THE CHALLENGES OF IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW OF NON-INTERNATIONAL ARMED CONFLICTS: A CASE STUDY OF KENYA 2007 POST ELECTION CONFLICT

By

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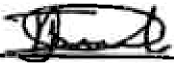
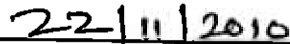
Declaration

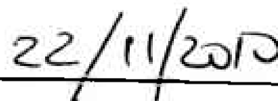
This project is my original work and has not been submitted for examination in any other university.





JOSPHAT K ITUKA Date

This project has been submitted with my approval as University supervisor.



Dr. Robert Mudida Date

Dedication

I dedicate this work to my family. May they live in a country free from the ravages of armed conflicts!

Acknowledgement

Quite a number of people have contributed in different ways to the completion of this work. Through their moral and emotional support, they encouraged me to work hard. To all of you, may God bless you!

My sincere gratitude goes to my supervisor Dr. Mudida for his tireless effort in guiding me to accomplish this work. Had it not been for his support, guidance and co-operation, the work would have been too difficult.

I am also very grateful to my friends for their words of encouragement whenever things seemed impossible. Sincere thanks also to my boss Mr. Gilbert Omondi who always granted me permission to attend to my course appointments.

Lastly, I would like to sincerely appreciate the IDIS staff who made my stay there memorable. Your assistance is highly appreciated. To all of you I say gratias!

Abbreviations

CIPEV – Commission of Inquiry into Post Election Violence

PEV – Post Election Violence

KNCHR – Kenya National Commission on Human Rights

PNU – Party of National Unity

ODM – Orange Democratic Movement

ICRC– International Committee of the Red Cross

UN – United Nations

ICTR– International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the Former Yugoslavia

ICC – International Criminal Court

IHL – International Humanitarian Law

IHRL – International Human Rights Law

NSIS – National Security Intelligence Services

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ABSTRACT

Despite almost universal ratification of international Humanitarian Law of Armed Conflicts by states, the implementation of this law on the ground reveals a different situation. IHL has been violated in the course of waging armed conflicts. In the post-cold war period, there has been marked proliferation of non-international armed conflicts. One defining feature of these conflicts is gross violation of human rights in general and IHL in particular. This raises the question of what implementation challenges states face in observance of IHL.

This study addresses the challenges states face in implementing IHL based on Kenya 2007 post-election conflict. During this conflict, there were systematic and multiple violations of IHL by government security agencies, organized ethnic and political parties' militias and civilians. These violations took place despite that Kenya has ratified and domesticated the main legal instruments of the IHL. These are the Geneva conventions of 1949, the Additional Protocols of 1977 and Rome statute of 1998 establishing the International Criminal Court.

Data for the study have been collected using content analysis and interview methodologies. Content analysis involved collection of data from secondary sources such as mass media, books and internet sources on international humanitarian law and its implementation in general as well as data on Kenya 2007 post- election conflict. Content analysis has been augmented by use of interview method to gather primary data. Data generated has been qualitatively analyzed and inferences made against the study objectives and hypotheses.

The study concluded that several implementation challenges of IHL of Non-International Armed Conflicts were faced during the Kenya 2007 post election violence. The main challenges were dysfunctional institution of policing characterised by logistical and human resource under capacity, low morale, lack of respect for human rights and political interference. Further, the

entrenched culture of impunity encouraged political leaders to rely on organized ethnic/ political party militias to unleash violence on perceived opponents. Finally there is lack of sustainable programs for creating awareness of IHL, either by governmental or non-governmental agencies.

CHAPTER ONE

BACKGROUND TO THE STUDY

Introduction

International humanitarian law is defined as international rules established by treaty or custom which are specifically intended to solve humanitarian problems that arise directly from international or non international armed conflicts.[1] The main instruments of international humanitarian law are the four Geneva Conventions adopted on 12th May 1949 and the two Additional Protocols of 12th August 1977. Protocol I and Protocol II Additional to Geneva Conventions of 1977 relate to protection of victims of international and non-international armed conflicts respectively.

International armed conflicts relate to all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties even if the state of war is not recognized by one of them or to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance.[2] On the other hand, non- international armed conflicts take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups which come under responsible command and exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.[3]

Though these definitions are not water tight, Durr argues that any differences arising between two states and leading to the intervention of armed forces is an armed conflict within the meaning of article 2, even if one party denies the existence of a state of war.

[1] ICRC, 'Commentary on the Additional Protocols of 8th June 1977'. Geneva: ICRC 1987), pp i-xxxv: xxvii

[2] J. Pictet, *Commentary of the First Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in the Armed Forces in the Field*,(Geneva: ICRC 1952), pp 29-37:32

[3] Article 1(1) of Protocol II Additional to Geneva Conventions of 12th August, 1977

It makes no difference how long the slaughter takes place. The respect due to human personality is not measured by the number of victims.[4]

The development of international humanitarian law is based on the notion of inevitability of armed conflict as a tool of policy. Thus armed conflicts need to be constrained but they cannot be outlawed altogether. The constraining of armed conflicts no doubt is in the interest of the belligerents and neutrals during the conduct of hostility and has a bearing on the facilitation of peaceful order after the armed hostilities have ceased.[5] Indeed, if there were no regulations, humanity will self destruct. To avert such a catastrophe, there is now a consensus that both international and non-international armed conflicts need to be regulated.

The implementation mechanism of international humanitarian law is self- regulating and involve international and national enforcement mechanisms. International humanitarian law of non-international armed conflicts specify only two implementation mechanisms; the obligation for states to disseminate international humanitarian law [6] and the right of International Committee of the Red Cross to offer its services.[7] The other means of implementation used though not legally applicable in non-international armed conflicts, relate to the law of international armed conflicts.

Kenya acceded to the Geneva Conventions of 1949 on 20th September, 1966 and ratified the two Additional protocols of 1977 on 23rd February, 1999. The Geneva Conventions of 1949 were incorporated into the Kenyan laws by the Geneva Conventions Act of 1968, but the two Additional Protocols of 1977 are not yet domesticated by national legislation. The country also

[4] O. Durr, 'Humanitarian Law of Armed Conflict: Problems of Applicability', Journal of Peace Research, Vol 24, No.3, 1987, pp.263-267:265

[5] A.Rosas and P.Stenback, 'The Frontiers of International Humanitarian Law', *Journal of Peace Research*, Vol 24, No.3, pp.219-236:226

[6] See Article 19 of Protocol II Additional to Geneva Conventions of 12th August, 1949

[7] See Article 3(1) Common to the Four Geneva Conventions of 1949.

signed and ratified the Rome Statutes of International Criminal Court of 1998 on 11th August 1999 and 15th March 2005 respectively. On 5th October 2001, Kenya established National Committee for the Implementation of International Humanitarian Law to promote respect of international humanitarian law.[8]

Between 30th December 2007 and 28th February 2008, Kenya experienced post election violence in which government security forces engaged in violent confrontation with protestors and communal armed groups. The announcement of the presidential polls results which gave president Kibaki victory, led to eruption of violence which dangerously took civil war dimensions. Prior to the elections, the campaigning period had pitted ethnic based parties against each other. The Party of National Unity (PNU), a predominantly Kikuyu, Embu and Meru ethnic groups party, battled for political supremacy with the Orange Democratic Movement(ODM) which was predominantly a Luo-Kalenjin and Luyha alliance. According to Klopp, this political competition reflected the long time inter-elite rivalry which revolved around Kikuyu-Luo poles[9] and the rejection of the presidential poll results triggered conflict. As a result of this conflict, estimated 1,300 people died, 300,000 internally displaced while 1916 sought refuge in Uganda and 244 rape cases were recorded. Further, a total of 117216 private properties and 491 government owned properties were destroyed.[10]

The purpose of international humanitarian law is to protect victims of armed conflicts. Many non-combatants suffered atrocities of war during the Kenya 2007 post election violence. This study analyses the challenges Kenya faced in the implementation of international humanitarian law of non-international armed conflict during the 2007 post-election conflict.

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[8] See Kenya Gazette Notice No. 7608 of 15th August 2008

[9] J. Klopp, 'Kenya's Unfinished Agenda's' *International Affairs*, Vol 62, No 2, 2008. pp 144-147

[10] See International Crisis Group, *Kenya in Crisis* .Africa Report No. 137 of 21st February 2008, pp 1-31:28

Statement of the Research problem

Inspite of almost universal acceptance and ratification of the Geneva Conventions of 1949 and their two Additional Protocols of 1977, many states continue to ignore their responsibility to respect and ensure respect of international humanitarian law of non-international armed conflicts. In most cases, officials entrusted with the responsibility to enforce the law have committed, planned and conspired to violate the same law. The failure to implement fully IHL of non-international armed conflicts is of critical concern, especially when most of the violent conflicts since the end of the cold war are internal in nature, and non-combatant casualties have exponentially increased.[11]

Kenya experienced post election violence in 2007 in which estimated 1,300 people died, 300,000 internally displaced while 1916 Kenyans sought refuge in Uganda.[12] The humanitarian suffering witnessed in this internal conflict portrays a high rate of non-compliance with the law of non-international armed conflicts. This is despite the fact that Kenya is a signatory to the Geneva Conventions of 1949, the two Additional Protocols to the Geneva Conventions of 1977, and the Rome Statute of International Criminal Court of 1998. This study investigates the implementation challenges of international humanitarian law of non-international armed conflicts Kenya faced during the post-election violence between 30th December and 28th February, 2008

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[11] See Norwegian Refugee Council Global IDP Project 2004 ,*Internal Displacements: A Global Overview of Travels and Developments in 2003.2004, available at www.idpproject.org*

[12] M. Leitenbury, *Deaths in Wars and Conflicts Between 1945 and 2000*, (Cornell University Peace Studies: Program Occasional Paper No. 29 of 2003), pp1- 33: 12

[12] See Commission of Inquiry into the Kenya Post Elections Violence Report ,2008, pp304- 352

Objectives of the study

The overall objective of the study is to examine the implementation challenges of international humanitarian law of non-international armed conflicts.

Sub- Objectives

The study is guided by the following sub objectives:

1) To investigate the implementation challenges of international humanitarian law of non-international armed conflicts Kenya faced during the 2007 post election conflict.

2) To find out the enforcement mechanisms Kenya has in place to ensure compliance with the international humanitarian law of non-international armed conflicts.

Literature Review

The literature on implementation challenges of international humanitarian law of non-international armed conflicts has been classified into six main themes. These themes center on sovereignty of state, recognition of belligerency and belligerents, adoption systems of treaty laws, interpretation of the law of non international armed conflicts, justice versus peace and the theme on Kenya national implementation of international humanitarian law. The theme of sovereignty of states is critical because sovereignty is considered as the corner stone of the international system[13]. Thus the way sovereignty of state is interpreted determines the extent to which the international can encroach on the domestic affairs of the state[14]. This interpretation subsequently affects implementation of IHL. Regarding the recognition of belligerency and belligerents, this theme is important because states challenged by non-state actors are usually resistant to demands that such sub-national actors be regulated by IHL, for this might amount to

[13] K. Waltz, *Theory of International Relations*. M.A .Reading : Addison Wesley, 1979, p 88
[14] R.J. Vincent, Non *Intervention and International Order*,(Princeton: Princeton Press, 1974), p14

recognition. Also some of the obligations created under IHL may require these actors to establish parallel structures to enforce them.

On the theme of adopting IHL, the issues are between monist and dualist approaches to international law. The contention is whether incase of IHL, states need to expressly domesticate them via legislation to make them applicable or IHL enjoys *jus cogen* status thus creating obligation *erga omnes.*[15] Regarding the interpretation of IHL of non-international armed conflicts, there exist contention of what constitutes non-international armed conflict and importantly whether it is necessary to stick to the international and non-international armed conflicts dichotomy, yet violations are violations irrespective of the level they are taking place[16]. The other theme concerns what should be given priority between peace and justice in post conflict societies. This is important for the two values operate in tension. The final section reviews the theme of Kenya's mode of adopting international law and seeks to determine whether Kenya adopts monist, dualist or mixed system.

Theme of Sovereignty of State

The theme of the sovereignty of states has two perspectives. These are sovereigns and Post- sovereigns positions. Scholars who support the sovereign perspective are Crawford, Waltz, Murphy, Penelope, Ramsbotham and Woodhouse while Searle, Parekh, Cox, Fukuyama Donaldson, Shapent, Forysthe, Schermes, Fleck, Dougherty and Pfaltgraff support the post sovereign perspective.

Crawford has argued that the sovereignty of state as rooted in the Westphalia Treaty of 1648 establishes the modern state system and endows states with rights which include equality of

[15] D. Fleck, 'Implementing International Humanitarian Law: Problems and Priorities' *International Review of the Red Cross*, March-April, 1991, p 14

[16] J. Garvon, 'Amnesties in the Light of Development of International Law and the Establishment of the International Criminal Court' *The International and Comparative Law Quarterly* Vol 51, No 1, Jan 2002, pp 91-97

status, independence and absolute jurisdiction within their territories.[17] Waltz supports this contention and observes that this status means that 'none is entitled to command, none is required to obey'.[18] Murphy takes the case of sovereigns further and asserts that the non-interference principle is a cardinal rule enshrined in the United Nations charter.[19] Parekh summarizes the sovereigns' position by asserting that the world consists of sovereign states, every human being is a member of an identifiable state, and the two belong to each other. Citizens are the exclusive responsibility of their state, and their state is entirely their own business.[20]

The sovereigns' position has been critiqued from several positions. Cox rejects the reification of sovereignty and argues that, 'state has not always existed as the organizing principle of the international system. It is a product of the treaty of Westphalia and just as it is socially constructed, it can be deconstructed. It should not be taken as a fact.[21] Burton takes the argument of Cox further and submits that the international system is made up of multiple actors and transactions which transcend the state. He states that there is a system of state, and there are also transactions between businessmen, traders, research workers, television stations, drug peddlers, students and others. There are systems or linkages such as those created by amateur enthusiasts, by people with the same ideological or religious outlooks, by scientists exchanging papers and meeting together or by people behaving in their different ways[22].

