objectives the parties were to engage without preconditions.

Apart from the third parties who were fronting their interests, the PNU and ODM also had their list of Agenda items. The presence of multiple and competing agenda called for a careful balancing in order to cater for interests of parties directly involved in conflict, their constituents and allies and third parties' and the mediator's interests. Importantly, owing to the importance of agenda setting in shaping the form and substance of what is to be discussed and by extension delimiting the parameters of negotiations, every party would have wanted its agenda to be the main document of mediation.

3.2 The PNU and ODM Agendas

Annan had meetings with both ODM and PNU leaders. Odinga insisted that the election had been rigged and the presidency stolen from him. Further, he set the preconditions for engaging Kibaki. These were Kibaki's resignation, a re-run of the presidential elections, the formation of transitional government and an agreement to undertake comprehensive legal and constitutional reforms especially concerning contentious issues.⁴⁷

President Kibaki, had delayed meeting Annan on 22nd in order to meet privately with close friend Museveni who was also conducting facilitation as the chairman of the East Africa community and had arrived at the same time as Koffi Annan. During the time he was in the country Museveni met both Raila and Kibaki and proposed a formula for resolving the electoral conflict. The formula consisted of a judicial commission of inquiry to investigate rigging claims and determine the winner of the elections, power sharing and investigation of post-election

⁴⁶ *Saturday Nation*, (Nairobi), 12th January, 2008. p.2

⁴⁷ 'Annan's Agenda for Peace' *Daily Nation*, (Nairobi), 29th January, p. 2

violence. The formula was not embraced for PNU and ODM disagreed on procedural issues such as appointment of the commissioners and substantive ones such as who to investigate these issues. On one hand, the government wanted to appoint all the commissioners and wanted investigation into the electoral violence to focus on whether it was organized or work of criminals taking advantage of the situation. On the other hand, ODM demanded to be involved in the appointing of commissioners and that the focus of inquiry into the violence be the security agencies and the use of live ammunition to quell violence.⁴⁸ Mwangi notes that though Museveni facilitation did not succeed, it was suggested that a meeting held between him, Annan and President Kibaki is what made the face to face meeting between Kibaki and Raila possible.⁴⁹

In his meeting with Annan, on 24th of January, Kibaki stated that he was willing negotiate with Odinga only if he accepted his presidency as legitimate and as long as he came to the table without preconditions. In addition, he insisted that his presidency was not an issue to be brought before international mediation, for it could only be challenged in a court of law and the ODM failure to do so was a testimony of the shaky ground upon which their contestation stood.⁵⁰

On the same day the principals met and publicly shook hands. Annan used this strategy to send a clear message to respective supporters that 'here are the leaders shaking hands, so hold your horses'.⁵¹ Unfortunately, this was no to be. Instead, though expressing willingness to negotiate in public, they widened the gap between them. ODM took issues with Kibaki speech where he

⁴⁸ See Mwangi, *The Water's Edge*, op cit, pp. 97-98

⁴⁹ Ibid, pp. 96-97

⁵⁰ *Daily Nation*,(Nairobi), 24th January, 2008, p.2

⁵¹ 'An Interview given by Koffi Annan to the Centre for Humanitarian Dialogue' Available at www.koffiannanfoundation.org/kenya

emphasized he was the 'duly elected president' and the crisis could be resolved internally. Further, he said that his government will not share power with those accused of mass killings.⁵²

This hard line position led to tensions and violence erupted again on the streets. Mourners and police clashed in Nairobi, fifty horses were burnt in the Rift Valley, and people in Nakuru were forced to dodge bullets and use cardboards to protect themselves from flying poisoned arrows⁵³. The parties' willingness to resort to violence raises two issues. First is the issue of entrenched interests which parties were not willing to comprise. This was captured by the then chairman of Kenya National Human Rights Maina Kiai who noted,

'it is not necessarily a problem that representatives of one particular tribe won the elections, what makes Kenya political system unravel is the fact that losing the elections, meant that individuals affiliated with the losing tribe lost access to state resources and economic opportunities'.⁵⁴

This way the quest for access to state resources becomes a game of life and death. Secondly the party had not reached a mutually hurting stalemate and as such there was a need to ripen the conflict.

The ripening of the conflict involved both external and internal forces. Externally (third parties) actions became more pointed. Britain reaffirmed that it did not recognize Kibaki's government until the issue of presidential elections was resolved.⁵⁵ The US through the assistant Secretary of State for African affairs, Jendayi Frazer, threatened an external solution if internal solutions were not forthcoming.⁵⁶ Though unspecified, the threat was construed to include a military option. The Australian government through its officials in Nairobi announced that it will

⁵² E. Lindermayer and J.L. Kaye 'A Choice for Peace? The Story of 41 days of mediation in Kenya' available at www.koffiannanfoundnation.org/kenya pp 15-16

⁵³ Ibid, p 16

⁵⁴ A Testimony by Maina Kiai to the US House of Representatives' House Committee on Foreign Affairs on 6th February, 2008. Accessed at www.foreignaffairs.house.gov/1101Kiai020608.htm

⁵⁵ 'Britain doe not Recognize Kibaki' *Daily Nation*,(Nairobi),20th January, 2008, p. 52

⁵⁶ 'Solve your problems or risk solution from outside', Kenya told, *Daily Nation*. (Nairobi),31st January, 2008, pp. 1-

restrict contacts with cabinet ministers.⁵⁷ These actions increased pressure on the government which all along has been viewed as an obstacle to the process.

Internally, Odinga was empowered by the victory of Mr. Kenneth Marende and Mr. Farah Maalim as Speaker and Deputy Speaker of the national assembly respectively. In addition, the continued demonstration by his supporters, led to more shootings by the security forces escalating the cost of continued demonstrations. On the government side, its supporters, especially the core Kikuyu community had borne the highest cost of the violence. The number of deaths, internally displaced persons and destruction of properties had reached unbearable levels and some soul searching had begun on whether, it was worth continuing to support a man who was a safe in statehouse and was unwilling to use the security machinery under his command to restore stability. Finally on both sides, the eruption of violence in Naivasha and Nakuru brought home the reality of a civil war and neither was willing to bear the negative legacy of having taken a state long viewed as an island of stability amidst turmoil down the path of anarchy.

3.3 The Pre-Negotiation Agreement

In mediation analysis, agenda setting is of critical importance for it contains items to be negotiated and order they will take.⁵⁸ Hence the party that wields more influence on agenda content creates an advantage.⁵⁹ During the negotiations for the agenda, Koffi Annan had a dear agenda on what should be done and the parties though not explicitly stated, were only expected to minimally alter the substance. A respondent stated that, 'Koffi Annan listened to various actors and developed the issues which he thought were important to address the post-electoral

⁵⁷ 'Solve your Problems or risk solution from Outside, Kenya told', *Daily Nation*, (Nairobi), 1st February, 2008, p. 1

⁵⁸ The importance of agenda setting has been discussed in Chapter Two.p.6

⁵⁹ See G.R. Berridge, *Diplomacy Theory and Practice*. London: Harvester. 1994, p. 99

violence. What constituted the agenda was essentially Annan's agenda'.⁶⁰ Annan's agenda included four items. These were to undertake immediate action to stop violence and restore fundamental human rights and liberties, to take immediate measures to address the humanitarian crisis, promotes reconciliation, healing and restoration, to overcome the political crisis, and to work on long term solutions.⁶¹

Zartman notes that, possessing a formula on how to resolve conflict is an important source of leverage. As such Koffi Annan's formula provided him with the leverage needed and was a pointer that he was not there to facilitate engagement but was going to be directive. However the perception by the parties to the conflict that they do not own the agenda may lead to commitment problems and hamper post-mediation /implementation process especially when the agenda includes issues which can be best addressed in through other processes instead of been included in the negotiations.

Importantly, the agenda were fractionated. Fractionating of the issues was an informed strategy. By pushing the main issues at the centre of dispute as the third agenda, Annan hoped to build momentum of the process and commit the parties as opposed to if he went straight into disputed presidential elections. Indeed the first two agendas were quickly dealt with. Incremental success in mediation creates a psychological momentum and belief that the problems can be solved mutually.⁶² This has been confirmed by a respondent who was included in the negotiating teams. He observed that, 'fractionating and ordering of the issues helped to build the momentum and once the momentum was built it is harder for the disputants to exit the process'.⁶³

⁶⁰ An interview conducted on 13th October, 2009

⁶¹ E. Lindermayer and J.L. Kaye 'A Choice for peace? ,Op cit, p. 17

⁶² See, G.R Berridge, *Diplomacy Theory and Practice*, op cit. pp. 125-126

⁶³ The interview was conducted on 13th October, 2009

Eventually, the road map for the mediation process was agreed upon and the occasion marked by the second face to face meeting of the principals on the 29th January, 2009 at the Nairobi County Hall⁶⁴. The road map gave the negotiating teams a common basis to work from. In the meeting Annan gave a time frame on how each agenda will be solved: violence could be stopped in seven days, the short term issues dealt with in four weeks and the longer term issues within one year⁶⁵. Creating of time lines aimed at creating a sense of urgency on the negotiations, so that they would move quickly once the mediation phase begun. In the same meeting the negotiating team was inaugurated. The government side was represented by Ms. Martha Karua, (Minister for Justice and Constitutional Affairs), Mr. Mutula Kilonzo. (a lawyer), Prof. Sam Ongeru, (Minister for Education) and Mr. Moses Wetangula. (Minister for Foreign affairs). The ODM side was represented by Musalia Mudavadi, William Ruto, Dr. Sally Kosgei and Mr. James Orengo. The liaison officers for the government team were Gichira Kibaara and Dr. Ludeki Chweya as alternate liaison officer and Karoli Omondi for the ODM.

The delegation of negotiations to these teams rather than principals engaging directly meant that the principals would not be around the negotiating table. This left vast amount of power outside the negotiating room, which could be tapped into incase the negotiators reached a deadlock. Mwangi terms such a strategy as useful for it enables the representatives to request for adjustment to the negotiations to enable them to consult their principals. This gives some breathing space to delegations of representatives. because they can consult more widely and regroup and even reframe their positions, in the negotiations.⁶⁶ Indeed, the importance of this strategy manifested itself in the mediation phase.

⁶⁴ 'Leaders Pledge to Unite Kenyans' *Daily Nation*, (Nairobi), 30th January, 2008, p. 2

⁶⁵ E. Linder Mayer J.L Kaye 'A Choice for Peace', op cit, pp. 17-18

⁶⁶ M. Mwangi, *The Water's Edge*, op cit, p. 104

CHAPTER FOUR

THE MEDIATION PHASE

4.0 Introduction

In the pre-mediation phase, as the preceding chapter has elaborated, parties have a chance to explore the possibilities of a mutual outcome. In the Kenya's post electoral violence mediation there were intense negotiations by various actors. These negotiations convinced the parties that there was a need to engage in mediation as the most appropriate mechanism of resolving the conflict which was quickly spiraling out of control. Ultimately the efforts bore fruit and an internationally overseen mediation process was put in motion. This moved the process to the mediation phase where parties concerned had to engage in around the table negotiations.