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[17] J. Crawford, *The Creation of States in International Law,* (2nd ed.), (London :Claredon Press, 2006,) pp 32-36

[18] K. Waltz, *Theory of International Relations*, op cit, 1979, p 88

[19] D. Murphy Sean, *Humanitarian Intervention: The United Nations in the Evolving world Order*, (Philadelphia: University of Pennsylvania Press , 1996)

[20] B. Parekh, 'Rethinking Humanitarian Intervention' *International Political Science Review / Revue internationale de science politique*, Vol. 18, No. 1, Jan., 1997, pp. 49-69:56

[21] Cited in, R. Devetak, 'Critical Theory' in Burchill, S et al (ed) *Theories of International Relations* (2nd ed), (New York: Palgrave Publishers, 1996), pp 155-175: 159-160

[22] Cited in C.R.Mitchell, 'World Society as Cobweb: States, Actors and Systemic Processes' in Banks. M (ed) *Conflict in World Society: A New Perspective in International Relations.* Op cit, p.76

While arguing in support of multiplicity of players in international relations, Parekh calls for a relational conceptualization of sovereignty. He observes that, the autonomy of state is not inherent in it but is the product of a collectively agreed practice among states, and necessarily subject to the constraints of that practice. The state enjoys autonomy because others have agreed not to interfere with it. It may claim autonomy as it may claim many other things, but the claim does not become a right unless it is accepted and the ensuing obligations acknowledged by other states. He further argues that sovereignty properly understood demands states willingness to be bound by the international law and norms governing the conduct of states.[23] Donaldson stresses that such an understanding is informed by the recognition that sovereignty is both a right and a responsibility. More so, the only irreducible locus of sovereignty is the individual, hence states derive their legitimacy from the will of individuals.[24]

The critique on sovereignty and its erosion in practice has rendered the sovereigns theme a weak and tenuous one. Consequently the issues have moved to the other discourses such as humanitarian imperative, recognition of belligerents, individual criminal responsibility and the need to build sustainable peace in post-conflict societies as reviewed in the following sections.

Sovereigns versus Humanitarians on the Theme of Definition of Non- International Armed Conflict

Moir in her analysis of the historical development of international law of internal armed conflicts notes that there exists a problem of defining non-international armed conflicts and this has plagued the implementation of international humanitarian law.[25] The theme on interpretation of the law of non international armed conflicts centers on disagreement between the sovereigns

[23] B. Parekh, 'Rethinking Humanitarian Intervention' Op Cit, P.63

[24] T. Donaldson, 'Kant's Global Rationalism' in Nardin. T and M. David, (eds), *Traditional International Ethics.* (Cambridge: Cambridge University Press, 1989),pp.136-157

[25] L. Moir, 'The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949' *International and Comparative Law Quarterly*, Vol 47, No2, April, 1998, pp 337-361

and humanitarians. According to Moir, during the 1949 diplomatic conference of states on international humanitarian law, the sovereigns argued for a definition which would not hamper states' efforts to deal with issues threatening domestic law and order. This called for a restrictive definition. On the other hand, the humanitarians called for a non-restrictive definition which included instances where human rights were being violated.[26] The outcome of this disagreement was an absence of a clear definition of what constitutes non-international armed conflicts. Greenwood supports Moir's contention and observes that armed conflict has always been considered purely a factual notion and there have been few attempts to define or even describe it.[27] He further argues that Additional Protocol II is the first attempt to regulate by treaty the methods and means of warfare in internal conflicts.[28] A similar view has been made by the ICRC commentary on the meaning of armed conflicts adopted by the 1949 Geneva Diplomatic Conference.[29]

Redre, the Head of British Delegation to the 1977 Geneva Diplomatic Conference argues that the definition of internal armed conflict adopted in Additional Protocol II is a balance between sovereigns who favoured high level intensity of armed conflict and humanitarians who supported low level of intensity in defining internal armed conflict.[30] He contends that if Additional Protocol II set too high level of application, it would have been useless. On the other hand, if it set too low level of application, it was unlikely to be accepted by states.

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[26] Ibid, p 341

[27] Christopher Greenwood, *The Development of International Law by the International Criminal Tribunal for the Former Yugoslavia* .Max Planck Yearbook of United Nations Law 97, 1998, pp 98-134:114

[28] Christopher Greenwood, *A Critique of the Additional Protocol II to the Geneva Conventions of 1949'* In H.Durham and T.L.H. MaCormack(eds), *The Changing Face of Conflict and Efficacy of International Humanitarian Law* 1999 p 14.

[29] J. Pictet, *Commentary of the First Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in the Armed Forces in the Field* op cit pp 29-37

[30] See Geneva Diplomatic Conference of 1977 Official Records Vol. VIII, CDDH/1/SR.24 p236

The theme on definition and interpretation of non-international armed conflicts has further been extended by the emerging trends of international criminal tribunals. Suomimen contends that the definition provided by the International Criminal Tribunal for Yugoslavia is the most exhaustive definition of armed conflict as it caters explicitly for classic armed conflict between two or more states, civil war between a state on the one hand and a non-state entity on the other hand and a third situation of armed conflict in which no government party is involved because two or more non state entities are fighting each other.[31] However, this position is contested by the International Criminal Tribunal for Rwanda in *Prosecutor vs. Rutaganda Case*. The tribunal ruled that the ICTY definition was inexhaustive, abstract and whether or not a situation can be labeled as 'armed conflict' meeting the criteria of the Common Article 3 is to be decided upon case by case.[32] Consequently, there is no agreed definition of non-international armed conflicts. This according to a commentary by the ICRC is not a weakness for it provides flexibility when determining whether a given conflict qualifies to be regulated by the international humanitarian law.[33]

The Theme of Recognition of Belligerency and Belligerent(s) in IHL of Non-International Armed Conflicts

The theme of recognition of belligerents concerns with the impact of creating international humanitarian law obligations to non-state actors and their status. Moir has noted that the Geneva diplomatic conference of 1949 made the first attempt to create a balance between the IHL obligations and the belligerents' status.[34] This attempt, according to Sassoli and

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[31] See Prosecutor Vs Tadic, op cit Para. 8

[32] See Prosecutor vs. Rutaganda, ICTR para 5.

[33] ICRC Commentary on International Humanitarian Law and the challenges of contemporary armed conflicts, *International Review of the Red Cross*, Vol 89, No 867, September, 2007, p 743

[34] L. Moir, The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949' *International and Comparative Law Quarterly*, Op cit, pp 337-361

Bouver, pioneered the development of some international rules applying to non-international armed conflicts then known as civil wars[35].

One perspective presented by Abi-Saab argues that recognition of belligerency in non-international armed conflicts is extended *ipso jure* in the application of *Jus in Bello* in the relations between belligerents[36]. In this perspective, international humanitarian law of non-international armed conflicts confer legal personality to governments, government agents, non-governmental forces and individuals in the principle of equality of belligerent in order to make the law be respected by all. This position is shared by Dukic who argues that some of the obligations created under international humanitarian law such as prohibition of passing a sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples' eats into the domain of states which reserves the rights to administer criminal justice.[37] Thus creating these obligations to non-state actors amounts to recognition. Somme argues that on the strength of rights and duties created by IHL, non-state actors would have to develop institutions parallel to the state in order to fulfil such obligations.[38]

The argument that IHL obligations amount to recognition has been rejected. Sassoli and Bauvier argue that recognition of belligerency does not arise in non-international armed conflicts

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[35] M. Sassoli and A. A. Bouver , *How Does Law Protect in War*, "Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, (Geneva: ICRC 1999) pp 214-215

[36] G.Abi Saab , "The Specifities of Humanitarian Law" , in Christophe Swinarski(ed.), Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet(Geneva/The Hague: ICRC/Nijhoff, 1984), pp 217-221:220

[37] ICRC, *Commentary on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, op cit, p 744

[38] See a discussion by J. Sommes, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in non-International Armed Conflict' *International Review of the Red Cross*, Vol 89, No 867,2007,pp 655-690

since international law does not allow anyone to participate in hostilities[39]. They submit that indeed, the law of non-international armed conflicts does not use the term combatant and therefore does not foresee combatant status. This position is supported by the state practice when developing the conventions governing non-international armed conflicts. For instance, the Addition Protocol II is clear that creation of obligations on both parties does not affect the legal status of the parties involved in a given conflict.

The situation has been remedied by the emerging judicial practice by various special tribunals set up to deal with war crimes. For instance, the special court for Sierra Leone resorted to common customary law to prove that non-state actors do indeed have obligations under the IHL. The court noted that 'there is no doubt that (Common Article 3) is binding on states and insurgents alike and that insurgent are subject to international humanitarian law... .[a] convincing theory is that [insurgents] are bound on a matter of customary international law to observe the obligations declared by [Common Article 3] which is aimed at protection of humanity"[40]. This middle way eliminates the concern with the legal status of the party as per common article 3 and at the same time places obligations on the grounds of customary international law. The tribunal's position reflects the fact that recognition is of secondary concern when it comes to adherence to IHL for non-international armed conflicts. This is because states, non-state actors, organized groups and individuals are subjects of international humanitarian law and can be held criminally responsible for their violations regardless of the justness of their cause.[41] Importantly, Garvon has noted that it is hypocritical to rely on recognition argument to limit the applicability of IHL to non-international armed conflicts yet

[39] M. Sassoli & A.A. Bouver, *How Does Law Protect in War,* Op cit , pp 214-215
[40] See Kallon Kamara, Decision on the Challenges to Jurisdiction: Lome Accord on Amnesty, SCSL-04-15-PT-060, 13th March, 2004, Para 45,47
[41] Henry Dunant Institute, *International Dimensions of Humanitarian Law*, (Paris: Martinus Nijhoff Publication 1985).

their impact are the same as that of international armed conflicts. He instead argues that if the greatest value is placed on life and integrity of person or property, the dichotomy between protection thereof in one type of conflict and not in another is hard to justify.[42]Garvon's argument has been supported by a ruling by the special tribunal for the former Yugoslavia in *Tadic Case* Appeal Chamber that international laws protect human being without any dichotomy of international and internal armed conflicts[43].

From this analysis, it is evident that as scholars continue to engage in opposing debates, they have been bypassed by the judicial practices. The tribunals are unencumbered by the recognition argument and instead have focused on the individual criminal responsibility irrespective of the designation of a given conflict.

The Theme of Amnesty versus Retributive Justice

There exists a complex argument on what to prioritize on in a post conflict environment. Should the perpetrators of the international humanitarian law of non-international armed conflicts be punished or should they be given amnesty for the sake of reconciliation? The dilemma presented by this question has elicited both political and legal arguments supporting either punishing offenders or giving amnesty.

Pennan, in support for amnesty has argued that amnesty is a pragmatic response to a need to create and make peace sustainable and is an incentive to make protagonists to commit themselves to the peace process.[44] Pakenhurst shares the same view and makes a robust defense for amnesty by arguing that to avoid the risks associated with retributive justice, amnesty should

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[42] J. Garvon, Amnesties in the Light of Development of International Law and the Establishment of the International Criminal Court' *The International and Comparative Law Quarterly* op cit pp 91-97

[43] Prosecutor v Tadic ,Appeal on Jurisdiction case IT-941 – AR72, October 2nd, 1995.

[44] A. Penman, 'The peace -Justice Dilemma and Amnesty in peace Agreements' in *Conflict Trends, Issue* 3, 2007

be pursued.[45] Umbreit supports this view and argues that by opting for non-retributive process, the constraints of retributive justice are avoided and ensures a concern with the future rather than the past based on understanding and not vengeance, reparation or retaliation and human dignity rather than victimization.[46] This position is supported by Best who notes 'the exposure of crimes without prospects of conventional punishment is hoped to be less likely to breed intractable resentments and more likely even to encourage repentance. That repentance by wrongdoers is important for it encourages reconciliation and helps relieve a sense of grievance by the wronged parties'[47].

Proponents for punishment reject the amnesty argument. A report prepared by El Hadji argued that amnesties may reinforce the culture of impunity which in the first place encouraged the said crimes to be committed. He notes that "impunity is not just the absence of punishment, but the failure to punish in a way that reflects or reinforces a cultural norm that wrongful actions are not permissible. Impunity is the absence of punishment where there is no rule of law, no respect for the lives or bodies or dignity of others".[48] Further, Pennan points out that failure to bring to account the perpetrators of crimes amounts to denying the victims their right to justice and non-punishment may encourage impunity especially if the previous perpetrators are still in power. [49] Evans who was the chair of the International Commission on Independence and

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[45] D. Pankhurst, '*Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualizing Reconciliation, Justice and Peace*', *Third World Quarterly*, Vol 20, No.1, February, 1999, pp 239-256:24

[46] M. Umbreit, *The Handbook of Victim Offender Mediation:An Essential Guide to Practice and Research*,(San Franscisco, Calif: Jossey Bass, 2001) p xxviii.

[47] G. Best, International relations and Human Rights, in *International Affairs*, Vol 71, No 4, 1995, pp 775-799:797

[48] *See* Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights), prepared by Mr. El Hadji Guissé, Special Rapporteur, pursuant to Sub-Commission resolution 1996/24. E/CN.4/Sub.2/1997/8 June 27, 1997.