This chapter analyses the mediation phase. It focuses on how the actors pushed for their interests, the strategies used, and the subsequent agreement. In this phase various activities take place. Berridge identifies the activities as including agreeing on the formula of negotiating, and adding flesh to the skeleton agreed during the pre-negotiation stage and concluding agreements on the issues contained in the agenda. Importantly, the phase marks the moment of truth for what is agreed on by the parties must be implemented in the post-mediation phase¹. In Kenya's electoral conflict mediation process the pre-mediation phase was successfully concluded. The parties had agreed on the need for a mediated outcome, the mediators and the agenda of the process.²

Mwagiru observes that, just as the whole mediation process is divided into different phases, so can each phase of the mediation be divided into different parts.³ In Kenya's electoral conflict mediation process, two phases can be identified. The first phase concerned itself with the

¹ G. R. Berridge, *Diplomacy, Theory and Practice*. Harvester Wheatsheaf: Hemel Hempstead, 1994, pp 133-136

² See Chapter Three

³ M. Mwagiru, *Water's Edge: Mediation of violent Electoral Conflict in Kenya*. Nairobi: IDIS, 2008, p 109

preliminary issues. The issues were agreeing on the rules of procedures, identity of negotiators, whether to link issues or fractionate them, which issue to begin with and agreeing on the timeliness of the process. Further the phase covered agenda one and two of the process. The agenda was on how to stop violence and restore fundamental rights and liberties address humanitarian crisis, promote reconciliation, healing and restoration. The second phase focused on how to overcome the current political crisis.⁴

4.1 Mediation Phase One on Preliminary Issues and Agenda One and Two

The mediation phase was launched formally on 29th of January at the county hall during the second face to face meetings of the principal. It had a swift and positive start. The phase began by resolving preliminary issues. Mwangi identifies the issues as concerning the identity of negotiators, the name of the process, the ordering of the agenda, and whether it made sense to have officers designated as ‘liaison officers’ in the mediation. Further, issue of whether Annan should designate a deputy negotiator, in case of his absence or lack of time to mediate the whole process, as he had intimated in his first meeting.⁵

During the first meeting, ODM negotiators raised the issue of inclusion of Mutula Kilonzo in the government team.⁶ To them the negotiation was between ODM and the government and Mutula who was an ODM-Kenya member had no business attending the process. The ODM claim touched on the question of whether parties’ negotiators have a right to determine the composition of the other team or whether who to include is at the discretion of the appointing authority. Ideally, the discretion belongs to the appointing authority, but in practical circumstances where reciprocation is a part of the rules of the game, parties may give in to the

⁴ See Annotated Agenda and Time Table on the Resolution of the Political Crisis. Available at www.koffiannanfoundation.org/kenya

⁵ See M. Mwangi, *The Water's Edge*, op cit, pp .110-115

⁶ *The Standard*, (Nairobi), 6th February, 2008

demands of the others, in anticipation of a reciprocated concession later. Importantly, where trust is in short measure, such actions may indicate a party's willingness to have the process moving on. In Kenya's case, the issue was resolved after a lengthy discussions and it was agreed that Mutula should remain. The other issue was about the name of the process. The ODM so keen to internationalize the conflict from the outset, wanted the process termed as international mediation. To the contrary, the government which had downplayed the conflict terming it as an internal matter which can be solved through a dialogue insisted that the process was a 'national dialogue'. Annan intervened in favour of the government side and the process was named the Kenya National Dialogue and Reconciliation. Later, Annan observed 'Such a concession to the government side at early stage would keep them on board and (make) the process more about the parties involved rather than the mediators who were guiding the process'.⁷ Certainly, this was a non-issue, for calling a rose in another name would not change the fact it was a rose. The process had all indicators that it was a mediation process and the conflict was already internationalized.

The third preliminary issue was whether it made sense to have officers designated as 'liaison officers' in the mediation. This was resolved and the officers were designated as secretaries. The fourth issue which proved to be more contentious was on appointment of Cyril Ramaphosa, as the chief mediator in case Koffi Annan was away. Ramaphosa is a skilled diplomat having successfully played the role of the lead negotiator during the African National Congress negotiations with the apartheid regime in South Africa. His appointment was agreeable to the ODM, while the government rejected the appointment on the grounds that Ramaphosa had business links with Odinga and had actually funded ODM campaigns. This argued the

⁷ An Interview given by Koffi Annan to the Centre for Humanitarian Dialogue. Available at www.koffiannanfoundation.org/kenya

government would lead to conflict interests.⁸ Further, the government argued that the protocol was not followed in his appointment which was announced in Addis Ababa by the Tanzanian Foreign Affairs Minister.⁹ Consequently, Ramaphosa was dropped and Koffi Annan issued a statement to the same effect on 4th February.

Finally, the issue of ordering of agenda was resolved. In negotiations, parties may agree to link the agenda or fractionate them. Further, they may decide to opt for the taking of the bull by its horns by going directly to the core issue(s) or start with less contentious ones. In addition they may opt to solve one issue before moving to the next one or continue with the process despite hitting a deadlock on some issues.¹⁰

In Annan's agenda, issues were fractionated into four categories, with priority given to less contentious issues. Indeed, the issue at the heart of the dispute, that is, the outcome of presidential elections was ranked as the third item. Though the ODM were skeptical about this ordering it eventually proved to be a good strategy by Annan.¹¹ This is because, by prioritizing on the core issues, parties would have gotten off at an acrimonious start and failure to agree would have derailed the whole process. Alternatively, by starting with 'easily' agreeable issues, a momentum was built and parties given a chance to learn each other in a face-to-face set up and develop some working relationship before moving to more difficult tasks. Eventually, on the 1st of February, an agreement on the agenda was signed.

The agreements had four agendas. The first agenda was on the immediate action to stop violence and restore fundamental rights and liberties; the second agenda covered measures to address humanitarian crisis, promote reconciliation, healing and restoration, the third agenda

⁸ 'Kenya rejects South African mediator' Al Jazeera News. Available at Al Jazeera com/news, 4th February, 2008

⁹ Annan List Agenda for Mediation 'The Standard,(Nairobi), 31st January, 2008, P. 4

¹⁰ See G.R Berridge, *Diplomacy Theory of Practice*. op cit. pp 133-136, also S. Stedman, *Peacemaking in Civil War: International Mediation in Zimbabwe 1974-1980*. London: Boulder, 1991. pp. 169-172

¹¹ *The East Africa*. (Nairobi). 4th -10th February. 2008. p. 4

concerned with how to overcome the current crisis and the forth agenda was on long term issues and solutions. The agreement also contained the timetable. where agenda items one, two and three items were to be resolved within a period of between 7 and 15 days from the date of commencement of the mediation while agenda four would be resolved within a period of one year.¹²

4.2 Mediation on the Immediate Action to Stop Violence and Restore Fundamental Rights and Liberties and How to Address Humanitarian Crisis, Promote National Reconciliation, Healing and Restoration.

The issues on agenda one and two were easily resolved. On agenda one there were heated exchanges between ODM and the government. The government insisted that the high levels of violence were a direct result of political incitement on behalf of the ODM, while the ODM team insisted that the political violence could only be organized by a government with the structures to make this possible.¹³ Despite of these accusation and counter-accusations, the issues was resolved. It was in the interest of both sides to have a cessation of hostility for the cost of violent strategies had escalated leading to a mutually hurting statement. Importantly, these agendas were less contentious and as a respondent noted, 'there was intense pressure from the civil society organizations as voices of the people, the media and the business community. As such no party wanted to be seen as responsible for violence or derailing of humanitarian assistance: issues which had a universal consensus'.¹⁴

Agenda one was finally agreed on the 1st of February. Among its contents were that the police should act in accordance to the rule of law, the constitution, the police act and forces standing order and that they should show restraint and impartiality when carrying their duties and

¹² See Anointed Agenda and Time Table on the Resolution of Political Crisis. Available at www.koffiannanfoundation.org/Kenya

¹³ 'Kenya, armed and dangerous', available at www.irinnews.org/report.aspx Report ID

¹⁴ An interview with the then chair of the International Commission for Jurists

responsibilities. Further, it called on the leaders to embrace and preach peaceful coexistence and avoid issuing provocative statements, disbandment of armed groups and militias, and that citizens should desist from actions of violence. On restoration of fundamental rights, the agreement called for restoration of freedom of expression, right to live broadcast and peaceful assembly. In addition it called for impartial, effective and expeditious investigations of all crimes and cases of police brutality among others.¹⁵

Negotiations on agenda two were carried out in a constructive manner and focused on practicalities such as the need to create transport corridors to ensure aid flow and the need to mobilize local leaders to reconcile communities. At this stage Annan drew upon the expertise of the UNDP and Kenya Red Cross Society. Representatives from these organizations briefed the negotiating teams on the situation on the ground where it was reported 923 people were dead and more than 250,000 displaced. This figures brought the reality home and there was an across the board agreement on the need for concerted action towards peace and reconciliation.¹⁶ On the 4th of February an agreement on agenda two was concluded.

The agreement called for operationalizing of the humanitarian fund for mitigation effects and resettlement of victims of post election violence-the fund had already been set up by the government on 30th of January, 2008- assisting and encouraging the displaced persons to return to their homes, provision of basic services to the displaced, and adequate protection particularly for the vulnerable groups including women and children in the camps and coordinating local and international humanitarian assistance. In addition it called for joint peace rallies convened by leaders, establishment of truth, Justice and Reconciliation Commission composed of local and

¹⁵ See a public statement issued by Annan on February 1st, 2008. Available at www.koffiannanfoundation.org/kenya

¹⁶ E. Lindenmayer and J.L. Kaye 'A Choice for Peace? The Story of 41 days of Mediation in Kenya'. Available at www.koffiannanfoundation.org

international jurists and welcoming of the United Nations High Commissioner for human rights to establish human rights investigating team.¹⁷

By the 4th February, 2008 agenda one and two had been dispensed with. The ease with which they were resolved was indicative of their less contentious nature. The agreements did not result to loss by any party. Rather, they represented a positive-sum encounter, for they did not touch on the structure of power relations. It is during negotiations on the presidential election outcome which was at core of the conflict that the odds for and against success evened out, and the prospects became unpredictable.

4.3 Mediation on the Disputed Presidential Election Results

The disputed presidential election result was at the centre of the violent conflict. In the months leading to the elections, the ODM had capitalized on the anger and disillusionment of many Kenyans with the slow pace of reforms. It had campaigned on a populist platform promising radical changes once in power and had suggested that the Kikuyu were collectively responsible for historical injustices since independence and hence were the problem. Importantly, ODM had cried wolf months before the elections claiming that PNU had an elaborate scheme to rig the elections in its favour.¹⁸ As such anything short of ODM victory was unacceptable.

On the other hand, the PNU rallied around the notion that the presidency should not be let to slip from the Kikuyu grasp. They too used hate speech and derogatory language about uncircumcised men to refer to Raila Odinga whose Luo ethnic group does not practice circumcision. Consequently, the electioneering period raised the stakes and victory became a matter of life and earth. Both sides were not willing to accept defeat, and the Independent

¹⁷ See a public statement issued by Koffi Annan on 4th of February, 2008. Available at www.koffiannanfoundation.org

¹⁸ J.M Klopp 'Kenya's Unfinished Agenda' *Journal of International Affairs*, vol 62, No. 2, 2009, pp. 145-147

Review Commission (IREC) later revealed that, there were serious flaws in the elections with both sides equally culpable for manipulating voting and tallying of votes¹⁹.

When the results were announced, declaring Kibaki the winner, violent demonstrations mainly targeting PNU supporters who were accused of stealing the elections erupted. In response, the government responded with brutal police action, which involved use of live ammunitions especially in ODM strongholds such as Kisumu, Eldoret and Nairobi slums.²⁰ The violence compounded the situation where electoral victory meant economic success through expropriating of state resources, and political competitors had invested much to secure statehouse residency. ODM feared that should Kibaki regime survive and consolidate itself, it would pursue revenge and retribution against its leaders and supporters whereas, PNU feared that the mediation would reveal the role of the Electoral Commission and hence their role in the election problems.²¹

Ultimately, the agenda as Annan rightly described it was 'hot' and bound to be the most difficult and contentious. Indeed Annan had to wait for the return of his co-mediators Graca Machel and Benjamin Mkapa who had earlier left due to pressing commitments in their respective countries. By doing this Annan hoped to capitalize on the benefit of multiple mediators such as sharing the burden of the conflict, ideas and opinions which may move the process forward.²² Mediation in this phase focused on two issues. The first issues was on how to deal with flawed elections and what should be done to address this, while the second issue was linked to the nature of power sharing.²³

¹⁹ J.M Klopp 'Kenya's Unfinished Agenda', op cit, p .149

²⁰ See the report by the commission of inquiry into the post electoral violence (CIPEV)

²¹ 'Hard liners fear exposure, revenge of crimes' *The East African*, (Nairobi), January, 28th February, 2008, p.2

²² See Chester C. Crocker 'A Crowded Stage: Liabilities and Benefits of Multiple Mediation' *International Studies*, vol 2, 2001, pp .51-67

²³ E. Lindenmayer and J.L Kaye, 'A Choice for Peace' op cit, pp. 21

The negotiations on how to deal with the disputed presidential elections began on 16th February, 2008. In the first meeting both the parties stated their positions. ODM maintained that they had raised the issue of PNU plans to rig the elections six months earlier owing to the flawed voters' registration exercise and suspicious recomposition of the Electoral Commission when Kibaki unilaterally appointed commissioners to replace those whose tenure had ended.²⁴ In addition they accused the PNU of manipulating the presidential results at the Kenyatta International Conference Centre (KICC) where ECK was based. To support this they pointed out discrepancies between the original form 16As sent to returning officers and the one that ECK had, intimating that the originals had been taken to Nairobi Industrial Area and destroyed. Further, they claimed victory in six out of eight provinces, but refused to have a re-tallying and instead pushed for a re-run of presidential elections or formation of an interim government to prepare for fresh elections.²⁵ A respondent observed that the refusal for a re-tallying was because the ODM had already conceded defeat at the KICC and their problem was in the fact that unless they contested the presidency they were bound to wait for the next five years before another election took place.²⁶

On its side, the PNU rejected the accusation of electoral fraud. They argued that international electoral observers had visited only three percent of the polling stations and the discrepancies they found were minor. Further PNU insisted that the elections results had been verified and endorsed by the representatives of both parties, that ODM had rigged in their strongholds with voters turn out in 10 constituencies ranging from 85 to 96 per constituency and that there existed clear legal mechanisms for setting electoral disputes.²⁷

²⁴ Op.cit, p 22

²⁵ See M. Mwangi, *The Water's Edge*, op cit, pp. 122-123

²⁶ An interview with an ODM-Kenya legislator conducted on 5th October, 2009

²⁷ Ibid, p. 123

To avert the seemingly unbridgeable gap, Annan who had devised a strategy of using technical experts to assist in resolving essentially political disagreements brought in experts from the Electoral Assistance Division of the UN department of Political Affairs. The director of the Electoral Assistance Division, Craig Jennes, took the negotiators through various options available to them. Commenting on the same in a later interview Annan noted,

‘I put all options on the table and let them run, and with Craig’s help took them through what each option means. For example if you are going to do a re-run, it is like organizing almost full elections. And they knew the situation on the ground ... counting 11 million voters and sending people to all constituencies..... it is another election, and it is going to have people killed. Is that what you want? Retallying gives you bits and pieces of paper, but it does not give you anything else. The so called forensic audit doesn’t really make sense. If this is the case, we don’t want to sweep the election issue under the carpet. We have to find some way of dealing with it, and I thought of the independent review would be way’.²⁸

Through this process Annan who was now relying on directive strategies managed to convince the party that, the only options available were political. The position was similar to PNU assertion that re-count was not possible for ODM had neither demanded it at the polling station nor had they petitioned the court for the same. On re-tallying, the ODM had failed to petition the electoral commission within 24 hours as required by law hence they were time barred and concerning a re-run, PNU had argued that neither Kibaki nor Odinga had failed to attain 25 percent of votes cast in five provinces as required by the law.²⁹

Finally, after much exchange, the parties on the 11th of February agreed to establish an independent review committee mandated to investigate all aspects of 2007 presidential election and make recommendations within three to six months after its constitution.³⁰ The option pushed by Annan helped to forestall endless squabbling and sealed Kibaki’s presidency.

²⁸ An Interview given by Koffi Annan to the Centre for Human Dialogue. Available at www.koffiannanfoundation.org

²⁹ ‘Sharp Divisions over Disputed poll Results’, *Daily Nation*, (Nairobi), 8th February, 2008, p.4

³⁰ E. Lindenmeyer and J.L Kaye ‘ A Choice for Peace’ op cit, p.23

Annan's achievement was attributable to his status as a mediator with muscle, always drawing leverage from powerful third parties with interest to protect. Indeed respondents were in agreement that the acceptability of Annan was largely because he had behind him the support of interested and powerful third parties.³¹ For instance as he mediated on how to deal with the flawed elections, the United States Sub-Congressional Committee on Africa, sitting in Washington had stated,

'Kenya was too important in the region and the world to be allowed to go the way of Rwanda and Somalia and warned that time was running out for a Kenyan solution to the political crisis, failing which the international community should move in and help'.³²

This reflected the US strategy of issuing veiled threats, as a way of making the parties move to the next level.

The agreement on how to deal with the electoral dispute moved the process to the more contentious issue on how to develop an accommodation between PNU and ODM. The issue of power-sharing was not longer one among many options, but the only way out. A respondent stated that 'at this stage there was a realization that the only way out of the conflict was through power sharing arrangements.³³ This issue was critical for it entailed zero-sum encounters with one party gain leading to a corresponding loss of the other. The government, which all along had insisted that it would not share power with people responsible for killings had to face the reality that ODM will join the government. The issue now was under what arrangements will that be, and the pressure was on the government to create a room for ODM.

Prior to the beginning on mediation on the intended power sharing, there was a need to lay the groundwork, for matters of power sharing essentially involved tinkering with the

³¹ Interviews conducted on various dates

³² See US House Committee on Foreign Affairs report on Kenya. Available at www.foreignaffairs.house.gov/110/kenyaconflict.htm

³³ An interview with the chair of the Kenya National Human Rights Commission, 5th oct. 2009.

constitution and re-adjusting of power structures to accommodate the ODM. The groundwork was a two level process. First, Annan had third meeting with the principals on the 11th of February. This meeting was about briefing the principals on the progress of the process as required by the Agreement on the Agenda. Also it aimed at marshalling influence at the highest level, so that the principal could endorse the idea of PNU/ODM government. At the meeting, Annan requested for a parliamentary session where the panel would brief the Members of Parliament on the progress made.

The parliamentary *Kamukunji* was convened on 18th February, 2008. This as a respondent observed was Annan's strategy of expanding the process beyond the negotiating teams. The expansion was meant to make the process transparent and increase pressure on the parties to make concessions.³⁴ In his address to this informal session of parliament, Annan called for patience and also some degree of speed while Graca made a persuasive argument that humanitarian aspects of the crisis called for a quick solution to the conflict. Importantly, Annan used the expanded platform to lay out what he thought the solution should be. In his speech he spoke of necessary reforms which entailed 'the establishment of a grand coalition government to undertake crucial and long overdue constitutional, electoral and other reforms'.³⁵ Though in later clarification, he stated that those were his perspectives on the discussions rather than any formal agreement³⁶, the statement made in front of cameras and broadcast live was strategically aimed at larger constituency both locally and internationally and sought to pre-empt whatever arguments that may arise later against a coalition government.

³⁴ An interview with the then chairman of the International Commission for Jurists conducted on the 5th October, 2009

³⁵ *Saturday Nation*, (Nairobi), 9th February, 2008

³⁶ E. Lindenmayer and J.L Kaye ' A Choice for peace, p 24

Indeed the statement was a reflection of a well thought media strategy of keeping public informed, planting the seeds of expected solutions in them and gauging their reactions. Annan's statement elicited protest from government negotiators. In a letter addressed to Annan, the head of the PNU negotiation team Martha Karua protested that,

'As a chair of the panel, you are expected to be impartial and take every care not to misinterpret or compromise the position of either party. To this end, we feel that these inaccuracies have greatly undermined our position embarrassed us as members of the dialogue team'.³⁷

Karua's statement missed the point. Koffi Annan was not there to let the parties talk out their problems, he was there to direct them on what to do and in some situations he was more of an arbitrator than a mediator. The process was his project and he was determined to see it through as he had planned. Towards this end, Karua's response similar to others by members of the government only furthered Annan's cause by keeping the issue in the media agenda, raising its profile and increasing pressure for a power-sharing agreement. Contrary to the government's reaction, the ODM responded positively to Annan's suggestions. A respondent attributed this to the fact that the statement was helping them achieve their Pre-negotiation objective of being a part of the government.³⁸ The only negative outcome of Anna's statement was that it hastened the creeping deadlock as both sides entrenched their positions. At this juncture the mediation moved from the basement of Nairobi's Serena Hotel to a 'secret' destination.

4.4 The Retreat at Kilanguni Lodge

On 12th February, 2008 the negotiating teams were flown in Air Force planes to Kilanguni Lodge, located at the Tsavo West National Park, not far from the border with Tanzania, for talks away from the media spotlight and from the pressure exerted by several

³⁷ 'Annan Answers Karua on Coalition Proposal' *Daily Nation*, (Nairobi), 14th February, 2008, pp. 1,2

³⁸ The interview was conducted on 13th October, 2009

partisan groups. Their focus at this stage was on the power sharing structures of the new government.

The negotiation which was to take 72 hours as per Annan's schedule broke down within 48 hours, when the government side insisted that they needed to consult their principal.³⁹ During the meeting PNU insisted on a non executive Prime-Minister, appointed by the president, and that the president retains his prerogative to appoint as minister whoever he wished from the ODM. On the other hand, the ODM insisted on an executive Prime-Minister and separation of the head of government and state functions, with the former function belonging to the prime-minister.⁴⁰

In a bid to break the impasse, Annan invited Gernot Erler, Minister for State of the Federal Republic of German to explain the practicalities of a coalition government to the negotiators. Erler argued that coalitions are exceptional arrangements for dealing with crisis; they operate on the principle of proportionality, needs cooperation among the parties and were informed by pragmatic rather than practical considerations. In response, PNU argued that Germany was different from Kenya and could only accept arrangements which fitted in the current constitution.⁴¹ This stance led to a deadlock which only the principals could resolve.

Despite stalling of talks, the parties had an agreement which closed the issue of re-count and re-tallying. On a re-run, it left the decision to be determined by the Independent Review Committee, and incase there was a re-run, several measures such as electoral reforms and establishment of dispute resolution mechanism had to be in place. In addition, there was an agreement on instituting constitutional and electoral laws reforms, reforming the electoral commission, police and parliamentary, legal and judicial institutions. identification and

³⁹ www.kbc.co.ke.asp?ID=48581

⁴⁰ E. Lindenmayer and J.L Keyer, 'A Choice for Peace' op cit, pp 26-28

⁴¹ Ibid.

prosecution of perpetrators of post-electoral violence, and other legislative, structural, political and economic reforms needed.⁴²

In a press briefing, when the teams returned to Nairobi, Kofi Annan in a bid to downplay the deadlock announced that progress had been made on formation of a 'new government' and importantly insisted that 'he will stay as long as it takes to get the issue of a political settlement to an irreversible point'.⁴³ This statement shifted the blame of whatever failings that may arise to the parties. To increase the pressure further, Annan called western capitals to issue statements to the effect that any attempt to derail the process will be reacted to forcefully.

The United States president responded by insisting that there must be real power sharing and dispatched the Secretary of State Condolezza Rice to Kenya.⁴⁴ France through its Ambassador in Kenya issued a statement that those who frustrate the talks will be punished and sanctions are one of the options that might be taken".⁴⁵ Other states which had been quiet such as Japan stated that they cannot afford to let Kenya be a failed state. That should not be an option.⁴⁶

On 18th February, 2008 prior to the commencement of talks, Condolezza Rice jetted into the country where she held meetings with Annan, Raila and Kibaki. In all this meetings her message was clear that time for settlement was yesterday and she clearly stated that.