[49] A.Pennan, The Peace-Justice Dilemma in Peace Agreements' op cit

Sovereignty of States in support of responsibility to protect principle argues that justice serve too many public policy goals to ever be lightly traded away[50].

In absence of an agreement of what should be the most preferred way, legal scholars such as Casese opines that it is up to the state in question to decide on what to do. He argues, in absence of clear state practice and *opinio juris* evidencing a duty to prosecute under customary international law, states arguably have permissive right, a jurisdiction but not an obligation to prosecute.[51] This position is reflected in the Additional Protocol II Article 6 (5) which notes that, 'at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict or those deprived of their liberty for reasons related to armed conflict whether they are interred or detained'.[52] The article is further elaborated by the ICRC commentary that amnesty is a matter of competence of the authorities and the object of this sub-paragraph is to encourage gesture of reconciliation which can contribute to re-establishment of normal relations in the eye of a nation which has been divided.[53]

Monist versus Dualist perspectives on Adoption of IHL of Non-International Armed Conflicts

The theme on adoption of international humanitarian law of non-international armed conflicts is based on the arguments contained in the monist and dualist theories of international law. According to Shaw, monist theorists argue that there is no distinction between domestic and

[50] G. Evans. the responsibility to Protect: Ending Mass Atrocity Crimes Once and for All, op cit, p 119
[51] A. Cassese, On Current Trends in International Humanitarian Law, op cit, p5
[52] D. Pankhurst, Issues of Justice and reconciliation in Complex political Emergencies, op cit, p 242.
[53] Article 6(5) of the Additional Protocol II to the Geneva Conventions of 1949

international legal systems and as such once an international convention is ratified it automatically becomes part of the state's law.[54]

On the other hand, dualist theories of international law treat the domestic and international legal systems as different. Thus for a convention to have the power of law in the domestic jurisdiction, it must be legislated on. This way, it is transformed into a national law which can now be used against individuals.[55] The dualist position has been supported by Sassoli and Bouvier who note that the implementation of international humanitarian law of non-international armed conflicts requires a wide range of preparatory measures to be taken by the signatory states which include transformation of international humanitarian treaties into national legislations, translation of international humanitarian instruments into national languages, wide dissemination and enforcement of the rules during peacetime[56].This argument is in full agreement with article 19 of the additional protocol II which require states to disseminate as widely as possible its rules[57]. The need for transforming international conventions into domestic laws is also supported by Umesh Kadam who argues that implementation of international humanitarian law encompasses all measures that must be taken to ensure that the rules of the law are fully respected[58]. These implementation measures include all the necessary dissemination of the rules to the civilian, security forces and establishment of structural and administrative arrangements.

Beyond the monist-Dualist debate, it has been argued that international humanitarian law enjoys a *jus cogen* status and hence creates obligation *erga omnes*. This view is forcefully

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[54] N.M. Shaw, *International Law* (Cambridge University Press,2003) pp 120-143:122

[55] Ibid, pp 120-143:122

[56] M.Sassoli & A.A.Bouver, *How Does Law Protec in Wart*, Op cit, pp 214-215

[57] See Article 19 of Additional Protocol II of 1977

[58] U. Kadam, 'Implementation of International humanitarian Law: Problems and Prospects ' *in* Vol. II, ISIL Yearbook of International Law. New Delhi: 2002, p76.

supported by Fleck in his argument that 'the rules of international humanitarian law are to a great extent peremptory norms [*jus cogens*] which in accordance with article 53 of the Vienna Convention on the Law of Treaties, are accepted and recognized by international community of states as norms from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character.[59] This position is supported by the judicial practice as evidenced by the International Tribunal for the Former Yugoslavia in *Tadic and* Erdemovic *Cases*.[60] From these landmark rulings, there is evidence that IHL enjoy universal jurisdiction and creates obligations on all the parties concerned whether they subscribe to monist or dualist perspectives.

The theme of Kenya National Implementation of IHL of Non-International armed Conflicts

Kenya has adopted both dualist and monist systems of implementing international humanitarian law. The dualist system adopted in Kenya has been inherited from the British dualist conception of international law whereas the monist system is reflected by some of the legislations made.

The theme of Kenya's system of implementing IHL is rooted in its legal tradition. Kenya legal tradition is largely influenced by the common Law of England and other commonwealth jurisdictions which to a large extent have adopted dualist system. The common law of England was received into Kenya by way of the Judicature Act of 1897.[61] This dualist system is established by section 3 of the Constitution of Kenya which states that:

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[59] D. Fleck, 'Implementing International Humanitarian Law: Problems and Priorities' *International Review of the Red Cross*, March-April, 1991, p 14

[60] See Prosecutor vs. Erdemovic case No ITY-96-27-T, Para 28. Cited in L.C .Green, *The Contemporary Law of Armed Conflict* (3rd ed), (Manchester: ferns publishing, 2008).

[61] See Section 3 of the Judicature Act Cap 8, 1897 Laws of Kenya

'this constitution is the constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47of this constitution, if any other law is inconsistent with this constitution, this constitution shall prevail and the other law shall to the extent of inconsistency be void'[62]

However Section 3 and 26(8) of the Constitution of Kenya and section 3 of the Judicature Act are arguably the basis of dualist concept of international law in Kenya. The effect of section 3 and 26(8) of the constitution of Kenya is that courts in Kenya cannot give effect, even to mere procedural rules of an international body or tribunal to the extent that it is in conflict with the Kenyan law.

Further reaffirmation of dualist perspective is the relationship between international law and the Kenya constitutional law. Kenya constitutional law presumes supremacy over international law. This position is emphasized in the case of *Okunda vs. Republic of Kenya* in which the High Court of Kenya ruled that,

> 'The constitution of Kenya must in the nature of things override all other laws....no conflict between the treaty of East African Cooperation and the Kenya constitution or other Kenya laws has arisen. If we did have to decide a question involving a conflict between Kenya laws on the one hand and principles or usages of international law on the other and we found it impossible to reconcile the two, we, as a municipal court would be bound to say that Kenya law prevailed.[63]

This position is further is reaffirmed by the Court of Appeal for East Africa Community in *Okunda case* decision which ruled that,

> 'the constitution of the Republic of Kenya is paramount and any law, whether it be Kenyan or of the community or any other country which has been applied in Kenya, which is in conflict with the constitution is void to the extent of the conflict. The provisions of a treaty entered into by the Government of Kenya do not become part of municipal law of Kenya save in so far as they are made such by the law of Kenya. If the provisions of any treaty, having been made part of the municipal law of Kenya, are in

[62] See Section 3 of the Constitution of Kenya 1963

[63] See Okunda versus the Republic of Kenya (1970) East Africa, 19 70

conflict with the constitution, then to the extent of such conflict, such provisions are void.[64]

The dualist perspective is also confirmed by the relationship between Kenya municipal law and international law. The position of Kenyan domestic law in relation to international law is that where international standards are domesticated, the constitution takes precedence. Where there is no constitutional conflict, the courts must determine whether the domestic law being applied is inconsistent with state's international obligation[65]. Where domestic law is inconsistent with international norms and standards, Kenyan courts follow the Bangalore principles in which domestic law take effect and the court draws the inconsistent to the attention of the appropriate authorities[66].

On the other hand, the proponents of the monist system contend that Kenya adopted monist system by incorporating the principle of universal jurisdiction in its adoption of Geneva conventions. Kenya domesticated via legislation the Geneva Conventions of 1949 through the Geneva Conventions Act of 1968. The country has also signed and ratified the Rome Statutes of International Criminal Court of 1998 on 11th August 1999 and 15th March 2005 respectively. In 2007, Kenya passed the International Crimes Bill. The Geneva Conventions Act 1968 has incorporated into Kenyan law certain provisions of these conventions, specifically the criminalization and punishment of grave breaches and trial procedures for protected persons[67].

Although Article 3 common to the Geneva Conventions and Additional Protocol II contains no obligation to repress violations committed during non-international armed conflicts, provisions of the Geneva Convention Act are indicative that serious violations of laws and

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[64] See Okunda V. Republic of Kenya, Court of Appeal for East Africa (1970) 453

[65] See R.M and Another Vs Attorney General, High Court of Kenya, Nairobi Civil Case No. 1351 of 2002.

[66] See Bangalore Principles of 1989, In Commonwealth Secretariat, Developing Human Rights Jurisprudence Vol. 3, 151 principle 8

[67] See Sections3 (1), 4(1) and 5 of Geneva Conventions Act 1968.

customs of war committed during internal armed conflicts in Kenya are war crimes. The state is authorized to prosecute such war crimes in accordance with the principle of universal jurisdiction. The monist argument is based on provisions of Article 3(1) of Geneva Conventions Act which states,

> 'Any person whatever his nationality, who whether within or outside Kenya commits or aids, abets or procures the commission by any other person of any grave breach of the conventions is guilty of an offence.[68]

Further, monists argue that the acceptance for universal justice in Kenya as indicated by the criminalization of serious violations of international humanitarian law of non-international armed conflict is evidence to a practice that Kenya accepts *jus cogen* status of IHL. According to a Memorandum of Objects and Reasons associated with ratification by Kenya on 22nd March 2005, Kenya's Attorney General Amos Wako stated that:

> 'incorporation into Kenyan law of the crimes prescribed by section 6 is not an obligation under Rome Statute, but ensures that Kenyan authorities rather than the ICC will be in position to prosecute those offences where they are alleged to have been committed by Kenyan national.[69]

The offences prescribed in section 6 are genocide, crimes against humanity and war crimes. Sections 7 and 8 of the statute prescribe the applicable principles for prosecution of these offences. By becoming party to the Rome Statutes, Kenya made it necessary that serious violations committed during non-international armed conflicts would benefit from the principle of complementarity. According to this principle, the jurisdiction of the International Criminal Court is intended to come to play only when a state is genuinely unable or unwilling to prosecute alleged war criminals over which it has jurisdiction.

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[68] See Article 3(1) Geneva Conventions Act 1968

[69] See Amos Wako, Memorandum of Objects and Reasons associated with ratification of Statutes of International Criminal Court by Kenya on 22" March 2005

Gaps in the Literature to be Filled by the Study

The literature reviewed on implementation challenges of international humanitarian law of non-international armed conflicts reveal that serious gaps exist in the definition of non-international armed conflict and threshold to determine applicability of this law. Article 3 Common to Geneva Conventions of 1949 define non-international armed conflict as the case of armed conflict not of international character occurring in the territory of one of the high contracting parties.[70]. This definition is quite different from the definition given in Additional Protocol II which define non-international armed conflict as a case of armed conflict that take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups which come under responsible command and exercise such control over a part of its territory as to enable them to carry out a sustained and concerted military operations.[71] Further, Rome Statute for International Criminal Court defines non-international armed conflict as a conflict not of an international Character.

Many scholars have commented on the difficulty in defining non-international armed conflict. Moir points out that in the historical development of international law for internal armed conflicts, there exists a problem of defining non-international armed conflict and this has plagued the implementation of international humanitarian law.[72] Greenwood agrees with this contention and observes that armed conflict has always been considered purely a factual notion and there have been few attempts to define or even describe it[73].

[70] ICRC, 'Commentary on the Additional Protocols of 8th June 1977'Op Cit pp 29-37:32
[71] Article 1(1) of Protocol II Additional to Geneva Conventions of 12th August, 1977 Op Cit
[72] C.R.Mitchell, 'World Society as Cobweb: States, Actors and Systemic Processes' in Banks. M (ed) *Conflict in World Society: A New Perspective in International Relations,* Op cit, p 337-361
[73] B. Parekh, 'Rethinking Humanitarian Intervention' Op Cit, P.98- 134: 114

Suomimen contends that in the absence of clear definition of internal armed conflict in the law of non-international armed conflicts, ICTY provides the most exhaustive definition which cater explicitly for classic armed conflict between two or more states, civil war between a state on the one hand and a non-state entity on the other hand and a third situation of armed conflict in which no government party is involved because two or more non state entities are fighting each other.[74] However, the International Criminal Tribunal for Rwanda in prosecutor vs. *Rutaganda Case* rejects this position and ruled that, 'the ICTY definition was abstract and whether or not a situation can be discussed as 'armed conflict' meeting the criteria of Common Article 3 is to be decided upon case by case'.[75] In view of this ambiguity and lack of clarity in the definition of non-international armed conflict, the special court for Sierra Leone in effort to define internal armed conflict resorted to common customary law to prove that non-state actors do indeed have obligations under the IHL. The tribunals' position reflects the fact that recognition is of secondary concern when it comes to adherence to IHL for non-international armed conflict. This is because states, non-state actors, organized groups and individuals as subjects of international humanitarian law and can be held criminally responsible for their violations regardless of the justness of their cause.[76]

Garvon has summarized the debate on definition of non-international armed conflict by asserting that it is hypocritical to rely on recognition argument to limit the applicability of IHL of non-international armed conflicts yet their impact are the same as that of international conflicts. He instead argues that if the greatest value is placed on life and integrity of person or property,

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[74] Prosecutor Vs Tadic, Op Cit para. 8

[75] Prosecutor vs. Rutaganda, *International Review of the Red Cross,* Vol 89, No 867, September, 2007, op cit p 743

[76] Henry Dunant Institute, *International Dimensions of Humanitarian Law*, (Paris: Martinus Nijhoff Publication 1985).

the dichotomy between protection thereof in one type of conflict and not in another is hard to justify.[77]

This study enters the debate from this universalization perspective of international norms and standards. The study takes Garvan's position and argue that dichotomization of armed conflicts into international and non-international armed conflicts hampers the implementation of the international humanitarian law relating to internal armed conflicts. The principle purpose of international humanitarian law is to promote respect for the value of life and property under all circumstances of armed conflicts. Dichotomization of armed conflicts into international humanitarian and non-international armed conflicts makes it difficult to offer total protection to all victims of armed conflicts the international humanitarian law intends to protect.