'the inability in Kenya would affect the whole region of Eastern, central, southern and Horn of Africa, the two sides needed to take steps to ensure violence did not engulf the whole country because if that happened, it would be difficult to stop, and the international community was not ready to allow violence in Kenya to spiral out of country an risk Rwanda like situation....further she called for a coalition and sharing of responsibilities and warned that the current stalemates and the circumstances are not going to permit business as usual with the United States".⁴⁷

⁴²See Agreement on How to resolve the Political Crisis, 14th February, 2008, available at www.koffiannanfoundation/kenya

⁴³ *Saturday Nation*, (Nairobi), 16th February, 2008

⁴⁴ 'Secret Talks with Rice' *Sunday Nation*, (Nairobi), 24th February, 2008

⁴⁵ *Saturday Nation*, (Nairobi), 16th February, 2008, p.3

⁴⁶ *Saturday Nation*, (Nairobi), 16th February, 2008, p.3

⁴⁷ 'Rice calls for power-sharing' Al Jazeera news.com, , 18th February. 2008

Rice visit and statement was indicative of powerful third parties with serious interests which they could not compromise on and were willing to apply the leverage necessary to force a settlement.

When the negotiators reconvened on 19th February, 2008 they did so under intense pressure. They had a mediator who had described himself 'a conductor steering the parties to the right direction' – which is just a euphemism for a directive mediator- ,who had stated that he was not just about to be frustrated and leave and interested parties threatening that an externally imposed solution was still on the menu.

During the first session on governance structures, PNU gave instances where such arrangements had been put into place to create a position of Prime Minister without having to amend the constitution, while ODM wanted an executive Prime Minister, with his position entrenched in the constitution. Further, ODM demanded that there should be 50:50 sharing of cabinet positions while the government proposed that ODM should not have more than 10 ministers. In addition ODM insisted on appointing the two deputy prime ministers, and the PNU insisted they should nominate on each. In response, ODM argued, if that was the case they would push for the post of vice president.⁴⁸ The demands certainly widened the gap between the protagonists, with none willing to cede the ground.

At the same time, Annan had brought in experts on board. The legal working group on governance led by Han Corell was tasked with coming up with a governance framework. After three days, they produced a draft National Accord and Reconciliation Act. A respondent observed that the draft was not any better than the ones developed by ODM and PNU legal committees.⁴⁹ The respondent observed that the mediator was determined to push his agenda at

⁴⁸ *Saturday Nation*, (Nairobi), 23rd February, 2008, p.4

⁴⁹ An interview with a respondent who was present during the negotiations conducted on 13th October, 2009

all levels. Indeed once the options were laid on the table, Annan picked it as the negotiation draft.⁵⁰

After failing to agree, the negotiators took the weekend to consult their principals, a tactic which was becoming more frequent. In the meantime president Bush indicated that 'Kenya displayed warning signs that the international community should pay attention to and back home ODM again threatened mass action if parliament was not summoned within a week to enact the necessary constitutional changes.'⁵¹ The situation had reached a tipping point and threatened to erase gains so far made.

When the parties met on 25th and 26th February, 2008 they were tasked with going through the legal working group's draft in order to resolve outstanding differences. The parties could not agree on how to share ministries, the roles of the Prime-minister, and how to legalize the position. PNU wanted it done through a statute of parliament while ODM insisted that historically both Inter Parties Parliamentary Group package of 1997 and the Memorandum of Understanding of 2002 had failed precisely because they had no legal force".⁵² These non-yielding positions led to a deadlock and Annan in consultation with Mkapa suspended the talks, so as to deal directly with the principals.

In the meantime the United States issued a hard hitting statement though Condolezza Rice that,

'the future of our relationship, with both sides and their legitimacy hinges as the cooperation to achieve this political solution". Further she intimated that, (they) were exploring a wide range of possible actions, (and they) will exert leadership with UN, the European Union and others to ensure a political solution the Kenyan people deserve is achieved...⁵³

⁵⁰ E. Lindenmayer and J.L Kenya, A Choice for Peace, op cit, p.32

⁵¹ 'Annan Frustrated by Kenya Talks' BBC News at bbcnews.com/archives

⁵² E. Lindenmayer and J. L. Keye, A Choice for peace, op cit, p.34

⁵³ 'Talks suspended as US threatens to act' *Daily Nation*, (Nairobi), February 27th, 2008, p.14

Among the negotiating parties suspension of talks elicited mixed reactions. PNU resented US attempt of trying to impose a solution and blamed the media for printing false stories on the process. To the contrary ODM side, which had ridden on the wings of the international community to achieve their interests commended Annan and portrayed the government as deliberately stalling the talks

4.5 Towards an agreement

The suspension of the mediation created an urgency to have a settlement at whatever cost. The moment had come to either 'repair the slow moving coach or unhinge it'.⁵⁴ If the mediation caravan had to increase its speed Annan had to take a dangerous corner on a slippery road. Towards this task, Annan 'invited' the African Union chairman, President Jakaya Kikwete of Tanzania to explain to Kibaki that 'he had a prime minister who had more power than the one there were thinking of for Odinga'.⁵⁵ It is worth stating that the question of who invited Kikwete is controversial. A respondent who was involved in the process refuted that it was Annan who invited Kikwete. He stated that.

'Koffi Annan's suspension of talks was an expression of how frustrated he had become. He was in a hurry to conclude the process. Indeed, he was ready to board the plane and leave when Kikwete came in. He either came as the chair of the African Union or as an emissary of the US president'.⁵⁶

Kikwete arrived on 26th February, 2008 and together with Annan reengaged in hectic diplomacy holding meetings with the principals individually and jointly. Annan met Kibaki at Harambee house with six points agenda, containing the issues of disagreement. In the meeting Kibaki objected to giving the prime minister power to supervise since this would lead to two centres of power and insisted that, requiring the president to consult the prime minister before

⁵⁴ An Interview with Koffi Annan. Available at www.koffiannanfoundation.org.

⁵⁵ Ibid

⁵⁶ The interview was conducted on 13th October.2009

appointing the cabinet violated section 16 of the constitution which make such appointments the prerogative of the president and that there was no need for constitutional amendments. This view ran counter to ODM's team assertion when it met Annan that they could not trust the government and hence power sharing and other agreements need to be entrenched in the constitution.⁵⁷

Around the same time Kikwete had a meeting with the ODM, to explain the modalities of Tanzania's political arrangements, where a non-executive prime minister had power to control, supervise and execute programmes of ministers and government departments. His explanations could not thaw ODM's position and they took the occasion to restate their demands of an executive prime minister answerable to cabinet and parliament and being a leader of government business in the in the parliament.⁵⁸

After two days of intense diplomacy, the final meeting took place on 28th of February. The meeting which included president Kibaki, Kiwete, former president Annan and Raila Odinga took five and half hours to iron out issues of contention in the draft agreement. Prior to the meeting Annan had called the head of the civil service Ambassador Francis Muthaura, insisting that only the five would attend the meeting. This aimed at keeping the hardliners at bay, people who all along had pretended to be protecting the president yet they were protecting their future political ambitions.⁵⁹

The meeting discussed the details of the draft act with assistance of Han's Correll, James Orenge and Amos Wako. All of them Lawyers, who were brought in after president Kibaki raised constitutional issues which would have prevented the creation of a position of an executive prime minister. Eventually the president agreed to have the word 'supervise' included

⁵⁷ See M. Mwagiru, *The Water's Edge*, op cit, pp 142-143

⁵⁸ *Daily Nation*, (Nairobi), 28th February, 2008

⁵⁹ An Interview given by the Koffi Annan to the Center for Humanitarian Dialogue. Available at www.koffiannanfoundation.org/kenya

so that the prime minister now had the powers to 'supervise and coordinate'. Later the same day at a ceremony at Harambee house president Kibaki and Raila Odinga, signed an agreement witnessed by Annan and president Kikwete on the Principles of Partnership of the Coalition Government and the National Reconciliation Accord bringing to an end the anxiety that had grabbed the country for two months. With the signing of the agreement, the phase two of mediation stage ended.

4.6 The Power Sharing Agreements

The principles of partnership of the coalition government⁶⁰ agreement laid out the rules of engagement between the coalition partners. It created the position of a prime minister with powers to coordinate and supervise affairs of the government, and that the composition of the government will at all times reflect the principle of portfolio balance and relative parliamentary strength of the partners. Further, it called for the entrenchment of the National Accord and Reconciliation in the constitution, among other requirements.

The National Accord and Reconciliation Act 2008⁶¹ provided a framework for the constitutionalization of the agreement. It established prime minister's position who was to be appointed from the party or a coalition of parties with the majority in the national assembly and two deputy Prime Ministers appointed by the coalition partners. Further it established the functions of the prime minister. These were coordinating and supervising of the government and performing other duties assigned to him by the president or under a written law. On the appointment of the cabinet, the president and prime minister should consult each other and such appointments should reflect the relative parliamentary strength of the respective parties and shall at all times take into account the principle of portfolio balance.

⁶⁰ Acting Together For Kenya: Agreement on The Principles of Partnership of the Coalition Government' available at www.koffiannanfoundation.org

⁶¹ The National Accord and Reconciliation Act 2008, www.kenyalaw.org

The act also established the circumstances under which the office of prime minister and his deputies shall be declared vacant. These are death, resignation or incase the holder ceases to be a member of parliament or through a motion of no confidence or if the coalition is dissolved. The coalition under the act stands dissolved either after the expiration of the tenth parliament, or if the coalition partners agree or if one partner withdraws from the coalition or after a new constitution is enacted, whichever comes earlier.⁶²

⁶² Ibid, article, 8

CHAPTER FIVE

THE POST-MEDIATION PHASE: IMPLEMENTING THE PEACE AGREEMENTS

5.0 Introduction

The preceding chapter has examined the mediation phase of the post-electoral violent conflict. It is in this phase that parties discuss their conflict and put details into the agenda agreed upon with a goal of reaching a mutual agreement. At this phase mediator's role become more visible as he guides the parties towards an agreement. Ideally the mediator should acknowledge that the conflict is essentially between the protagonists and he should give them an opportunity to talk it out.¹ However, in Kenya's case, Kofi Annan drawing on the leverage provided by the powerful third parties was more directive formulating solutions to the conflict and insisting that the parties should adopt them with minimal changes.² The sustained pressure led to the signing of peace agreement on 28th February, 2008. The signing of the agreement ended the mediation phase and now parties had to implement what they had agreed on the negotiation table.

This chapter analyses the post-mediation phase and how the parties went about the business of implementing the agreement. Traditionally the signing of peace agreements was viewed as marking the death of the violent conflict and ushering a new dawn of peace. However, the reality of agreements unravelling even before the ink has dried on the document signed and the subsequent relapse to violence has made the implementation phase critical. Indeed, the end goal of mediation process is peace and the marker of its success largely hinges on the ability of the agreements to deliver peace dividends to the previously contending or warring leaders and their constituencies.

¹M. Mwangi, *The Water's Edge: Mediation of Violent Electoral Conflict*. Nairobi:IDIS,2009. p.110

² See Chapter Four,pp.65,75

Importantly, the rationale for mediation is that parties have reached a mutually hurting stalemate.³ This means that, they can no longer pursue their interests and values unilaterally. Consequently they engage in the search for a mutual outcome whereby at least some of their interests and values can be secured. The extent which this is achieved is dependent on the how the implementation process unfolds. As such peace agreements constitute an integral part of conflict resolution and their sustainability largely depends on whether they can deliver security to the elite and their constituencies in form of inclusion in decision making processes, mainstream politics, and any other centre where authoritative allocation of values takes place.

In addition, implementation phase is important because of various reasons. First, it provides recognition to disputants as the former protagonists must now work together. Second, implementation of peace agreements is a critical transitional phase characterized by deep seated and permanent changes that are needed to address or redress major grievances and complaints in different spheres.⁴ This may involve changes in the constitutional architecture especially on the structures of political power, exercise of justice, distribution of resources and equitable representation. Third, the implementation brings on board other actors who may not have actively participated in the negotiation process. Primarily actors include the constituents who even though it is presumed, their interests are represented by their leaders/negotiators, may reject the agreements leading to the problems of re-entry especially if their interests diverge from those of their leaders. This exposes the mediation process to the fallacious assumption that peace will 'trickle down' to the constituents. Other actors include allies –state and non-state- involved in the reconstruction phase, pursuit of transitional justice and so on. In fact, the concerns with

³ I.W Zartman, *Ripe for Resolution*. New York: oxford University Press. 1989, p.268, Also see Chapter Two, p.24

⁴ P. Bischoff 'Towards Continental Transformation: Understanding Sustainable Peace Agreements in Africa' *Conflict Trends*, Issue 3, 2007, p. 7

transitional justice not only bring on board actors of different shade but also bring to the fore the tensions between peace and justice in a post-conflict environment.⁵ On this basis the section examine the post-mediation phase of Kenya's post-electoral conflict mediation process.

5.1 The Implementation of the National Accord and Reconciliation Act and the Agreement on the Principles of Partnership of the Coalition Government

The signing of peace agreements by the principals on 28th, February, 2008 was celebrated for it marked a reverse from the path of destruction which the country had taken in the previous two months. In the signing ceremony Kofi Annan stated. 'Kenyans would finally have peace they much desired following post-elections turmoil that saw communities rise against another.⁶ The world Bank and IMF congratulated the leaders especially for focusing on the root causes and pledged that, the bank will do its part to help ensure quick return to full economic activity, realization of considerable economic potential and significantly greater attention to equity and governance.⁷

In the meantime the United States through the Secretary of State Condoleeza Rice observed 'Kenyan Coalition government and the people can count on our support as they move forward to implement the agreement' while Japan expressed optimism 'that both parties will steadily implement the agreement which is an important milestone in resolving political crisis'.⁸ The principals also their reactions both pledging their commitment and will to implement the agreement in the interest of Kenyans.

⁵ A Pennman 'The Peace -Justice Dilemma and Amnesty in Peace Agreements' ,*Conflict Trends*, Issue 3, 2007, p 31. Also see Chapter Two, pp.18-20

⁶ *The Standard*, (Nairobi),3rd March, 2008, p.3

⁷ *The Standard*. (Nairobi),3rd March. 2008. p.3

⁸ *Kenya Times* (Nairobi), 1st March, 2008, p.2

At the same time some doubt had begun to emerge especially on how water tight the agreement was. A commentator observed,

‘creating a new-government will be one of the greatest tests of the national accord. As one can see these words ‘coordinate’ and ‘supervise’ the work of ministry actually entails? Nobody knows yet, not even Raila, the man whom now everybody expects to become a Prime Minister’.⁹

Another commentator stated, ‘at face value, the panel has demarcated political turfs for both president Kibaki and Raila Odinga. However the risks underlying power deal may be reflected in adoption of the adage that ‘good fences make good neighbours’.¹⁰ These observations manifested themselves when disagreements arose on how the agreement should be implemented.

The implementation phase begun when the two principals met on 4th March, 2008 at Harambee House. In the meeting, the principals discussed various issues. These are the formation of a six man transition committee to spearhead the transition to a coalition government, a team to harmonize vision 2030 and ODM and PNU manifestos, inter-parties working relations and the reconciliation of Kenyans. After the meeting Raila confidently observed that ‘we have agreed to heal the wounds that were afflicted in the last two months. We shall be holding meetings with elders from various communities to bring harmony’.¹¹ At this point the task was left to parliament to pass the necessary legislations aimed at entrenching the agreements into the constitution and make the ‘shot-gun marriage’ between ODM and PNU constitutional.

This involved the appointing of five members drafting team, tasked with identifying the sections of the law that required amendment, drafting of the necessary bills in a manner that

⁹ Dominic Odipo ‘Creating a New government will be the greatest test of the government accord’ *The Standard*,(Nairobi), 3rd March, 2008, p.6

¹⁰ A. Otieno, ‘Deal Promises peace as well as fresh challenge’ *The Standard*,(Nairobi), 3rd ,March,2008

¹¹ *The Standard*, (Nairobi), 5th March, 2008, pp. 3,4

would require only minimum debate, amend certain sections of the constitution to accommodate establishment of the offices of the Prime Minister and two deputies, and identify the character and functions of these offices.¹²

The parliament convened on 6th March, 2008. In his opening speech, president Kibaki observed that, ‘the events of the last two months offered an opportunity to look inwards and fully comprehend both weaknesses and threats on one hand and the strengths and opportunities we have as a nation’.¹³ Further he gave notice to parliament on the necessary bills to be passed and rallied their support. The bills were the National Accord and Reconciliation bill, the Constitution of Kenya (amendment) 2008 bill, the Truth Justice and Reconciliation Commission Bill and the Ethnic and Race Relations Bill.¹⁴

Around the same period debates emerged on the interpretation of the national accord. According to Mwangi, the debate revolved around the interpretation of the words ‘supervise’ and ‘coordinate’ contained in the agreement. To the ODM, the terms of reference, implied an executive Prime Minister while to the PNU, since the cabinet was still chaired by the president, it was clear that the prime minister’s job was non-executive.¹⁵ A respondent attributed this confusion to the fact the accord created two drivers for one vehicle.¹⁶ Another characterised the accord as ambiguous and crafted in a hurry.¹⁷

Ngilu who was a senior ODM member reflected ODM’s view when she called for the dissolution of the cabinet on 10th March, 2008. She insisted that, ‘we cannot be equal partners when our colleagues are occupying cabinet positions. They should relinquish them so we can

¹² *Sunday Nation*, (Nairobi), 2nd March, 2008, p.2

¹³ *The Standard* (Nairobi), 7th March, 2008, p.3

¹⁴ *The Standard* (Nairobi), 7th March, 2008, p.3

¹⁵ M. Mwangi, *The Water’s Edge*, op cit, p .173

¹⁶ An interview with a respondent affiliated to the PNU coalition conducted on 5th October, 2009

¹⁷ An interview with a participant during the mediation process conducted on 13th October, 2009

start on the same footage'.¹⁸ To her, the agreement made ODM and PNU equal partners enjoying equal power sharing. In response to the emerging debate, the head of the Civil Service, ambassador Muthaura, issued a statement to the effect that the prime minister was placed third after the vice-president who came second by virtue of being president's principal assistant. Further, he argued that,

'the accord [did] not include sharing of jobs in the public service. We cannot divide the public service. It is not about politics, it is about serving Kenyans equally regardless of their political standing. That is why the civil service cannot be partisan'.¹⁹

In response, the ODM roundly condemned Muthaura's position. In a statement, ODM stated 'any statement clarifying, interpreting or explaining, the national accord must jointly be released by the principals and that they expected 50:50 power sharing in cabinet and the civil service'.²⁰ In an address to parliament, Raila argued 'the grand coalition government brings together two equal partners and we must treat each other with respect. There is no number one, two or three; we are all number one in a grand coalition government'.²¹

Mwagiru characterizes the debate as a reflection of the delicate situation both principals were, in their effort to ensure safe re-entry. He notes,

'for Kibaki, the need to accommodate members of the coalition and thus keeping them in and maintaining the 'grand coalition', the issues of ministerial posts, and the powers to be accorded to the prime minister were crucial. But they were equally crucial for Raila Odinga, who was involved in keeping a delicate balance between the act of spreading his tentacles without losing grip of ODM. Any sign that he has been 'swallowed' or is 'carried away' could trigger trouble for him in ODM'.²²

¹⁸ *The Standard(Nairobi)*, 10th March, , 2008, p.5

¹⁹ *Daily Nation*.(Nairobi), 11th March, , 2008, p.4

²⁰ *The Standard*.(Nairobi), 11th March, , 2008. p.2

²¹ *Daily Nation*, (Nairobi), 12th March. 2008, p.7

²² M.Mwagiru, *The Water 's Edge*, op cit, p.169

Apart from the disagreements on the cabinet, cracks were appearing on the content of the bills which were to be passed to constitutionalize the agreements. This was more apparent with the PNU coalition. Indeed, in their retreat prior to the bills being brought to parliament, some PNU/ODM-Kenya MP's had threatened to block the deal arguing that 'it gave too much power to the prime-minister and created two centers of powers'²³. This position was reversed after the MP's were given a presentation by constitutional lawyer Githu Muigai, who took them through the two bills during a meeting held at Windsor Hotel.

The opposition was reflective of the hardliners whose idea of power sharing was alien to them and were keen to retain the status quo. This view was harshly noted by a commentator who argued, 'while constitutional reform is aimed at empowering the well being of Kenyans, hardliners look at it as threat to the economic and political power they wield. While legal reforms are aimed at revising quaint colonial laws, the hardliners fight to maintain them for oppressing people'.²⁴ Despite attempts to derail the passage of the bills, the parliament on 18th March, 2008 in a session attended by the president who actively participated in the debate, passed the Constitutional of Kenya (amendment) bill and the National Accord and Reconciliation Bill (2008). The bills were assented by the president at the same day and gazetted on a special issue of Kenya Gazette²⁵. They effectively made the agreement constitutional.

The passage of the bills, which had been characterized by Karua as not reflective of 'very good jurisprudence but they are here for absolute political necessity' elicited mixed reactions.²⁶ Annan's successor Adeniji observed, 'Kenyans should celebrate the passing of these crucial bills. The process is almost complete but the announcement of the coalition government is the

²³ 'MPs wanted to block key Bills' *Daily Nation(Nairobi)*. 19th March, 2008, p.5

²⁴ 'What do we do with hardliner's' *Daily Nation,(Nairobi)*. 17th March, 2008, p. 11

²⁵ 'Kibaki Signs law to create Prime minister post' *The Standard,(Nairobi)*. 19th March. 2008, p.1

²⁶ 'Kibaki Signs law to create Prime minister post' *The Standard,(Nairobi)* ,19th March, 2008, p.5

clinger'.²⁷ To the contrary honourable Mungatana characterized the law as weak for it lacked a tribunal to arbitrate disputes in the coalition established'.²⁸ This position is shared by a respondent who observed that the accord was anchored on a weak legal and institutional framework.²⁹

5.2 The Constitution of Kenya (Amendment) Act (2008)³⁰

This act changed the political power structure as contained in the constitution by inserting a new section 15A which created the positions of a prime minister and two deputy prime ministers. Importantly the amendment act gave the National Accord and Reconciliation Act, 2008 an elevated status, which aimed at shielding it from potential legal challenges on its constitutionality. Usually, the constitution being the supreme law of the land, declares any other law which is inconsistent with it as null and void to the extent of its inconsistencies.³¹

This means that, without clear safeguard, the amendment, which had changed Kenya's political system from presidential to a hybrid one, was open to legal challenges and possible nullification by the constitution court. To pre-empt such possibilities, section three of the constitution which in part states, 'subject to section 47, if any other law is inconsistent with the constitution, this constitution shall prevail and the other law shall, to the extent of inconsistency, be void.' was amended by the act. The 'amending' section 2 of the act adds after the word 'void' that 'provided that the provisions of this section as to consistency with this constitution shall not apply in respect to act made pursuant to section 15A (3), which gives parliament to provide for the appointment and termination of office of the prime-minister, and the deputies, their functions,

²⁷ 'Here comes' *The Standard*, (Nairobi), 19th March, 2008, p.1

²⁸ *Ibid*, p.3

²⁹ The interview was conducted on 5th October, 2009

³⁰ The Act is available at www.kenyalaw.org

³¹ The Constitution of Kenya, Section 3

establishment of the coalition government and any other matter incidental to or connected to the foregoing.³²

Further safeguards, are contained in section five which, states that, ‘the act made pursuant to sub-section three- the section contains amendment of section 15 of the constitution – shall, while in force be read as part of this constitution and further in section 6 which releases any act made by parliament in pursuant to section 15 A (3) from legal challenges of being inconsistent with the constitution.

5.3 The National Accord and Reconciliation Act 2008 (The Accord)³³

The purpose of amending the constitution by inserting section 15 A was to allow for the entrenchment of the National Accord, which created a coalition government. The accord provided for the appointment of prime minister and two deputies. [section 3(1)] and laid down the criteria for appointing and functions of the prime minister. According to section 2 the prime minister should come from the party or a coalition of party with majority in the National Assembly while ODM and PNU will appoint one deputy Prime minister each [section 3(3)].