Justification of the study

This study is academically important for it identifies and analyzes the implementation challenges of international humanitarian law of non international armed conflicts. There is need to explore and develop more effective implementation means to overcome state and non-state actors impunity and unwillingness to respect and ensure respect of humanitarian norms. Sassoli and Bouvier note that the implementation of international humanitarian law of non-international armed conflicts requires a wide range of preparatory measures to be taken by the signatory states which include transformation of international humanitarian treaties into national legislation translation of international humanitarian instruments into national languages, wide dissemination and enforcement of the rules during peacetime[78].This argument is in full agreement with article 19 of the additional protocol II which require states to disseminate as widely as possible its

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[77] J. Garvon, Amnesties in the Light of Development of International Law and the Establishment of the International Criminal Court' *The International and Comparative Law Quarterly* Vol 51, op cit, pp 91-97

[78] , M.Sassoli & A.A.Bouver, *How Does Law Protect in War*, Op cit, pp 214-215

rules[79]. The need for transforming international conventions into domestic laws is also supported by Umesh Kadam who argues that implementation of international humanitarian law encompasses all measures that must be taken to ensure that the rules of the law are fully respected[80]. However the widespread violations of these laws in internal conflicts raise the question why they have not been implemented. The study will contribute to the understanding of this glaring failure of observance of IHL in internal conflicts.

Importantly, there lacks studies done on the challenges that have faced Kenya as far as implementation of the international humanitarian law is concerned. The study aims at filling this gap through analysis of the post-election conflict within the international relations and international law frameworks. This is through examination of the conflict itself and determining whether it meets the threshold of internal armed conflict, violations which occurred, aspects of international humanitarian law related to non-international armed conflicts, and the extent which Kenya has implemented these laws.

On policy grounds, the study findings will benefit policy makers as they move towards addressing the challenges faced in implementing of IHL in Kenya. This include the legal gaps exposed in the law of internal armed conflicts, establishment of administrative arrangements for dissemination and enforcement of the norms of international humanitarian law to general public, security agencies and other government actors as well as contributing to design and implementation of appropriate education and training for military and law enforcement agencies in international humanitarian law of non-international conflicts.

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[79] See Article 19 of Additional Protocol II of 1977

[80] U. Kadam, 'Implementation of International humanitarian Law: Problems and Prospects ' *op cit*, p76.

Theoretical Framework

This study has been guided by the liberal internationalism theory. The theory is associated with Immanuel Kant philosophical writings especially his propositions for global democratic peace. Kant noted that peace can be perpetual for the laws of nature dictate harmony and cooperation among people. Further, through human reason and the capacity of human beings to realize their inner potential, they remain confident that the stain of war can be removed from human experience.[81] One way of achieving this is through the establishment of republican forms of government in which rulers are accountable and individual rights are respected which would lead to peaceful international relation because the ultimate consent of war would rest with the citizens of the state.[82]

One field which Kantianism has been dominant is in the area of human rights. In this area, the theory argue that the legitimacy for domestic orders is largely contingent on upholding the rule of law and the state's respect for the human rights of its citizens. If it is wrong for the individual to engage in socially unacceptable or criminal behavior, it is also wrong for the states.[83] Importantly, the theory treats these rights as inherent in the sense that they are birth right of all, inalienable because they cannot be given up or taken away and universal since they apply to all regardless of nationality ,status, gender or race.[84] The conceptualization of human rights as arrived upon by human reason, and derived from humanity itself has impacted on the foreign policy and international relations. This has given the rights a legal foundation to emancipatory

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81 R.N. Gardner, 'The Comeback of Liberal Internationalism' ,*The Washington Quarterly,* vol. 13,no.3,1990

82 I. Kant, *Kant's Political Writings,* edited by H. Reiss and translated by H. Nisbet, (Cambridge, 1970), p.100

83 S. Burchill, 'Liberalism' in Burchill, S et al (eds), *Theories of international Relations (2nd ed).*Hampshire: Palgrave, 2006, p.41.

84 Ibid, p.42

justice and human freedom. Their affront is an affront to the dignity of all and a stain to the human condition.[85]

The outcome of treating the violations as an affront to humanity has led to universalization of the harm principle. This theme has been promoted by cosmopolitanism, a variant of liberal internationalism. Cosmopolitans argue that some crimes such as crimes against humanity, war crimes, genocide and egregious violations of human rights are universally condemned.[86] Consequently, they are universal and obliges everyone to avoid harming others unnecessarily and reflects a shift towards a post-Westphalian system where there are other actors who are equally important if not more important than the states and have unmediated rights under international law.[87] In Habermas' words protection cannot be left solely in the hands of nation states, it must be increasingly entrusted to international and *sub-national* bodies.[88]

This theory is relevant to the study because it treats international system as made up of multiple actors who are engaged in cobweb of interactions with rights and responsibilities under international law. This way it assists in the analysis of other actors apart from the state who have impact on the international system and are increasingly being recognized as possessing rights and duties as subjects of the international law. These include non-state organized actors and individuals who were previously treated as objects of international law whose obligations and claims to the protection under international law were only through states[89]. Secondly by treating human rights as universal and inherent in individuals as persons, the theory escapes the limits of

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[85] Ibid, p.42

[86] S.C. Roach, 'Value Pluralism, Liberals and Cosmopolitan Intent in International Criminal Court' ,*Journal of Human Rights*, 4 ,2005, pp 475-490:476

[87] D. Zolo, 'A cosmopolitan Philosophy of International Law? A Realist Approach' *Ratio Juris*, vol. 12,no.4,1999, pp 429-444:435

[88] T. Cottier, 'Multilayered Governance, Pluralism and Moral Conflict' *Indiana Journal of Global Legal Studies*, vol.16, No.2, 2009, p663

[89] Cited in C.R.Mitchell, 'World Society as Cobweb: States, Actors and Systemic Processes' in Banks. M (ed) *Conflict in World Society: A New Perspective in International Relations.* Op cit, p.76

state-centrism and confers rights to individuals in a way which is unmediated by the state. That way, the responsibility for observance or non-observance of IHL shifts from abstract entities such as states to persons in their official and unofficial capacities. Consequently, this enables the researcher to illuminate on the IHL violations during the Kenya's post-electoral conflict at individual and sub-state levels and irrespective of the official or unofficial status of the persons involved in these violations.

Research Hypotheses

The Study has tested the following hypotheses,

1. There were violations of international humanitarian law of non-international armed conflicts during the Kenya 2007 post-election violence.

2. Kenya lacks effective legal and institutional mechanism for enforcing international humanitarian law of non- international armed conflicts.

3. Kenya lacks effective institutional arrangements for disseminating international humanitarian law of non-international armed conflicts.

Methodology of Study

The study has relied on both primary and secondary sources of data to investigate the challenges Kenya faced in application of international humanitarian law of non international armed conflicts during the 2007 post election violence. Primary data has been collected through the use of structured interview method. According to Kombo and Tromp, structured interview method is a systematic interviewing technique which subjects every informant in a sample to the same stimuli[90].

[90] D.K. Kisilu and D.L. Tromp, *Proposal and Thesis Writing: An Introduction*(Nairobi: Pauline Publications Africa 2006), pp.94-95

The technique is favored because it is systematic, comprehensive, reliable quantifiable and time saving[91].The method's main weaknesses are rigidity and too much formality[92]. This has been overcome by making as many choices in the questionnaire as possible, having open ended questions, following up in case an issue is not clear, giving respondents' adequate time and guidance to respondents to answer the questions freely.

Data Collection

Primary data has been collected from Kenya law enforcement officers in Kenya Police, Administration Police and Kenya Prisons Service. Also the researcher has interviewed officials from Kenya National Commission on Human Rights and The Red Cross Society of Kenya to investigate the implementation challenges they encountered in application of international humanitarian of non-international armed conflicts in the Kenya 2007 post election conflict[93]. It has been reinforced through analyses of the Constitution of Kenya, Geneva Conventions Act 1968 (Laws of Kenya), various reports such as the Commission of Enquiry into Post Election Violence report 2008, Kenya National Commission on Human Rights report and the Task Force on Kenya Police reforms Report[94].

Secondary data has been collected from two categories of sources. The first source of secondary data has been books, journals and publications on historical evolution and development of international humanitarian law of non-international armed conflicts[95]. This category of data has provided the researcher with clear understanding of the subject and its main discourses.

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91 Ibid p 94
92 Ibid p 95
93 See Chapter Four, pp 94- 111
94 See Chapter Three, pp71-91
95 See Chapter Two, pp 32- 57

The second source has been books, journals and publications on the means of implementation of international humanitarian law of non-international armed conflicts. The focus has been on debates on implementation systems of international humanitarian law of non-international armed conflicts, implementation challenges and theoretical basis of the law of non-international armed conflicts[96]. The information collected in both primary and secondary data sources has helped in engaging with the debates that exist in implementation of IHL, why these debates exist and their effects on the implementation of this law. Importantly, the data has provided insights on the challenges Kenya faced in implementing IHL during the 2007 post-election conflict.

Sampling Design

Purposive sampling method has been used to capture views from officers in Kenya Police Administration Police, Kenya Prisons, the Kenya Committee of the Red Cross and the Kenya National Human Rights Commission about their direct experience during the Kenya 2007 post election violence. Purposive Sampling is a technique used by researchers purposely to target a group of people believed to be rich and reliable with the information being studied[97]. A target population of ten senior officers has been sampled from Kenya police, Kenya Administration Police, Kenya Prisons, Kenya National Commission on Human Rights and Kenya Society of the Red Cross for in-depth analysis of the challenges they experienced in application of international humanitarian law in the Kenya 2007 post election conflict.

[96] See Chapter Two, pp 32 -57

[97] J.A. Orodho, *Elements of Education and Social Science Research Methods*,(Nairobi: Masola Publishers 2004) p 147

Data collected from the study has been analyzed using qualitative data thematic analysis method and logical inferences made. Thematic analysis refers to topics or major subjects that come up in discussions for identifying main themes and concepts[98].

Chapters outline

Chapter One: Introduction. The chapter introduces the research study by setting the broad context of the research, the statement of the research problem, justification, theoretical framework, literature review, hypothesis and the methodology of the study.

Chapter Two: Debates on International Humanitarian Law in International Relations and International Law Frameworks. The chapter reviews the contemporary debates on the implementation of IHL of non-international armed conflicts in the frameworks of international relations and international law as well as critically appraising aspects of IHL of non-international armed conflicts evolving from states practice and principles enunciated by various international criminal tribunals.

Chapter Three: Analysis of International Humanitarian Law Violations during the Kenya 2007 Post Election Conflict. The chapter undertakes conflict Analysis of Kenya 2007 Post electoral violent conflict.

Chapter Four: Critical Analysis of the Implementation Challenges of IHL of Non-International Armed Conflicts during Kenya 2007 Post Election Violence. This chapter gives a critical analysis of the findings of the study.

Chapter Five: Conclusions: The chapter provides a summary, Conclusions and Recommendations of the study.

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98 D.K. Kombo, and D.L. Tromp, *Proposal and Thesis Writing: An Introduction*, Op Cit pp 110-133:119

CHAPTER TWO

DEBATES ON INTERNATIONAL HUMANITARIAN LAW (IHL) AND ASPECTS OF IHL REGULATING INTERNAL ARMED CONFLICTS

Introduction

This chapter is divided into two sections. The first section reviews the dominant debates on the interpretation and implementation means of international humanitarian law within international law and international relations frameworks. The second section delineates aspects of international humanitarian law relating to internal armed conflicts. International relations and international law are twins in the sense that they share the same tenets. The tenets of positivism in international law say the same things as its counterpart, realism in international relations; those of socialist theories of international law are philosophically linked to those of structuralism in international relations and those of pluralism in both disciplines share the same title and profess similar principles. At paradigmatic level, the conclusion has been inescapable that international law and international relations are not only twins but Siamese twins where one feeds from the other[1].

Indeed, both disciplines concern with the same object and subject of study; the international system. They reflect the dominant trends and feed into each other. International law like domestic law is politically created and as such is reflective of international politics at any given time. This view is captured by pluralist scholars who argue that international law and international relations are part of the same process and must always be considered together in studying the complex international society[2].

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[1] M. Mwagiru, *A Critical Comparison of the Analytical Framework of International Relations and International Law*. M.A. Dissertation, University of Kent at Canterbury, September 1991

[2] M.S Douglas, 'Law and Power', *American Journal of International Law*, Vol 46, 1952, pp 102-114

The study enters the debate from this perspective which treats international law and international relations as inescapably entwined. This applies even on interpretation and implementation of International Humanitarian Law (IHL) in the sense that IHL is a product of treaty agreements and treaty making process is fundamentally political, though it ends with a document which upon adoption by states becomes part of international law. Within this approach the chapter will focus on various debates concerning issues of sovereignty, impact of application of IHL on belligerents, interpretation of IHL of non-international armed conflicts, tension between amnesty and justice and issues on the adoption of treaty laws in Kenya.[3]

Debates on sovereignty of States

The dominant notion of sovereignty is rooted in the Westphalia Treaty of 1648 which established the modern state system. The treaty created the key elements of the modern sovereign state. These elements are that states are legally equal to each other, not subject to imposition of supranational authority and importantly, they should not intervene in each other's internal affairs.[4] This conception of sovereignty implies relations of equality and in Waltz words, 'none is entitled to command, none is required to obey'.[5]

This status means that states are independent with no authority above them and that each state is formally equal to the other. In Vattel's word, 'a dwarf is as much of a man as a giant; a small republic is no less sovereign than the most powerful kingdom'[6]. Along this view, proponents of Westphalian sovereignty dichotomize the domestic and international spheres and argue that domestic systems are centralized while international systems are decentralized and

[3] For the rationale of these debates see Chapter one, introduction on literature review, pp.6-7
[4] S J. Crawford, The Creation of States in International Law, (2nd ed.), (London :Claredon Press, 2006), pp 32-36
[5] K. Waltz, *Theory of International Relations*. M.A .Reading : Addison Wesley, 1979, p 88
[6] See E.D Vattel, *Law of Nations, Preliminaries,* Para 18. Available at http://www.constitution.org/vattel/vattel-pre.htm

anarchic[7]. Thus the only way the international system can function is through respecting the sovereignty of states as a key pillar of organizing the international system.