Further, the accord laid out the functions of the prime ministers which includes ‘coordination’ and ‘supervision’ for the cabinet and any other duties assigned to him by the president or under any written law [section 4]. Importantly, the accord took away the presidential prerogative to appoint the cabinet by making a provision that ministers and assistant ministers from political parties that are partners in the coalition other than the president’s party, shall be nominated by the leader of the coalition’ and that ‘there shall be full consultation with the president on the appointment of all ministers [section 4(2)]. Lastly, the accord, laid down conditions upon which the coalition stands dissolved. These are when the coalition parties agree

³² See Section 3 of the Constitution of Kenya (amendment) Act, No 3, 2008

³³ The Act is available at www.kenylaw.org

in writing to dissolve the coalition or when one of the coalition partners withdraws from the coalition by a resolution of the highest decision making organ of that party (section 6) or when a new constitution is enacted (section 8).

The passage of the two bills moved the arena of implementation from the legislature to the executive which was expected to implement these laws. The main task included the appointment of the cabinet which reflected parties' parliamentary strength and real portfolio balance, establishing real power sharing.

5.4 The Making of the Grand Coalition Government

The mediation process is a complex process. Beyond the main protagonists who are the face of the conflict, there exist multiple relationships and interests emanating from constituents, and allies, who expect to be rewarded in the post-conflict political order. In Kenya's case the negotiations on the composition of the 'grand coalition' reflected these complex relationships as principals sought to secure the interests of their constituents and allies. This made the process which Raila had stated that it will be done in two weeks, a long and difficult one.³⁴ The difficulties were manifested in the 'politics' of the size of the cabinet, interpretation of power sharing and portfolio balance.

5.5 The Politics of the Size of the Cabinet

The desired size of the cabinet elicited different views. On one hand, ODM had in its campaigning promised a lean cabinet, as a reaction to the bloated cabinet in the name of government of National Unity which president Kibaki had appointed in 2005 after he disappointed a section of government ministers allied to Raila Odinga, who had led an internal rebellion against president Kibaki, for failing to honour an informal memorandum of

³⁴ *The Standard*, (Nairobi), 3rd March, 2008, p.3

understanding signed between them prior to 2002 elections. On the other hand the PNU/government side, which already had appointed seventeen ministers prior to the beginning of the mediation process, and was made up of a coalition of many political parties insisted on a larger cabinet.

The two divergent circumstances led to disagreements on the size of the cabinet. Initially ODM insisted on a cabinet size of 24 members to be shared on 50:50 basis while the government wanted to have the number raised to 44.³⁵ The demand by ODM was unacceptable to Kibaki who had already appointed 17 minister, and it would have meant that he sack some of the ministers and move others to less powerful ministries, a situation that would have been unacceptable to his supporters.

Other actors also expressed their position on the most appropriate size of the cabinet. Francis Atwoli the chairman of COTU commenting on the PNU position described it as 'pure selfishness and total wickedness for the Kenyan tax-payers who are already burdened to be added on extra-burden. [And that] it was only to enable a section of the political class to ride and stay lavishly when Kenyan population continued to live in abject poverty'.³⁶ The NCKK and the Catholic Church called for a lean cabinet of not more than twenty five ministers and excluding corrupt leaders and those suspected of fuelling post-election violence. They also termed anything going beyond that as an attempt to reward cronies.³⁷ Maina Kiai, during a street protest by religious and human rights activist demanding a cabinet of 24 or less stated that, 'we want a lean cabinet of 24 ministers for PNU and ODM side' and Wangari Maathai urged the principals 'to

³⁵ *The Standard*, (Nairobi), 26th March, 2008

³⁶ *Daily Nation*, (Nairobi) 25th March, 2008, p.2

³⁷ *The Standard*, (Nairobi), 27th March, 2008, p. 4

listen to the voices of the public and not come up with a cabinet to please MPs.³⁸ The United States through its ambassador Michael Ranneberger also called for a lean cabinet and noted that retaining thirty four ministers was reasonable. Anything more was excessive' because massive' resources would be needed to finance the government.³⁹

Eventually after negotiations between the principals in various face to face meeting they agreed to a cabinet of 44 ministers, with PNU arguing that it had to take care of affiliate parties and interest groups such as gender and youth.⁴⁰ The PNU position reflected the reality of mediation process where there are multiple interests that need to be taken into consideration. In this case PNU could not have overlooked the interests of its affiliate political parties and interests. Any other position would have led to breaking up of PNU coalition over unfulfilled promises. Considering that PNU had only fourteen MPs, such a situation would have critically weakened the president's position and expose him to ODM pressure.

The 44 members cabinet contrary to the claims that it will be a drain of national resources, simply involved an exercise of fragmenting ministries and sharing the budgets of existing ministries between the newly created departments hence could not lead to major fiscal imbalances. Instead as Mwagiru correctly predicted, 'the effects of a larger cabinet will be felt in other areas, for example creating many new centres of power. creating jurisdictional conflicts between ministries (and ministers), making coordination between fragmented ministries more difficult. and slowing down project completion rate because of the same problems.'⁴¹

³⁸ *Daily Nation*, (Nairobi), 2nd April, 2008, p. 4

³⁹ 'Cabinet delays upsets Annan' *Nairobi Star*, (Nairobi), 3rd April, 2008, p.2

⁴⁰ *The Standard*. (Nairobi), 26th March, 2008

⁴¹ M. Mwagiru, *The Water's Edge*, op cit, p.177

5.6 The Politics of Interpreting 'Power Sharing'

After the signing of the peace agreements on 28th of February, 2008, doubts started to emerge on the poor draftsmanship of the agreements. A commentator stated that,

'the accord is rather vague on the finer details of exactly how the prime minister and the president will share power, and the exact duties and functions of the proposed new office. One problem is that the power-sharing deal is more of a short-gun marriage than a union of mutual consent'.⁴²

This vagueness manifested itself in the ensuing disagreements on the meaning of real power sharing as expressed in the preamble of the national accord which stated 'there needs to be real power sharing to move country forward'.⁴³

On one hand, the PNU argued that power sharing meant sharing of cabinet positions. This was clearly stated by the head of the civil service, Francis Muthaura, who in a press statement which aimed at clarifying the accord noted, 'the accord does not include sharing of jobs in the public service. It is about serving Kenyan's equally regardless of their political standing. This is why civil service cannot be partisan'.⁴⁴ Muthaura's position projected a civil service run by technocrats owing their loyalty to serving the public irrespective of the political racial, ethnic or ideological standing. On the other hand, the ODM insisted that real power sharing included that only sharing of the cabinet but also civil service positions.

ODM position was reflective of the predominant view that the civil service was dominated by a few ethnic groups, and the majority of top civil servants were in any case political appointees who owed their positions to the entrenched patron-client system. For instance in case of state corporations, ministers had the leeway in appointing chief executives

⁴² M. Gaitho, 'The deal is done, now for the Tricky Part', *Daily Nation*, (Nairobi), 4th March, 2008, p. 10

⁴³ The Preamble, of the National Accord and Reconciliation Accord Act, 2008

⁴⁴ *Daily Nation*, (Nairobi), 11th March, 2008, p. 4

and directors and usually they appointed people from their ethnic groups.⁴⁵ The view was best captured by Raila on 28th March, 2008, when after a deadlock with Kibaki during a face to face meeting he stated,

‘the government is not just the cabinet. There is the bureaucracy. As you are aware the permanent secretaries are all the time appointed afresh whenever a cabinet is reshuffled. So nobody should claim that these are professional and so on. We want to be involved in appointment of PSSs, diplomats and all other political appointees including head of parastatals and their chairs’.⁴⁶

Despite persuasive arguments from both sides, the issue was never conclusively resolved. However the president either took note of ODM concerns or had entered into an informal agreement with Raila during one of their face to face meetings. This is because when appointing the new Permanent Secretaries after the formation of grand coalition government, 19 of the new Permanent Secretaries named were allied to ODM.⁴⁷

5.7 The Appointing of Ministers and the Politics of Portfolio Balance

The issue of cabinet positions was bound to be contentious. Though section 3 of the accord had clearly stated ‘the composition of the government shall at all times.....take into account the principle of portfolio balance⁴⁸, making it a reality was a hard task. President Kibaki had initially appointed 17 ministers on the grounds that the government must continue to function. This put him in a disadvantaged bargaining position for it meant that he had to sack some of his ministers occupying powerful ministries in the face of ODM demands that ‘they would not accept fringe ministries and that ‘they will not eat bones while others are eating

⁴⁵ M. Mwangi, *The Water's Edge* op cit, p. 179

⁴⁶ ‘Kibaki and Raila differ on Cabinet’ *Saturday Nation*, (Nairobi), 29th March, 2005, p. 10

⁴⁷ *Daily Nation*, (Nairobi), 22nd April, 2008

⁴⁸ Section 3 of the National Accord and Reconciliation Act

steak'.⁴⁹ Further, there is no doubt that Kibaki's ministers were unwilling to relinquish their ministerial positions or take ministries which are perceived as less influential.

The issue of portfolio balance came to the fore when ODM pentagon members led by Ngilu on 9th March, 2008 argued that 'the ministers have no business in being in an office after Kibaki and Raila signed power sharing deal. [And that they] cannot be equal partners when [their] colleagues are occupying cabinet positions. They should relinquish them so we can start on the same stage'.⁵⁰ The statement made to PNU/government aimed at making the claim that no ministry was non-negotiable, and hence the 'coalition government' had to start from a clean slate. In response Kibaki in a meeting with Raila clearly intimated that he would want to keep ministries that so far have ministers while ODM takes up rest'.⁵¹

The issue of portfolio balance became more prominent after the principals had agreed on the size of the cabinet. After a face to face meeting between the principals on 25th March, 2008 Raila in an address to the press noted, 'we have covered some grounds, but there is still more to do. We have agreed to do more consultations before coming up with the final decisions'.⁵² These consultations were about sharing of ministries. PNU and ODM were disagreeing on key ministries such as education, foreign affairs, internal security, finance, local government and public service.⁵³ Ruto, a key ODM member, along the same line, stated, 'we are still negotiating but we want to make it clear that if we fail to agree, then we will call for fresh elections so that

⁴⁹ *The Standard*, (Nairobi), 28th March, 2008, p.5

⁵⁰ *The Standard*, (Nairobi), 10th March, 2008, p.5

⁵¹ *The Standard*, (Nairobi), 26th March, 2008

⁵² *Daily Nation*, (Nairobi), 26th March, 2008, p.2

⁵³ *The Standard*, (Nairobi), 26th March, 2008, p.2

the side that wins will be judged on its performance and delivery of services to the people of Kenya'.⁵⁴

In response, the PNU upped the stake when in a cabinet meeting on 31st March, 2008 added an extra criteria for would be ministers. The cabinet insisted that 'ODM appointments should have clean people who are not having any pending court cases and who will help drive economic growth'.⁵⁵ The extra-criteria hastened the creeping deadlock. ODM accused the government as using stalling tactics and argued that 'the call for a clean cabinet was not conducive to reconciliation'.⁵⁶

At this juncture ODM appealed to Kofi Annan to intervene. Something he readily did by issuing a statement where he told ODM and PNU that they are equal partners and must share important cabinets equally. Further he noted, 'the situation in the country dictate a coalition government in which the two parties will be equal partners. The cabinet will be shared equally with appropriate portfolio balance thus enabling each party to see itself as playing an equal role with other partner'.⁵⁷ To increase the pressure for a solution, the US and European called the principals to clear the last hurdle. In an uncharacteristic and undiplomatic way, Ranneberger, called upon Kibaki and Raila to 'tame their foot soldiers who are busy making silly statements which will jeopardize the implementation of the deal'.⁵⁸

The pressure from third parties and the seeming disagreements between PNU and ODM, led to suspension of the discussions. At this stage ODM had relinquished the demands for be allocated the ministries of finance and internal security in exchange for the ministries of local

⁵⁴ *The Standard* (Nairobi), 1st April, 2008, p.4

⁵⁵ *The Standard*. (Nairobi). 1st April, 2008. p.4

⁵⁶ *Daily Nation*. (Nairobi), 1st April, 2008, p.1

⁵⁷ *Ibid*. p.1

⁵⁸ *Daily Nation*,(Nairobi), 3rd April, 2008, p.1

government, foreign affairs, transport and roads, while PNU argued that foreign affairs ministry was an extension of the executive and local government also had executive powers over the council⁵⁹. These disagreements led to collapse of the talks on 7th April, 2008 when after a day long meeting the principals could not agree and the parties resorted to exchanging of letters.

ODM wrote a letter to Kibaki, arguing that they had made enough concessions on the bloated cabinet and the response to their magnanimity has been Kibaki's retracting every agreement they had finalized. Further they insisted that the ministries of local government, foreign affairs, transport, energy and cabinet affairs are their irreducible minimum. In addition, they demanded agreement on the government structure, role of the head of public service and secretary of the cabinet, appointment of ambassador and high commissioners, parastatal chiefs and constitutional office holders'.⁶⁰ The demands went beyond the issues of portfolio balance to the very interpretation of the National accord and the ODM demanded a response before the meeting scheduled on 7th of April could take place. Later the same day in an international press conference, Raila told the media 'we have reached an irreducible limit and cannot be in government to eat because we have food in our home'.⁶¹

In response, the head of public service Francis Muthaura sent a long letter to ODM where he argued that the accord did not interfere with section three of the constitution which vests the power to appoint the secretary of the cabinet. Permanent Secretaries, ambassadors and high commissioners in the president. Further, section 18 of the constitution, gave the president powers to assist any business of the government by allocating portfolios to ministers. In addition section

⁵⁹ *Daily Nation*, (Nairobi), 3rd April, 2008, p. 4

⁶⁰ 'Stalemate blame game in letters' *Daily Nation*,(Nairobi), 8th April, 2008

⁶¹ *Ibid.* p. 3

23 of the constitution had not been amended by the constitutional amendment act and the president remained both the head of state and government.⁶²

In reaction to the stalling of talks various third parties made their position known. In a terse statement issued on the 9th of April, the US through a statement by the Secretary of State Condoleezza Rice, stated. 'should the accord not be implemented, the US will form its own judgments regarding the responsibility for lack of implementation of the accord and act accordingly. British, through its foreign Secretary, David Milliband, noted, 'both sides must be prepared to make concessions including president Kibaki supporters ceding some powerful portfolios'.⁶³

The stalling deadlock, pressure from powerful third parties and the hard line position taken by the ODM and PNU supporters meant that, only the principals could solve the deadlock. To do so they resumed their face to face meeting on 12th, April, 2008 at Sagana State Lodge, where in an eight hour meeting they agreed on the size of the cabinet. and portfolio balance and the new coalition government was announced on 13th of April. As one commentator noted, 'indeed it appears that whenever the two leaders met in private, they always make a great deal of progress only for the aides to intrude and throw spanners in the works'⁶⁴.

The new government was sworn in on 17th of April, 2008, in a meeting attended by foreign dignitaries. It elicited various responses. US ambassador 'termed it as positive and pledged US assistance, German ambassador called the parties to work together in order to address the needs of Kenyans.⁶⁵ The UN ambassador, Ban Ki-Moon, noted 'now that the immediate power sharing issues have been addressed. I urge all sides to stay committed to

⁶² Ibid, p 3

⁶³ Ibid, p 3

⁶⁴ Ibid, p 5

⁶⁵ *Daily Nation*,(Nairobi), 14th April, 2008, p.6

resolving the long term causes of recent unrest'.⁶⁶ President Museveni, in his usual literary style also offered a piece of advice, when he stated,

'it is good that you have found a cure to the disease that had infected you. The duty you have ahead is to keep the prescription safe and apply it as the doctor has instructed. Such diseases are never cured completely.'⁶⁷

The swearing in of the coalition government marked the end of the electoral conflict mediation process and importantly the end of the conflict which had led to loss of lives, destruction of livelihoods and massive displacements of thousands of people. The 'surgeons' had put a sustained efforts to mend the body politic which was bleeding and hopefully heal the putrid wounds. Though the wound takes long to heal the surgery take much less time and when completed we can look back and with the benefit of hind sight ask whether the process was successfully carried out or not and which factors influenced how it was carried out. This was the task the study had set out to achieve.

From the analysis the study has achieved its objectives .The objectives were: To find out the linkage between the characteristics of a mediator and the influence it has on the mediation process and to investigate the environmental factors that influence the mediation process. To realize these objectives the study had three hypotheses. These are: The timing of the initiation of mediation is important for a successful outcome; Mediation process is dependent on the actors, issues and the nature of the conflict and mediation process is influenced by the characteristics of the mediator and the strategies they employ.

The first hypothesis has been proved. In the Kenya's mediation process the earlier intervention was critical for the mediation success. The conflict was transforming quickly from being about the disputed presidential elections to an ethnic conflict. If the intervention had been delayed, the conflict would have become entrenched as it transforms from bargainable interests in this case the disagreements about the outcome of the presidential elections to ethnic based conflict.

⁶⁶ *Daily Nation*, (Nairobi), 18th March, 2008, p.2

⁶⁷ *Ibid*, p.15

The second hypothesis has been validated. Mediation process is influenced by the issues involved, the nature of the conflict and the actors involved. The Kenya's post electoral mediation process was quickly resolved for it was primarily a conflict of interests and hence issues involved could be bargained and concessions made. In addition, the mediation process attracted a united international front which applied immense pressure to the parties to end violence and engage in the mediation process. Importantly both the principals were committed to the process and whenever mediation process slowed down they had the courage of sidelining the hardliners and making the tough decisions. Lastly the mediator enjoyed international prestige, was an experienced diplomat and had ensured that there was no parallel mediation processes. All this factors influenced the mediation process and its outcome.

The third hypothesis has also been validated. The study shows that the mediator and the strategies he employs influence the mediation process. Annan's personal attributes as an internationally recognized senior diplomat who had experience in the rough and tough world of international diplomacy, his patience and ability to listen to different opinions was pivotal in maintaining the mediation process. Also he was willing to use more directive strategies and was able to convert resources at his disposal into a powerful leverage. It is doubtful whether the post electoral mediation process would have been successful had it been led by a mediator who lacked such skills and the good will of interested third parties.

Chapter Six

Summary and Conclusion

6.0 Introduction

Conflict is an inevitable aspect of social relations and plays an important role as an agent of social change. Depending on how it is handled it can either lead to total collapse of social relations or to society's regeneration as different actors seize the moment to address that which ails their society. In Kenya, the violent electoral conflict was an indication that the society was ailing. A malignant tumour had reared an ugly head and like a hydra was threatening to engulf the whole social body. What was an essentially the highest expression of the citizens' democratic right; the right to elect and confer mandate to persons who were expected to take care of their interests turned out to be tantamount to tying a noose around ones neck. Instead the presidential election results were contested as the loser was not willing to accept defeat gracefully. Consequently violence broke out as demonstrations against the electoral outcome turned into orgies of killing, looting and destruction of properties. The conflict quickly turned into an ethnic one as groups sought to address and redress real and perceived grievances violently.

The violence attracted the attention of the international community and local peace constituents. In one voice they had a consensus that something needed to be done to stop the violent conflict. The efforts were led by Bishop Desmond Tutu. A man of God who had seen so much violence in his country during the apartheid rule and who out of his effort in fighting the bad and ugly in his native country had won a Nobel peace prize. He had brought the message of peace but he came too early when the protagonists believed they can still wrestle and win the prize. His efforts were followed by local initiatives as various endogenous actors offered to facilitate talks.

However in a society where trust is a rare commodity these groups could not pass the Caesar's wife test. They were viewed with suspicions and in some instances treated with contempt. All of them had an original sin. The religious leaders had been weighed and found wanting for they had deserted their flocks in the moment of need. Like the Pharisees of the old they had allowed the places of worship to be turned into arenas of political contest and peddling of ethnic hatreds and were as guilty as those who were killing, maiming, burning and looting. The civil society organisations had joined various political bandwagons during the campaigning period and had quickly subverted their roles making them uncivil. As such whenever they offered to assist the parties find a peaceful solution they were rightfully told to go and tell it to the birds. However they redeemed themselves by expanding the agenda of the talks.

Other efforts were spearheaded by the attorney general and the World Bank's country representative Colin Bruce. Their efforts did not do much to make the parties agree to have a mediated outcome. Unlike David's music which had the power to sooth Saul's deranged mind whenever he was seized by a moment of madness, their efforts lacked the power to sober up the principals and make them reign on their supporters to stop violence. Around the same period there came president Kufour; a graceful man from the land of Kwame Nkrumah. that true son of Africa who had a dream of the United States of Africa. Kufour had witnessed Ghana's near demise as vampires forcefully took political power and also witnessed its conversion to stable country in the troubled West African region. In addition he was the chair of the African Union which after its revival had ceased to treat interfering with the internal affairs of member states as adulterous. Kufour's facilitation efforts made the principals agree to engage in mediation and agree that the process will be spearheaded by a panel of eminent African persons.

The panel was to be headed by Kofi Annan, Kufour's fellow country man; a man who had pursued a diplomatic career and after retirement had made the quest for peace in Africa his goal as he approaches the twilight of his life. The arrival of the panel marked the beginning of what newspapers referred to as Annan's mediation effort. The efforts lasted for forty one days and continued afterwards until the 13th April, 2008 when the coalition government was sworn in. The post electoral mediation process is a story worth being told for it is a story about hope over despair, triumph over obstacles and birth of something new. This story has been told in this study.

The study was divided into five chapters. Chapter one provided the back ground of the study. It established the objectives of the study, hypotheses and reviewed the literature on mediation. The chapter showed that mediation is similar to the negotiation but more complex in the sense that it brings on board third parties. This changes the structure from a dyad into a triad. The transformation expands the issues and relationships present for third parties have interests in the process which they aim at achieving. Consequently the mediator operates at two levels. He has to assist the parties in finding a solution to their problem and at the same time push for his interest to be catered for in the subsequent outcome. How to achieve this balancing act is contingent on the mediation environment, issues at the centre of the conflict and the attributes of the mediator.

Chapter two built on the literature reviewed in the preceding chapter. It provided a detailed analysis of the mediation process. Mediation process is structured into three phases. These are the pre-mediation, mediation and post-mediation. In each phase several critical activities takes place. The pre-negotiation phase is primarily tasked with make parties directly involved in conflict acknowledge that there is a problem which cannot be solved unilaterally.

This is done through persuasion and raising the costs of unilateral actions so as to make the parties perceptually realize that they are in a mutually hurting stalemate. Unless the parties perceive their conflict this way third parties intervention are futile for the conflict will not be ripe for resolution. Also at this phase third parties analyses the benefits they stand to achieve by engaging in the management of given conflict. In case the conflict is ripe and there are some benefits to be derived parties move towards setting the agenda and other related tasks.

The successful completion of the pre-mediation leads to the mediation phase. Parties now have to engage in around-the-table process. This phase encompasses parties restating of facts and making of reciprocated concessions in the presence of a mediator. Indeed, during mediation phase, mediator's role is critical and he has to realistically deploy the resources in his possession to maintain the momentum of the process. The importance of this phase is that whatever agreement(s) parties make they are expected to implement them. As such they strive to reach agreement(s) which are acceptable not only to them but to their constituents and allies. Any other outcome leads to problems of re-entry into the conflict environment.

The conclusion of the mediation phase leads to implementation phase. Parties now have to implement the agreements they signed. The phase tests the parties commitment to what they agreed upon and whether the third parties were genuine in their efforts. Importantly it is at this phase when we can judge whether the mediation process was successful or not.