This conceptualization of sovereignty as giving state absolute rights over what happens within its jurisdiction has been challenged. Constructivists argue that,

> 'although sovereignty and anarchy were once taken as enduring views of international relations, they are now more usefully understood as social facts, that is, social practices that are produced and reproduced through practices of states. Hence, sovereignty is not exogenous to the system but produced through the practices of states. Nor is it not necessarily fixed although its status as a social fact does not imply that it is fluid and malleable either. Social facts are facts precisely because they are basic premises upon which actors condition other behaviours, they are therefore enduring and hard to change. Nonetheless, recognizing that sovereignty and its relational forms- domestic hierarchy and international anarchy- are socially constructed potentially opens up new avenue, for understanding international politics[8].

Along this view, critical scholars have questioned the ontological and epistemological roots of sovereignty. Cox in his advocacy for problem solving theories as opposed to what he terms as traditional and positivist theories argue that positivists' claim that facts and values, objects and subjects can be separated is false. Instead, a political theory is always reflective of certain values and usually aims at stabilizing the existing social and political order[9]. Therefore there is need to unmask values underpinning theoretical claims on sovereignty and acknowledge that, 'the state has not always existed as the organizing principle of the international system. It is a product of the treaty of Westphalia. Just as it is socially constructed, it can be deconstructed. It should not be taken as a fact'[10].

Linklater, in critiquing Westphalian conception of sovereignty characterizes it as a 'totalizing project which produced a conception of politics characterized by demands that

[7] K. waltz, *Theory of International Relations*, op cit, p 88
[8] S. J. Searle, *The Construction of Social reality*, (New York: Free Press, 1998)
[9] R. Devetak, 'Critical Theory' in Burchill, S et al (ed) *Theories of International Relations* op cit, pp 155-175: 159-160
[10] Ibid, p 179

sovereignty, territory, nationality and citizenship must be coterminous[11]. Instead, there is a need to move away from these totalizing claims and open up ways of securing freedoms from unacknowledged constraints, relations of dominations, and conditions of distorted communication and understanding that deny humans the capacity to make their future through free will and consciousness[12]. This shift has its goal as a realization of Kantian democratic peace characterized by international order conforming to cosmopolitan justice based on global human community and not political units called states[13].

The sustained attack on sovereignty borne out of reality that some states use it as a shield to perpetrate egregious human rights violations against their own citizens, or they are so weakened such that they cannot provide protection has led to emergence of post-Westphalia order, especially after the end of cold war. States such as Rwanda, Former Yugoslavia, Liberia, Sierra Leone, Somalia and Democratic Republic of Congo have been sites of extreme violations of IHL. Fukuyama explains this shift as a reflection of the inadequacies of Westphalia state. He notes that,

> 'the Westphalia system was built around a deliberate agnosticism over the question of legitimacy. The end of the cold war brought much consensus within the world community over the principles of political legitimacy and human rights than before. Sovereignty and therefore legitimacy could no longer be automatically conferred on the *de facto* power holder in a country....dictators and human rights abuses could no longer hide behind the principle of sovereignty to protect themselves as they commit crimes against humanity'[14].

It is now acknowledged that sovereignty is not only a right but a responsibility towards citizens for in the final analysis, the individual is the only irreducible locus of sovereignty. If the

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[11] A. Linklater 'Rationalism' in Burchill, S et al (eds), *Theories of International Relations*, op cit, pp 103-124
[12] K. Booth, 'Security in anarchy: Utopian realism in Theory and Practice', *International Affairs*, Vol, 67, No 3, 1999, p 539
[13] A. Linklater, 'What is a Good International Citizen' in Keal ,P (ed) *Ethics and Foreign Policy*, 1992 (a), p 36
[14] F. Fukuyama, *State Building: Governance and World order in the 21st Century*,(London: Profile Books Ltd., 2004), p 131

state is unable or unwilling to perform its responsibilities of protecting persons within it, the international community has a right to step in by whatever means appropriate to the particular positions[15]. As a result, post-Westphalia conception of sovereignty tampers absolute claims with obligations outlined in a host of conventions and customary law of nations. It calls for states to acknowledge that certain problems affect them collectively and consequently, their resolution must be attained through global efforts. Such problems include crimes against humanity and genocide.

The post-Westphalia conception of sovereignty has thus challenged the absolute claims of its predecessors. It has treated the state as one among many other equally important actors in international system. It acknowledges that states have relinquished power to other institutions and there exists solidarists global society founded on shared political and moral norms. Importantly, it has argued for treating the individual as the only irreducible locus of sovereignty, for states exists for the individual not the other way round, and should there be a tension between sovereignty and need for protecting individuals, the latter should always prevail[16].

In international law, the debates have revolved around the interpretation of the United Nation Charter, the obligations of states under international law and the subjects of international law. Crawford[17] observes that, 'sovereignty as an organizing concept of international system attracts different interpretations and application within domestic and international law discourses. Traditionally, it meant the whole body of rights and attributes which a state possesses in its territory to the exclusion of all other states, and also in relation with other states[18].

[15] G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All.* Washington: Brookings Institution press, 2008, pp 40-42
[16] R. Shapent ,Solidarism and After: Global Governance International Society and Normative Turn in International Relations ,*Pacifica Review*, Vol 12, No. 2, 2006. Also D.A. Lake 'The New Sovereignty in international Relations' *International Studies Review*, vol 5, No3, 2003, pp 303-323.
[17] J. Crawford, *The Creation of States in International* Law, op cit, p32
[18] R.J. Vincent, *Non Intervention and International Order*, op cit, p14

This is reflected in the United Nations Charter articles 2 (4,7) which give states a legal right to manage their internal affairs free from outside interference and govern their citizens as they deem it right. The principle was further strengthened by the 1970 declaration of principles of sovereign equality of all states. The Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States noted;

> 'all states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community not withstanding difference of an economic, social, political or other nature. In particular sovereign equality include the following elements; (a) states are juridically equal, (b) each state enjoys the rights inherent in full sovereignty, (c) each state has the duty to respect the personality of other states'[19].

The declaration sought to reaffirm the United Nations Charter prohibitions on interfering with internal affairs of the states. Surprisingly, the same view is contained in Protocol II Additional to Geneva Conventions of 1977 article 2 which states,

> 'nothing in this protocol shall be invoked for the purpose of affecting the sovereignty of the state or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the state or to defend the national unity and territorial integrity of the state ...[nor]... as a justification for intervention directly or indirectly for any reason whatever in the armed conflict or in the internal or external affairs of High Contracting Party in the territory which that conflict occur'[20].

This provision is in full conformity with the UN Charter on the inviolability of the national sovereignty and the principle of non-intervention in matters within the jurisdiction of the state.[21]

This restrictive interpretation of sovereignty has been critiqued. Bhoke[22] asks whether state sovereignty should be respected under all circumstances. In response he argues, 'in some cases, state sovereignty is not and should not be a bar to interfere in the domestic affairs of state especially when there are serious violations. If such interference is unacceptable assault on the

[19] Ibid, p 14

[20] Article (2) of Protocol II Additional to Geneva Conventions of 1977

[21] See, J. Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of International Criminal Court'. *The International and Comparative Law Quarterly*, vol 51, No I, Jan, 2002, pp 91-117

[22] C. Bhoke 'The Trial of Charles Taylor: Conflict Prevention, International Law and Impunity Free Africa' ISS Paper No. 127, August,2006, p7

state sovereignty, then how should the international community respond to situation of human rights violations? Should sovereignty be a shield for persons committing atrocious crimes against their people within the state?' Pellet shares the same view and contend that sovereignty properly defined is not a defense of the breaches or gross violations of fundamental human rights. Sovereignty can only be defended as the very criterion of states, by virtue of which entity possesses the totality of international rights and duties recognized by international law as long as it has not limited them in particular terms by concluding a treaty'.[23]

Indeed since 1970's, Forysthe[24] argues that states have agreed on the legitimacy of certain international action to hold states accountable for their policies under these standards. It is now universally accepted for instance that there should be a UN diplomatic review of states' compliance with the international law of human rights. Further, the Security Council has expanded the notion of international security by declaring that human rights violations inside states amount to threats to international peace and security and hence should not be tolerated.

Consequently, there is evidence of states' practice in expressing the need to punish such violations irrespective of where they take place. This is further represented in international humanitarian and human rights conventions some of which have universal application. A view forcefully supported by Fleck in his argument that 'the rules of international humanitarian law are to a great extent peremptory norms [*jus cogens*] which in accordance with article 53 of the Vienna Convention on the Law of Treaties are 'accepted and recognized by international

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[23] A. Pellet, *State, Sovereignty and Protection of Fundamental Human Rights: An International Law Perspective*, Pugwash University Occasional Papers, Vol, Feb 2000.
[24] D. Forsythe 'Human Rights, United Nations and Foreign Policy'. *A Review of Research Activities of the United Nations University*, Vol 15, No 3, 1999, p 14

community of states as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[25]

The *jus cogen* status of IHL creates an obligation on all states to enforce them and to prosecute their violations. Kamen[26] notes that 'every state has an obligation to take whatever national legislative and other steps that are necessary to prevent and punish violations of the rules…this obligations arises from the principle that all treaty and customary law obligation must be fulfilled in good faith. By ratifying a treaty, states essentially bind themselves to be governed by them and give up part of their sovereignty'.

This view was upheld in the *Barcelona Traction Case* where the International Court of Justice ruled that states have obligations towards international community. The court noted that,

> 'an essential dictum should be drawn between the obligations of a state towards the international community as a whole, and those arising from vis-à-vis another state in the field of diplomatic protection. By their very nature the former concerns all states. In view of the importance of the rights, all states can be held to have a legal interest in their protection, they are obligations *erga omnes*. Such obligations derive for example in contemporary international law outlawing acts of aggression and genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination[27].

This obligation *erga omnes* status was further reaffirmed in the international criminal tribunals for the former Yugoslavia and Rwanda. For instance, the statute establishing the tribunal for Rwanda called upon states to cooperate with the ICTR in the investigation and prosecutions of persons accused of committing serious violations of IHL. It noted that, 'states shall comply without undue delay with any request for assistance or an order issued by a trial

[25] D. Fleck, 'Implementing International Humanitarian Law: Problems and Priorities' *International Review of the Red Cross*, op cit, p 14
[26] S.Kamen 'States Entitlement to Take Action to Enforce International Humanitarian Law' *International Review of the Red Cross*, may-June, 1989, p 16
[27] The Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium vs. Spain), Second Phase judgment of 5th February, 1970, 1970, ICJ reports 3, p 32

chamber, including but not limited to; (a) identification and location of persons, (b) taking of testimony and the production of evidence, (c) the service of documents, (d) the arrest and detention of persons, (e) surrender or transfer of the accused to the ICTR'[28].

The ICTY in *Tadic case* on the competence of the tribunal noted,

> 'the crimes which the international tribunal has been called upon to try (crimes against humanity and grave breaches of Geneva Conventions) are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international law and transcending the interests of one state. The trial chamber agrees that in such circumstances, the sovereign rights of states cannot and should not take precedence over the right of international community to act appropriately as they affect the whole mankind and struck the conscious of all the nations of the world. There can therefore be no objections to an international tribunal properly constituted trying these crimes on behalf of the international community'[29].

This was further reaffirmed on the grounds that crimes against humanity are not crimes against individual per se but crimes against the human civilization. This was upheld in *Erdemovic Case* where the chamber ruled that;

> 'crimes against humanity are serious acts of violence which harms human beings by striking what is essential to their life, liberty, physical welfare, health and dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to international community, which must perforce demand their punishment. But crimes against humanity transcend the individual because when the individual comes under attack, humanity comes under attack and is negated. It is therefore the concept of humanity which essentially characterizes crimes against humanity'[30].

These judgments show that there exist states practices which privilege norms of humanitarian law over sovereignty and indeed create obligation *erga omnes*. This is contrary to Judge Casese[31] claims that 'the obligations on states to prosecute serious violations of

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[28] Article 28 of the Statute establishing International criminal Tribunal for Rwanda.
[29] See Prosecutor vs. Tadic, decision on the defence motion on jurisdiction, 10th August 1995, Para 2.
[30] See Prosecutor vs. Erdemovic case No ITY-96-27-T, Para 28. Cited in L.C .Green, *The Contemporary Law of Armed Conflict* (3rd ed) .Manchester: ferns publishing, 2008
[31] A. Casese, 'On current Trends of International Humanitarian Law' in *Edinburgh Journal of International Humanitarian Law*, 9, 1990, p5

international humanitarian law in their national jurisdictions arise from treaties. In the absence of clear states practices and *opinio juris* evidencing such a duty under customary international law, states usually arguably have a permissive right, a jurisdiction but not an obligation to prosecute, in the absence of a treaty provision under the principles of universal jurisdiction and passive personality.