Chapter three examined the pre-negotiation phase of the Kenya's post-electoral mediation process. It has shown that at these phase there was multiplicity of actors offering to mediate and suggesting solutions to the conflict. The offer to mediate by various actors was turned down because they lacked resources which the parties valued. This explains the acceptance of the panel of eminent Africans. Its chair Kofi Annan possessed the necessary attributes having served as the

United Nations Secretary General. This made him acceptable to both PNU and ODM, their allies, constituents and various third parties who had interests in the conflict. Importantly, the panel enjoyed the backing of the African Union, the European Union and the United States. The united front provided the necessary leverage to create a mutually hurting stalemate and enable the mediator to use more directive strategies to move the parties to the negotiation table. Apart from the role of the mediator the chapter has shown that third parties expand the issues in conflict. For instances a respondent from the civil society organisations indicated that agenda two on humanitarian assistance and agenda four on the long term solutions to the conflict was largely determined by them.

Chapter four has analysed the mediation phase. It has shown the importance of mediators attributes at this phase. Kofi Annan adopted a range of strategies which included developing solutions whenever there were disagreements, setting deadlines, bringing in technical experts, expanding the mediation through directly communicating to the allies and constituents, and requesting interested third parties to apply pressure on the conflictants. Further, when there was a deadlock he suspended the process so that he can engage the principals. This strategy shows the importance of leaving out some power with actors outside the negotiation team. Had the principals been directly involved it would have been impossible to proceed whenever there was a deadlock. Also Annan was an accomplished international diplomat and had the required prestige. This made it impossible for the parties to brush him aside.

Chapter five has examined the implementation of the agreement signed on 28th February, 2008. It has shown a lot of negotiations take place at this phase. Peace agreements are ambiguous and attract different interpretations. In this case there were disagreements on the meaning of the power sharing agreement. PNU interpreted power sharing as sharing of cabinet positions

whereas ODM insisted on a broader interpretation to include the civil service and security agencies. This called for a lot of inter-parties negotiations. Further, the chapter has shown the role of allies and constituents at this stage. The disagreements on the size of the cabinet reflected the PNU dilemma for a smaller cabinet would have isolated its coalition partners who expected to be rewarded for their support. Otherwise problems of re-entry would have emerged. ODM's insistence on the sharing of the civil service and security agencies reflected the same concerns.

Lastly, at this phase the role of the mediator is less visible and the task of implementing the agreements primarily lies with the conflictants. As such during the mediation phase they should be empowered to make arrangements which they can implement without compromising their vital interests. Thus, the mediator and the third parties should desist from applying threats and other coercive measures which may lead to glossing over the problems or perception by the parties that they conceded too much. Glossing over the problems or perception that the concessions were unfair erodes the commitments of the parties and occasions attempt to revise the agreements during implementation.

The structuring of the mediation process is important for at every stage important activities takes place. How these activities are handled determines whether there will be progress to the next stage. This has been shown in the analysis of the post electoral mediation process. Further there is no single factor which determines mediation success. Rather it is contingent on a host factors.

BIBLIOGRAPHY

Text Books

- Bacharach, B. and E. J. Lawler, *Bargaining: Power, Tactics and Outcomes*. Sanfransciso and London: Jossey-Bass, 1988.
- Barash, D.P and Webel,P. *Peace and Conflict Studies* .California: Sage publications, 2000.
- Bendahmane, D .B. and McDonald, J.W. *Perspectives on Negotiation: Four Case Studies and Interpretations*. Washington: Foreign Institute US Department of State, 1986
- Bercovitch, J. and Rubin, J.Z. *Mediation in International Relations: Multiple Approaches to Conflict Management*. New York: St. Martins Press, 1992.
- Bercovitch, J.(ed), *Resolving Conflicts: The Theory and practice of Mediation*.Boulder: Lynne Reinner, 1996.
- Berridge, G. R. *Diplomacy, Theory and Practice*.Harvester wheat Sheaf: Hemel Hempstead 1994.
- Crocker, C. *High Noon in Africa, Making Peace in a Rough Neighborhood* .London: W.Norton. 1992.
- Deutsch, M and Coleman P (eds), *The Handbook of Conflict Resolution Theory and Practice*. Sanfransciso: Jossey Bass, 2000.
- Druckman, D. *Negotiations: Social-Psychological Perspectives*. London: Sage Publishers: 1977.
- Edmead, F. *Analysis and Prediction in International Mediation*. London: Unitar, 1971.
- Fisher, Ury and Patton, '*Getting to Yes: Negotiating and Agreement without Giving in*'. London: Arrow Business Books, 1997.
- Kleiboer, M.*The Multiple Realitiesof International Mediation*.Leiden:Leiden University,1997.
- Kriesberg, L. and Thorson, S.J. (eds), *Timing the De-escalation of International Conflicts*. Syracuse: Syracuse University Press, 1991
- Mitchell, C. "*Cutting Losses: Reflections on Appropriate Timing*". Institute for Conflict Analysis and Resolution of George Mason University. ICAR Working Paper 9. 1996.
- Mitchell. C.R. and Webb. K.(eds), *New Approaches to International Mediation*. New York: Greenwood Press, 1988
- Mwagiru, M. *Conflicts in Africa: Theory Processes and Institution of Management*.Nairobi: Watermark, 2000.
- Mwagiru, M. Munene, M.and Karuru, N. *Understanding Conflict and its Management* Nairobi: Centre for Conflict Research Kenya, 1998.

- Mwagiru, M. *Waters Edge: Mediation of Violent Electoral Conflict in Kenya*. Nairobi: Institute of Diplomacy and International Studies, 2008.
- Okoth, P.G, *Peace and Conflict Studies in a Global Context*. Kakamega: Masinde Muliro University Press, 2000
- Stedman, S. *Peacemaking in Civil War: International Mediation in Zimbabwe 1974-1980*. London: Boulder, 1991.
- Stern, P.C. and Druckman, D.(eds). *International Conflict Resolution after the Cold war* Washington DC: National Academy Press, 1995
- Thompson, L. *The Mind and Heart of the Negotiator*. Upper Saddle River: N.J Prentice Hall: 1998.
- Touval. S. and Zartman, W. (eds). *International Mediation Theory and Practice*. Boulder: West view Press, 1985.
- Vayrynen, R.(ed), *New Directions in Conflict Theory: Conflict Resolution and Conflict Transformation*. London: Sage Publications 1991.
- Zartman I. W. and Berman, M. R. *The Practical Negotiator*. London and New Haven: Yale University Press 1982.
- Zartman, I. W. *The Negotiation Process: Theories and Application*. London: Sage Publications 1978.
- Zartman, I.W. *Ripe for Conflict Resolution*. New York: Oxford University Press, 1989.
- Zartman. I.W. (ed). *Resolving Regional Conflict International Perspective*. NewSbury Park: Sage Publications, 1991.
- Zartman, I.W. *Ripe for Resolution*. New York: oxford University Press, 1989.

Journals

- Assefa, H., 'The Challenge of Mediation in International Wars: Reflections on the INN Experience in Ethiopia /Eritrea Conflict', *Security Dialogue*, vol. 23.
- Bercovitch, J. and Sneider, G. "Who Mediates? The Political Economy of International Conflict Management, *Journal of Peace Research*, Vol. 37, 2000.
- Bercovitch J. 'Understanding Mediation Role in Preventive Diplomacy', *Negotiation Journal*, vol. 12, 1996.
- Bercovitch. J and Houston, A. "Why Do They do it like this? An Analysis of the Factors Influencing Behaviour in International Conflicts". *Journal of Conflict Resolution*, Vol. 4. No.2, 2000.
- Bercovitch, J. 'International Mediation,' *Journal of Peace Research* Vol. 28, No.1, 1991.
- Bercovitch, J. and Houston, A. 'Influence of Mediator Characteristics and Behaviour on the

Success of Mediation in International Relations', *International Journal of Conflict Management*, vol.4.1993.

- Bercovitch, J. and Langley, J. "The Nature of the Dispute and the Effectiveness of International Mediation", *Journal for Conflict Resolution*, Vol.37, No.4, 1993.
- Bischoff, P. 'Towards Continental Transformation: Understanding Sustainable Peace Agreements in Africa', *Conflict Trends*, Issue 3, 2007
- Botes, J. and Mitchell, C. "Constraints of Third Party Flexibility" *The Annals of the American Academy of Political and Social Sciences* vol. 542, No. 3, 1995.
- Brams, S.J. and Doherty, A.E. 'Intransigence of Negotiations: The Dynamics of Disagreements.' *Journal of Conflict Resolution*, Vol. 37 No. 4, 1993.
- Crocker, C.A. 'A Crowded Stage: Liabilities and Benefits of Multiple Mediation.' *International Studies*, 2. 2001.
- Fisher, R.J. 'Pre-Negotiation Problem-solving Discussions: Enhancing the Potential for Successful Negotiations', *International Studies*, Vol 44, 1989.
- Greig, M. "Moments of opportunity: Recognizing conditions of Ripeness of mediation between Enduring Rivals", *Journal of Conflict Resolution*, Vol. 45, No.6, 2001.
- Gross-Stein, J. 'Getting to the Table: The Triggers, Stages, Functions and Consequences of Pre-negotiation', *International Studies*, Vol 44, 1989.
- Gulliver, P.K. 'Negotiation as a Mode of Dispute Settlement: Towards a General Model', *Law and Society Review*, Vol. 7 No. 4, 1973.
- Kleiboer, M. 'Understanding Success and Failure in International Mediation', *Journal of Conflict Resolution*, Vol. 40 No. 2, 1996.
- Klopp, J.M. 'Kenya's Unfinished Agendas'. *Journal of International Affairs*, vol 62, No. 2, 2009
- Lindenmayer, E. and Kaye, J.L. 'A Choice for Peace? The Story of 41 days of Mediation in Kenya'. Available at www.koffiannanfoundation.org
- Mitchell, C. "Multilateral Negotiation; An Analytic Approach". *Negotiation Journal*, Vol. 5 No. 2, 1989.
- Pennman, A. 'The Peace -Justice Dilemma and Amnesty in Peace Agreements', *Conflict Trends*, Issue 3, 2007
- Richmond, O. "Devious Objectives and the Disputants View of International", *Journal of Peace Research*, Vol. 35, No. 6, 1998.
- Touval, S. "Biased Intermediaries. The Theoretical and Historical Consideration Jerusalem"
- Wall J. A. et al, 'Mediation: A Current Review and Theory Development' *Journal of Conflict Resolution*. Vol. 45, No. 3, 2001.
- Wall, J.A. "Mediation An Analysis Review and Proposed Research," *Journal of Conflict Resolution*, Vol. 25, 1981.
- Wilkenfield, J. et al, 'Mediating International Crises', *Journal of Conflict Resolution*, Vol. 47 No. 3, 2003.
- Winham, G.R. 'Practitioners View of International Negotiation' *World Politics*, 1979.
- Zartman, I.W. 'Conflict and Order: Justice in Negotiation'. *International Political Science Review*, Vol. 18, No. 2, 1997

Websites

Al Jazeera com/news
bbcnews.com/archives
<http://www.royalafricansociety.org/index.php?>
www.christianpost.conflict/overseas/2008/01/tut-begins
www.foreignaffairs.house.gov/1101Kiai020608.htm
www.irinnews.org/report.aspx Repoort ID
www.Kofiannanfoundation.org/kenya
www.kenyalaw.org
www.kbcnews.co.ke

Laws and Conventions

The Constitutive Act of African Union, 2002
The National Accord and Reconciliation Act 2008,
The Kenya Constitution Amendment Act, 2008
The constitution of Kenya
The Africa Union Peace and Security Protocol, 2002

Newspapers

Business Daily (Nairobi)
Daily Nation (Nairobi)
Kenya Times (Nairobi)
Los Angeles Times
Nairobi Star (Nairobi)
New York Times
The East African (Nairobi)
The Guardian
The Standard(Nairobi)
The Sunday Morning Herald(London)