Even if as judge Casese claims, there is no treaty obligation on states to prosecute, international law has expanded the subjects of international law. Traditionally, the state and organizations of states were the only subjects of international law[32]. However, today there is acceptance that individuals and non-state actors are subjects of international law. This view was reaffirmed in the Nuremberg trials when Nazi German officials were held accountable for their actions. This was further reaffirmed in the statute establishing ICTR and ICTY which attributed jurisdiction and individual responsibility for the first time to international instruments (common article 3 and protocol II) that apply specifically to internal armed conflicts[33].

The position of individual responsibility was consolidated by the coming into force of the Rome statute of 1998 which established a permanent International Criminal Court to compliment national mechanisms in prosecution of international crimes related to human rights. The Statute which came into force in 2002, put perpetrators of international crimes individually responsible and liable for punishment. The statute holds that there are no grounds for justifying violations by persons. Article 25 states 'any person who commits a crime within the jurisdiction of the court including war crimes shall be individually held responsible and liable for punishment within this statute[34]. Further, article 27 rejects the claims that actions were committed on official capacity. It

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[32] See L.C Green, *The Contemporary Law of Armed Conflict*, op cit, p66
[33] J. Gavron, 'Amnesties in the Light of Developments in International Law', op cit, p 105.
[34] See Article 25(2) of the Rome Statute, In C.D .Than and E. Shorts '*International Criminal Law and Human Rights*,(London: Sweet and Maxwell, 2003), p6

reads, 'the statute shall apply equally to all persons without any distinction based on official capacity. In particular official capacity of the head of state or government, a member of government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the statute'[35].

Consequently, as Akande argues, 'the general principle that only the state and not the officials may be held responsible for acts done by officials does not apply to acts that amount to international crimes. On the contrary, it is well established that official positions of individuals do not exempt them from individual responsibilities for acts that are crimes under international law'[36]. This is evidenced by the trials of former president of Yugoslavia, the late Slobodan Milosevic, former Liberian president Taylor or the indictment of Sudanese president Omar- al Bashir. By conferring responsibility on the individuals, international humanitarian and human rights laws have further eroded the claims to sovereignty.

Debates on Definition of Non- International Armed Conflicts

The problem of defining non-international armed conflict has plagued the implementation of international humanitarian law.[37] Attempt to legalize IHL and make it applicable to internal armed conflicts begun in earnest in 1946 at the preliminary conference of National Red Cross Societies. In the conference, the parties did not define what constituted armed conflict. They simply stated that, "the convention shall be equally applied by each of the adverse parties unless one of them expressly declares its refusal to conform there to"[38].

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[35] Ibid, p6

[36] D. Akande, International Law, Immunities and the International Criminal Court '*American Journal of International Law*, Vol 98, 2004; p 407

[37] See chapter one, pp.8-9

[38] L. Moir, The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949' *International and Comparative Law Quarterly*, Vol 4 op cit, pp 337-361

During the ICRC conference which followed in 1948 held in Stockholm, the draft documents read, 'in all cases of armed conflicts which are not of an international character especially civil wars, colonial conflicts or wars of religion, which may occur in the territory of one or more of the high contracting parties, the implementing of the principles of the present convention shall be obligatory on each of the adversaries"[39]. This did not define what constitutes non-international armed conflicts.

Consequently, when this definition was tabled during the 1949 diplomatic conference of states, there was a split of the parties into sovereigns and humanitarians. Sovereigns argued that the article was too broad to include almost anyone opposing the state and limiting states ability to even respond to law and order issues such as riots. Even criminals under the provision would have grouped to seek protection under the convention. On the other hand, humanitarians argued that even 'bandits' might actually be disaffected patriots fighting for the independence and dignity sanctioned by international community[40].

The enduring outcome of this lack of consensus is that international humanitarian law does not give a clear legal definition of the term armed conflict. Article 3 common to the four Geneva Conventions of 1949 adopts the definition of non-international armed conflict "as the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties"[41]. While commenting on the definition of armed conflict by the Geneva Conventions, Christopher Greenwood has observed that,

> 'the definitions of international and internal armed conflicts are of considerable importance. Neither term is defined in the Geneva Conventions or other applicable agreements. Whereas there is extensive literature on the definition of "war" in

[39] Ibid, pp 337-361
[40] Ibid, p 341
[41] See Article 3 Common to the Geneva Conventions of 1949

international law, armed conflict has always been considered purely a factual notion and there have been few attempts to define or even describe it[42].

Interpretation of the term, "armed conflict not of international character" is a subject of great debate. One interpretation of the term given in article 3 common to the Geneva Conventions of 1949 refers to a situation of full scale civil war .In this context, non-international armed conflict is a war reaching the threshold of intensity associated with contemporaneous conventional international warfare. This definition recognizes only civil wars, liberation wars and religious wars as the only forms of non-international armed conflicts. It excludes situations such as anarchy, rebellion or plain banditry. According to ICRC, this definition was the minimal measures acceptable to states after great opposition by delegates to the 1949 Geneva Diplomatic Conference who feared that adoption of international rules applicable to non-international armed conflicts would protect individuals at the expense of the equally legitimate protection of state[43].

The other interpretation of the term, "non-international armed conflicts" contained in article 3 common focus on the term," armed conflict". The substitution of the word "war" with the term "armed conflict" in article 3 common to Geneva Conventions adopts a low threshold of hostility of non-international armed conflicts which recognize individuals and organized groups as legal entities in international humanitarian law.

While commenting on the meaning of armed conflict adopted by the 1949 Geneva Diplomatic Conference, ICRC has observed that,

'it remains to ascertain what is meant by armed conflict. The substitution of the much more general expression for the word "war" was deliberate. One may argue almost endlessly about the legal definition of "war". A state can always pretend when it commits a hostile act against another state that it is not making war, but merely engaging in police

[42] Christopher Greenwood, *The Development of International Law by the International Criminal Tribunal for the Former Yugoslavia* .Max Planck Yearbook of United Nations Law 97, 1998, pp 98-134:114
[43] See Geneva Conventions 1949 Diplomatic Conference, Final Record vol. II-B Summary of Records of the Joint. Committee 2nd Meeting 27th April 1949).

action or acting in legitimate self-defense. The expression "armed conflict" makes such argument less easy[44].

The substitution of the word "war "with the term "armed conflict" makes article 3 be considered as a revolution in international humanitarian law for making a provision for the first time for automatic application of the laws of war in internal armed conflicts regardless of recognition of belligerency by states.

The 1949 Geneva Diplomatic Conference *travaux preparatoires* shows that the conference generally accepted that for article 3 common to be applicable in a situation within a state territory, the threshold of hostility should be very low, unequivocal, involves the government armed forces and organized armed groups[45]. This low level threshold of armed conflicts in article 3 Common encompasses protection of human beings in internal and international armed conflicts against their own state and international community[46]. Thus application of common article 3 is not limited to inter-states relationship but is impervious to frontiers in the service of humanity.

The lack of clear definition of non-international armed conflicts was further complicated in Protocol II Additional to Geneva Conventions of 1977. Article 1 of this protocol describes non- international armed conflict as a case of armed conflict that," take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups which come under responsible command and exercise such control over a part of its territory to enable them to carry out a sustained and concerted military operations"[47]. Originally

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[4] See ICRC Commentary to the Geneva Convention I of 1949

[5] See ICRC Travaux preparatoires of the Geneva conference between 1945-1949

[5] S.R. Ratner, and S.J.Abrahams, 'Accountability for Human Rights Atrocities in International Law,' op cit, pp 1-8

[7] See Article 1 of Additional Protocol II of 1977

the intentions of Additional Protocol II were to develop the rules of article 3 common to Geneva Conventions.

From this definition, Additional Protocol II sets a very high threshold for internal armed conflicts. The definition was accepted after several criteria for definition of internal armed conflicts were proposed and rejected by the 1974 Geneva Diplomatic Conference Delegates. Even after a sub-committee to deal with the definition of what was meant by internal armed conflict was established and despite of 11 weeks of debate, there was no consensus on definition and scope of non-international armed conflicts[48].

John Redre, the Head of British Delegation to the conference while commenting on the definition of internal armed conflicts adopted in Additional Protocol II observed that,

> 'the underlying difficult was that of striking the right balance of the scope and content. If the level of application was set so high that only the classical civil war was covered, Additional Protocol II would be useless; if it was set so low that it covered police action against sporadic criminal terrorist acts, it was unlikely to be accepted by states'[49].

The debate on the interpretation of non-international armed conflicts is further reflected in the Rome Statutes of International Criminal Court of 2002. Article 8 of Rome Statutes defines non-international armed conflicts as conflict "not of an international character"[50]. The conceptualization of non-international armed conflicts by the Rome Statute of International Criminal Court reflected an attempt to balance the differing views. It accommodates classic definition of armed conflicts between states and civil wars as well as armed conflicts between states and non- state actors and non state actors among themselves. This compromise definition of non-international armed conflicts is the basis of the double thronged decentralized and

[48] ICRC, Travaux preparatoires of the Geneva conference between 1945-1949 ,Op cit p 11,
[49] See Official Records Vol. VIII, CDDH/1/SR.24 p236
[50] See Article 8(2) of the Rome Statute of International Criminal Court.

centralized systems of implementing- international humanitarian law of non-international armed conflicts which use special tribunals and International criminal Court.

A more operational definition has been attempted by the Criminal Tribunal of the Former Yugoslavia. According to the Appeal Chamber in *Tadic case,*

> 'an armed conflict exists whenever there is a resort to armed force between states or protracted violence between government authorities and organized armed groups or between such groups within a state[51].

Commenting on the definition of armed conflict by the Appeal Chamber, Suomimen has stated that,

> 'the definition of armed conflict given by the International Tribunal of Yugoslavia Appeal Chamber not only caters explicitly for conflict between non-state entities but also sets a low threshold for application of international humanitarian law. This definition covers the classic armed conflict between two or more states, civil war between a state on the one hand and a non-state entity on the other hand and a third situation of armed conflict in which no government party is involved because two or more non state entities are fighting each other[52]

However the definition did not establish under what threshold the term applies. In addition, it has not been accepted as the benchmark. During the prosecutor vs. *Rutaganda Case* in the trial Chamber of the International Tribunal for Rwanda, the court ruled that, 'the ICTY definition was abstract and whether or not a situation can be discussed as 'armed conflict' meeting the criteria of Common Article 3 is to be decided upon case by case basis'[53].

From these debates, it is clear that the definition of non-international armed conflicts is yet to be settled. However, this has been an advantage. No definition be it either general or enumerative can be precise enough to cover all possible manifestations of a particular concept.

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[51] T. Meron "The Humanization of Humanitarian Law", New York: *American Journal of International Law, 94* ,2000 ,pp 239-260: 260

[52] Prosecutor Vs Tadic, op cit para. 8

[53] ICRC 'Commentary on International Humanitarian Law and the challenges of contemporary armed conflicts', in *International Review of the Red Cross,* Vol 89, No 867, September, 2007, p 743

Furthermore, an overly strict definition might in fact result to consequences far removed from the intention of the framers, the text becoming more restrictive than complete definition it tries to define[54]. This view is shared by ICRC which in a commentary has observed that, in certain cases it is unclear whether a group resorting to violence can be considered a 'party to the conflict' within the meaning of Common Article 3. Apart from the level of violence involved, the nature of the non-governmental group must also be taken into account when a situation is qualified in legal terms. Where the internal structure of the group is loose or where clandestine chain of command is at play, the question that arises is whether the group is sufficiently organized to be characterized as a party to an armed conflict. Such determinants must be made upon case by-case basis. Only when the level of violence and the parties involved meet the requirements for a non-international armed conflict do the relevant rules apply[55].

Debate on Recognition of Belligerency and Belligerent(s) in IHL of Non-International Armed Conflicts

Another central debate in the implementation of international humanitarian law concerns the impact of implementation of this law on belligerents' status. Recognition of belligerency and belligerents was the first attempt to develop some international rules applying to non-international armed conflicts then known as civil wars[56]. Recognition of belligerency and belligerents could be made by either a third party state or the government of the concerned state and aimed at alleviating suffering of internal armed conflict victims. The doctrine of recognition of belligerency and belligerents aimed at putting insurgents in par with a party to an international armed conflict so that they can be bound by the same regime of rights and duties as any other party to an international armed conflict.

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[54] Ibid, P 345

[55] Prosecutor vs Rutabaganda para 5 , Judgment delivered vs. the trial chamber of ICTR. op cit

[56] M. Sassoli and A. A. Bouver , *How Does Law Protect in War*, op cit, pp 214-215

The principle of equality of belligerents is crucial in making the rules of humanitarian law be respected. According to Abi-Saab, recognition of belligerency in non-international armed conflicts is extended *ipso jure* in the application of *Jus in Bello* in the relations between belligerents[57]. In this perspective, international humanitarian law of non-international armed conflicts confer legal personality to governments, government agents, non-governmental forces and individuals in the principle of equality of belligerent in order to make the law be respected by all.

The principle of equality of belligerents promotes equality of all conflict parties before the law and subjects them to the same rights and duties. This recognition gives mandatory and automatic legal status to the rebel and bestows duties and responsibilities to the belligerents but does not give parties international legal recognition.

However, the doctrine of recognition of belligerency and belligerents is rejected by sovereigns on the ground that the principle undermines the sovereignty and independence of state. Sassoli and Bauvier who are opposed to the doctrine of recognition of belligerents argue that recognition of belligerents does not arise in non-international armed conflicts since international law does not allow anyone to participate in hostilities[58]. Indeed the law of non-international armed conflicts does not use the term combatant and therefore does not foresee combatant status.

Further, Additional Protocol II make the debate on the principle of equality of belligerents remains contentious. This is because, though the protocol is clear that creating of obligations on both parties does not affect the legal status, in practice it does. Indeed, recognition

[57] G. Abi Saab , G.Abi Saab , "The Specifities of Humanitarian Law" , in Christophe Swinarski(ed.), Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet(Geneva/The Hague: ICRC/Nijhoff, 1984), p 365

[58] M.M. Sassoli & S, Bouver, *How Does Law Protect*, Op cit , pp 214-215

impacts on the central tenet of state, that of being its authority over its constituents. Furthermore, some of the obligations such as prohibition of passing a sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples eats into the domain of states which reserves the rights to administer criminal justice[59]. This is because, for a non-state actor to meet the above criteria, it has to act like a state through instituting a court system and in effect, that means states are obliged to relinquish fundamental components of its sovereignty dispensation of criminal justice to an enemy proven within.

The way out of this situation is a middle way elaborated by the special court for Sierra Leone which resorted to common customary law which is distinct from the customary status of the Common Article 3. The court noted that;

> 'there is no doubt that (common article 3) is binding on states and insurgents alike and that insurgent are subject to international humanitarian law... .[a] convincing theory is that [insurgents] are bound on a matter of customary international law to observe the obligations declared by (common article 3) which is aimed at protection of humanity"[60].

This middle way eliminates the concern with the legal status of the party as per common article 3 and at the same time places obligations on the grounds of customary international law.

The Debate on Amnesty versus Retributive Justice

The debate between amnesty and retributive justice reflects the dilemma faced by post conflict societies. Usually, peace agreements establish the mechanisms for dealing with atrocities committed in the past and at the same time bring reconciliation. The two concerns presents a dilemma, for at times, protagonists demands to be guaranteed immunity from future prosecutions on their acts during the conflict as a precondition for signing peace agreements.

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[59] ICRC, *Commentary on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, op cit, p 744

[60] Kallon Kamara, Decision on the Challenges to Jurisdiction: Lome Accord on Amnesty, op cit, Para 45,47

This dilemma has elicited both political and legal arguments supporting either punishing offenders or giving amnesty. A case has been made for amnesty. It argues that amnesty is a pragmatic response to the need to create and make peace sustainable and is an incentive to make protagonists to commit themselves to the peace process. Further, it is critical for it encourages truth telling by guaranteeing partial or blanket amnesty in exchange of the full disclosure of past wrongs. In addition, without amnesty there is a risk of exposing the courts and the entire fabric of justice to political propaganda, polarizing and undermining the credibility and independence of justice institutions and importantly, ongoing judicial investigations and prosecutions leave psychological and emotional war wounds wide open, making reconciliation impossible and diverting attention away from development[61].

Pankhurst advances other benefits of amnesty. He makes a long argument that,

> 'in post-conflict situation, the question of how to see that justice is done is itself usually a matter of political negotiation and compromise as almost by definition, different sides have different conceptions of what would constitute a just outcome, even if they share an understanding of just principles. During conflicts, it is common for both parties to conceive themselves as fighting for justice. The challenge in peace settlement is often to find a conception and structures to ensure a minimal of justice which is acceptable to all key players". Usually, such justice is only achievable through a process which ends in amnesties. This is because under post-conflict situation it is difficult to avoid prosecution being seen as vengeance, even if full prosecution of all parties is attempted……..the stake become high in criminal prosecution; a process which is set up to mete justice but which ends up being seen in that way, is often regarded as having made the situation worse'[62].

Thus, though justice is necessary to move forward, it is a part of wider goal toward sustainable peace. Sustainable peace demands inclusion and support of all actors. This in most cases entails a trade-off between justice and peace for some protagonist threaten instability should they be prosecuted or demand immunity as a part of the peace deal. The predicament is summarized by Best who notes that 'the exposure of crimes without prospects of conventional

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[61] A. Penman, 'The peace -Justice Dilemma and Amnesty in peace Agreements' in *Conflict Trends, Issue* 3, op cit
[62] D. Pankhurst, '*Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualizing Reconciliation, Justice and Peace*', *Third World Quarterly*, Vol 20, No.1, February, 1999, pp 239-256:24

punishment is hoped to be less likely to breed intractable resentments and more likely even to encourage repentance. The repentance by wrongdoers is important for it encourages reconciliation and helps relieve a sense of grievance by the wronged parties[63]. Reconciliation is important as an end goal for to paraphrase Damato[64], 'what will remain for justice in the event that demands for justice help dissolve the state which alone can sustain it"?

On the other hand, supporters for justice argue that amnesty is a failure to bring to justice the perpetrators of human rights violations and as such, itself constitutes a denial of victims' right to justice. Further, there is need to first address and resolve the past for in the absence of justice, further impunity is possible by the same offenders especially if they are still in power. Importantly, by holding violators to account, deterrence of would be future violators is achieved. This is through exposing the strength of the rule of law and institutionalizing justice, an act which sends a clear message that human rights violation will not be tolerated and no one is above the law[65].

Pursuing justice is also significant in the sense that it can increase the chances for peace in the longer term through reassuring those 'innocent' of crimes who could seek vengeance in the absence of justice and to exclude from positions of power, if not from society the 'guilty' who might have their reasons for prolonging or renewing the conflict. The benefits for justice are aptly captured by Evans who argues that,

> 'justice serve too many public policy goals to ever be lightly traded away: these are retribution(helping channel revenge through institutional rather than freelance channel) incapacitation(physically removing from the scene potential post-conflict spoilers), rehabilitation(giving some hope to offenders that they will have a post- justice future); truth – telling (focusing on reality, stripping away myths and minimizing the prospects for repetition); delegitimization (through exposing and discrediting); institutionalization

[63] G. Best, International relations and Human Rights, in *International Affairs*, Vol 71, No 4, 1995, pp 775-799:797
[64] A. D'Amato, Peace Vs Accountability in Bosnia, in *American Journal of International Law*, 88:3, 194, pp 500-506
[65] A.Pennan, The Peace-Justice Dilemma in Peace Agreements' op cit

of human rights norms and deterrence (the power of example to prevent future misbehavior by others). All these benefits – and most of all deterrence- are significant over the long term[66].

The debate has spilled over into the legal discourses related to whether to punish gross humanitarian and human rights law violators or grant them amnesty. Indeed, the Additional Protocol II envisages amnesty. Article 6 (5) states that, 'at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict or those deprived of their liberty for reasons related to armed conflict whether they are interred or detained'[67]. Further, elaborating on the article, ICRC commentary argues that amnesty is a matter of competence of the authorities and the object of this sub-paragraph is to encourage gesture of reconciliation which can contribute to re-establishment of normal relations in the eyes of a nation which has been divided[68].

In line with the Additional Protocol II, the state practice has mainly resorted to amnesty often in conjunction with truth commissions as a way of addressing the atrocities committed during internal conflicts or by oppressive regimes. Amnesties have been given in South Africa, Chile, Argentina and in other countries dealing with past injustices. The resort to amnesty has been defended on the grounds that it is within the competence of states to decide how to deal with the past. As Casese argues, in absence of clear state practice and *opinio juris* evidencing a duty to prosecute under customary international law, states arguably have permissive right, a jurisdiction but not an obligation to prosecute[69].

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[66] G. Evans, the responsibility to Protect: Ending Mass Atrocity Crimes Once and for All, op cit, p 119
[67] D. Pankhurst, Issues of Justice and reconciliation in Complex political Emergencies, op cit, p 242.
[68] Article 6(5) of the Additional Protocol II to the Geneva Conventions of 1949
[69] A. Cassese, On Current Trends in International Humanitarian Law, op cit, p5

The issue of amnesties has been challenged. Danner, characterizes amnesties as application of double standards in application of criminal law and points out that it risks undermining public confidence in the judicial institutions. He states,

> 'one of the fundamental element of any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice. The experience of many domestic jurisdictions over the years has been that.....public confidence maybe eroded if these institutions give an appearance of injustice by permitting substantial inconsistencies in the punishment of different offenders, when the circumstances of the different offences and of the offenders being punished are similar, that the punishment imposed for injustice would be expected to be generally similar. Essentially, Rawlsian principle that like cases should be treated alike is a fundamental element of criminal justice. Thus, if acts committed are punishable by law, they should be punished[70].

The issue of amnesty has been tackled in length by the Inter-American Court of Human Rights. This has been in response to amnesties given to violators in various countries in Latin America, where truth Commissions originated. In *Vaelsquez Rodriguez Case*, the court ruled that,

> 'if state apparatus acts in such a way that violators go unpunished and the victims full enjoyment of such right is not restored as soon as possible, the state has failed to comply with its duty to guarantee this free and full exercise of those rights to the persons within its jurisdiction[71].

In *Hugo vs. Uruguay Commission Case* where the issue of state granting amnesty was raised, the court reiterated its position arguing that, 'gross violations of human rights are incompatible with the obligations of a state to prosecute. It further observed that, 'in adopting this law [amnesty]

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[70] M. Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing, '*Virginia Law Review*, Vol 82, No.3, May,2001, pp 415-501:441

[71] Vaelasquez Rodriguez vs Uruguay.comm No 322/1988 views of July 1994,UNDOC/ICCRR/C/51/D/1323/1988 (1994)

the state party [Uruguay] has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further gross human rights violations'[72].

The debate on amnesty versus punishment has been compounded by the Rome Statute which established the International Criminal Court. The statute did not resolve the status of amnesty vis-à-vis punishing of gross violators of international humanitarian and human rights law. Though the preamble is very clear that most crimes of concern to international community as a whole must not go unpunished and that it is determined to put an end to impunity for the perpetrators of these crimes'[73], some later articles dilutes this content and opens up avenues for amnesty, especially if one factors in that ICC only commences prosecution if the concerned state is unable to or unwilling to genuinely carry out the investigation or prosecution[74]. Essentially ICC compliments national prosecution as a court of last resort.

Two articles are important to elucidate on Rome statute lack of clarity on amnesty. Article 17(1) (a) declares a case inadmissible where the case is being prosecuted or investigated by a state which has jurisdiction over it, unless the state is unwilling or unable to carry out investigation or prosecution or where 'the case has been investigated by a state which has jurisdiction over and the state decided not to prosecute the persons, unless the decision resulted from unwillingness or inability of the state to genuinely prosecute. A liberal interpretation of the clause would include amnesties on the argument that a state which retains the primary competence to prosecute decides upon investigations that it is not in the interests of justice to prosecute and opt for other forms of justice instead of retribution. This position is supported by Dukic's argument that, 'it appears plausible to contend that under certain circumstances,

[72] Vaelasquez Rodriguez vs Uruagay.comm No 322/1988 views of July 1994,UNDOC/ICCRR/C/51/D/1323/1988 (1994)
[73] Preamble of the Rome Statute of International Criminal Court Para 4-5
[74]Rome Statute of International Criminal Court Article 17(1) (a)

[providing of] amnesties in combination with truth telling could lead to the inadmissibility of a case before the ICC'[75].

Further, article 53 allows the prosecutor not to commence with the case in the 'interest of justice', that is, if upon investigation, the prosecutor concludes that there is not sufficient basis for prosecution. Article 53 (1) (c), 2(2) elaborates the 'interests of justice' by requiring the prosecutor to stop proceedings if they would not serve the purpose of justice. Commenting on the article, Dukic argues that, 'though the exact contours remains ambiguous, it is clear that article 53 intends to formulate some circumstances in which the initiation of an investigation or a prosecution will be ill-advised[76]. An example is when attempts to prosecute leads to unraveling of peace agreements.

Indeed, it is on these grounds that, article 16 of the statute empowers the UN Security Council to stop prosecutions. It states that, 'no investigation or prosecution maybe commenced or proceeded with under this statute for a period of 12 months after Security Council in a resolution adopted under Chapter VII of the Charter of United Nations, has requested the court to that effect.[77]' Read against the background of Chapter VII of the Charter which is concerned with preservation of international peace and security[78], it is arguable that, if demands for peace (order) conflicts with quest for justice, the former should prevail. This way, truth commission generated amnesties or other traditional amnesties are admissible as mechanisms aimed at enhancing sustainable peace and hence are superior to criminal prosecution.

This debate brings out the dilemma between the values of amnesty and punishments. They exist in irresolvable tension and there is no convincing argument against adopting any.

[75] D. Dukic, Transitional Justice and the International Criminal Court- in the Interest of Justice? *International Review of the Red Cross*, Vol 89, No. 867, September, 2007, pp 691-718: 695
[76] Ibid, p,700
[77] Article 16, Rome Statute of International Criminal Court
[78] Chapter VII, United Nations Charter

Both have benefits and risks. As judge Mahmood when delivering judgment on the legal status of South African Truth and Reconciliation Commission noted,

> 'the result at all levels is difficult, sensitive, perhaps even agonizing, a balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future[79].

Too much amnesty can seem like impunity which itself can be a trigger to further violence, and too much prosecution can defeat the purpose of justice leading to further violence. As such amnesty versus punishment is a case of between the devil and the deep blue sea. It raises moral legal and political arguments. As such it should be left within the competence of the state and constituencies within it to decide which way offer minimal risks.

The debates brought so far on international humanitarian law reflect the tension between legal and political competences of the domestic and international spheres. Much of what passes of as international essentially have domestic sources and the 'domestic sphere' tries to assert its competencies in dealing with it. The domestic – international system rivalry is akin to sibling rivalry, each attempting to assert its authority over the other. As the sovereigns assert that the state has original jurisdictions over what takes place in its territory, the post-sovereigns argue that sovereignty is not only a right but also a responsibility and individuals have unmediated obligations under international law.

Currently, despite the sustained challenge by the sovereigns, there is ample evidence that the debate is in favour of post-sovereigns. As such the 'international' is winning over the 'domestic' and there is commitment to punish the violators of IHL, although in practice there is continued challenge and tensions over the preferred value system. The next section reviews aspects of international humanitarian law applicable to internal conflicts. The review adopts the

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[79] S.Spitz et al, 'Memory and Specter of International Justice: A Commentary on Azapo' in South African Journal of Human Rights,13,1997, pp,269, 273

post-sovereign position of low conflict threshold, rights and obligations on the basis of individuals unmediated by the state.

Aspects of International Humanitarian Law Related to Non-International Armed Conflicts

Traditionally, international humanitarian law was applicable to international conflicts. This meant for an armed conflict to warrant regulation by international law of armed conflicts, it required a contention between states through the medium of their armed forces, come under regular command, wear uniforms or such other identifiable marks to make them recognizable at a distance, and conduct their hostilities in accordance with the international rules of armed conflicts[80]. This view was reflective of the dominant view that states as sovereign entities had absolute jurisdiction in what was happening within their territorial jurisdiction. This way, internal uprisings and conflicts were viewed as matters of domestic security and non-state-actors threatening the state viewed as mere criminals unworthy of any legal protection[81]. Further, they were the only units of the international system worth attention. Ultimately classical international law had states as its only subjects and the rest were objects of international law[82].

The strict dichotomization of domestic and international jurisdictions started to diminish during the second world war when the horrors of crimes committed and wanton destruction of lives and properties brought to the fore the issue of human rights and the need to respect them. Indeed, the aftermath of the war can be characterised as the golden era of human rights. They were codified in the United Nations Charter and other conventions such as International Convention on Civil and Political Rights (1948), Convention Against Genocide (1948) and

[80] L .Moir, The *Law of Internal Armed Conflict*. (Cambridge: Cambridge university press, 2002), p2
[81] Ibid, p2
[82] N. Schrijver, 'The Changing Nature of Sovereignty' in *British year Book of International Law*, vol 70, 2000, pp 67-73

Convention Against Torture. The human rights based approach made it possible to create mechanisms for regulating non-international armed conflicts.

Several dynamics have informed the need to regulate internal armed conflicts. First, despite their domestic character, they impact on international peace and security. They can spill over into neighbouring countries which may also be subjected to influx of refugees and other forms of internationalization[83]. Secondly, after the Nuremberg and Tokyo trials, it now became established that international law was no longer concerned only with states and their mutual relations. Individuals too became subjects of international law with a host of rights and responsibilities[84]. This meant that they could derive humanitarian protection from international law and they could be held accountable for its violations in situations of armed conflicts. Third, there was a consensus that armed conflicts impacted negatively on individuals irrespective of whether it is international or non-international. A view held by Garvon in his argument that if the greatest value is placed on life and integrity of person or property, the dichotomy between protection thereof in one type of conflict and not in another is hard to justify[85].

The main source of rules regulating internal conflicts are Article 3 common to the four Geneva Conventions of 1949, Additional Protocol II of 1977, the rulings by various tribunals constituted to try violators of IHL and international human rights law and the Rome Statute establishing the International Criminal Court of 1998. These sources are discussed below.

[83] For a discussion of internationalization of conflict see M. Mwagiru, *Conflict in Africa: Theory, Institutions and Processes of Management*,(Nairobi: CCR, 2006), pp61-68
[84] See G. Best 'International Relations and Human Rights' *International Affairs*, Vol 71, No 4, 1995, pp 775-799
[85] J. Garvon, Amnesties in the Light of Development of International Law and the Establishment of the International Criminal Court' *The International and Comparative Law Quarterly* Vol 51, No 1, Jan 2002, pp 91-97

Article 3 Common to Geneva Conventions

Pictet[86] characterizes the Common Article 3 as a self contained code or mini-convention of civil conflicts. The common article 3 states that, in case of armed conflict not of an international character occurring in the territory of the high contracting parties, each party to the conflict shall be bound to apply as minimum, the following provisions,

1. Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely without any adverse distinction founded of race, colour, religion or faith, sex, birth or wealth or any other similar criticism. To this end, the following acts are and shall remain prohibited at any time and in place whatsoever with respect to the above mentioned persons.
    a) Violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
    b) Taking of hostages
    c) Outrages upon personal dignity in particular humiliating and degrading treatment;
    d) The passing of sentence and the carrying out of executions without previous judgements by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilised peoples.
2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross may offer its services to the parties to the conflict.
3. The parties to the conflict shall further endeavour to bring into force, by means of special agreements, all or part of the provision of the present convention.
4. The application of the preceding provisions shall not affect the legal status of the parties to the conflict[87].

The common article 3 remained the main set of rules regulating internal armed conflicts until the development of Protocol II Additional to Geneva Convention of 1977. The common article 3 served an important purpose for it collapsed the boundary between international and non-international armed conflicts, state and non-state actors by making obligations binding not only to high contracting parties but, 'to each party to the conflict'. Since then, the view that the

[86] J. Pictet, *Commentary of the First Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in the Armed Forces in the Field*,(Geneva: ICRC 1952), pp 41-49
[87] Article 3(1-2) Common to Geneva Conventions of 1949

dichotomy between international and non-international armed conflicts, state and non-state actors does not apply in case of common article 3 has been upheld in several rulings. The International Court of Justice in *Nicaragua Case* ruled that, 'the rules contained in common article 3 are considered as customary and represent a minimum standard from which the belligerents should never depart,......common article 3 covers organized groups against each other [and] that no control of territory is necessary for article 3 to apply'[88].

This position was reinforced in *Tadic Case* when the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) observed,

> 'why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as, proscribe weapons causing unnecessary sufferings when two sovereign states are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a single state? If international laws, while of course duly safeguarding the legitimate interests of states, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight[89].

This position was reaffirmed in *Kallon Kamara Case* when the special court for Sierra Leone ruled, 'there is no doubt that the common article 3 is binding on state and insurgents alike, and that insurgents are subject to international humanitarian law[90].

The legal status conferred to common article 3 means that it has become peremptory norm and it creates obligation *Erga Omnes* as defined during *Barcelona Traction Case*. The outcome is that [the rights and duties established have] devolved upon both the government and the rebels, neither of whom have any excuse for failing to abide by them. Common article 3 can

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[88] See the *Nicaraguan Case* , 0p cit pp41-49

[89] Prosecutor v Tadic ,Appeal on Jurisdiction case IT-941 – AR72, October 2nd, 1995, op cit

[90] Kallon Kamara: Decision on the Challenge to jurisdiction: Lome Accord Amnesty, SCSL-04-15-PT-060. 13th of March, 2005 paras 45, 47, http://www.un.org/ICTR/Judgement.htm

thus be seen to be legally binding on all parties to an internal armed conflict'[91]. The article has been reinforced by Additional Protocol II of 1977.

The Additional Protocol II of 1977

Additional protocol II was negotiated during the 1974-77 diplomatic conference. It had its goal as: one, developing existing humanitarian law of internal armed conflicts, shoring up any gaps, especially with conduct to hostilities and methods and means of combat; two, clarifying the ambit of international humanitarian law with regard to internal armed conflict, especially the questions of the threshold and ceiling, and thirdly, to safeguard what common article 3 had already achieved by providing that it would retain its own autonomous existence. The protocol marked the first initiative to regulate non-international armed conflicts through a specific treaty[92].

The Additional protocol II did not seek to replace common article 3. This is captured in paragraph one which states,

> 'this protocol develops and supplements article 3 common to the Geneva convention of 1st August, 1949 without modifying its existing condition of application, shall apply to all armed conflicts which are not covered in the article 1 of the protocol 1 additional to Geneva conventions......which takes place in the territory of the high contracting party between its armed forces and dissident armed forces and other organized groups which come under responsible command, exercise such control over a part of its territory so as to enable them to carry out sustained and concerted military operations and to implement the protocol[93].

The major shortcoming of the protocol was its restrictive definition of non-international armed conflicts by insisting that they must involve the armed forces of the government and the opposing group must be organized in a way that it is capable of implementing the duties set

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[91] L. Moir, *Law of Internal Armed Conflict*, op cit, pp 52-57
[92] See ICRC, *Understanding Humanitarian Law: Basic Rules of the Geneva Convention and their Additional Protocols*. Geneva, 1983,
[93] M. Sassoli, and A.A Bouvier, *How Does Law Protect in War: Cases, Documents and Teaching Materials in International Humanitarian Law*, (Geneva :ICRC, 1999), p 541

under the protocol[94]. This left out many instances such as riots, isolated or sporadic acts of violence and other activities by groups which though not exercising territorial control falls within the ambit of IHL. However the situation is saved by the facts that the additional protocol II supplements rather than supplant common article 3, which is more liberal in assigning of rights and duties to groups involved in internal conflicts by clearly stating that it implies in all times and in all place[95].

The protocol sets out detailed protection of civilians and civilians interests in various articles, in addition to the protections contained in common article 3. It prohibits starvation of civilians as a method of combat, protecting objects indispensable to their survival, attacks on cultural or historical objects and places of worship and forced movement of civilian unless strictly required by military reasons or else for their own security. In any case, they should not be compelled to leave their own territory for reasons connected with the conflict. Importantly, the preamble of the additional protocol II reaffirms the customary international law norm of *Martens Clause* which states that, 'in situations not covered by treaty rules, both combatants and civilians remain under protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience[96].

The Addition Protocol II was important in the sense that it entwined humanitarian and some aspects of international human rights law. For instance part II on humane treatment, article 4(1) states that all those who do not take part in hostilities or else have ceased to do so, and whether or not their liberty has been restricted are entitled to respect for their person, honour and

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[94] Ibid ,p540

[95] F. Krill, The Protection of women in International Humanitarian law' *International Review of Red Cross*, Nov – December 1985, p7

[96] M. Sassoli and A.A Bouvier, *How Does Law Protect in war*, op cit, p 541

convictions and religious practices. Further, article 4 prohibits at anytime and anywhere outrages upon personal dignity in particular humiliating and degrading treatment, rape, enforced prostitution any form of indecent assault and pillage.[97]

This emphasis on some aspects of human rights law is because not all human rights are applicable in situation of armed conflict. This view was clarified by the International Court of Justice in the *Palestinian Case*, which confirmed the concurrent applicability of human rights law and IHL to armed conflicts in the following manner;

> "as regards the relationship between international humanitarian law and human rights law, there are thus three possible solutions. Some rights may be exclusively matters of human rights law; yet others may be matters of both these branches of international law"[98].

The judgement was a reflection of the fact that human rights and humanitarian laws have different philosophical basis. IHL is based on the acknowledgement that there are risks incidental in warfare and hence there is need for a balance between the military and humanitarian necessities. For instance, it safeguards the lives of civilians and *hors de combat* but not active combatants and its insistence on principle of proportionality is an acknowledgement that in pursuit of military objective(s), some actions which violate human rights may be necessary[99]. Further, IHL is based on the point of view of a series of duties that the combatants have to obey and allows for no derogation.

This can be contrasted with the human rights law whose origin is traceable to the philosophical thoughts of enlightenment philosophers such as John Locke, Jean Jacque Rousseau, and Thomas Paine. They developed as means of checking the exercise of state power

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[97] See for instance article four of the Additional Protocol II of 1977.
[98] Cited in G.D. Beck 'The Right to Life in Armed Conflict: Does International Law Provide all the Answers? *International Review of the Red Cross*, volume 88, Number 864, December, 2006, pp 881-904:899
[99] See L. Beck and S. Rite, ' International Humanitarian law and Human Rights Law' *International Review of the Red Cross*, 1993, No. 293, pp 94-119

and as a justification for making legitimate demands on the state intervention to ensure rights are respected. Further, some aspects of human rights laws can be derogated from, unlike in IHL. Indeed, only the hardcore human rights such as prohibition of slavery, retroactive criminal legislation or punishment among others are non-derogable[100].

However, from the UN resolution XXIII passed during Tehran Conference of 1966 which laid the ground for the diplomatic conference on additional protocols, there was a consensus on the need to integrate both IHL and human rights law. The resolution *inter alia* called for 'the need for additional international humanitarian convention or for possible revisions of existing conventions to ensure better protection of civilians, prisoners and combatants in armed conflict[101]. Since then and as indicated in the additional protocol II, the dichotomy between IHL and some aspects of human rights have become untenable. A view captured by Beck insistence that,

> 'the greater awareness of the relevance of humanitarian law for the protection of people in armed conflicts coupled with increasing use of human rights law in international affairs means that both these areas of law now have much greater international profile and are regularly used together"[102].

Nowhere is this ascertained more than in the Rome statute establishing a permanent International Criminal Court, a landmark action which firmly established that international humanitarian and human rights laws violations must never go unpunished[103].Since then, several cases have been instituted against violators. Currently, individuals accused of these violations in D R Congo, Former Yugoslavia, Liberia and Sierra Leone are undergoing trials in The Hague.[104]

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[100] Ibid

[101] ICRC, *Understanding Humanitarian Law: Basic Rules of Geneva Convention and their Additional Protocol*, op cit, p 539

[102] L.D Beck and S. Rite, The Right o Life In Armed Conflict: Does International Law Provide all the Answers, op cit, 94

[103] The preamble of the statute establishing International Criminal Court

[104] The list of ICC trials is available at http://www.icc-cpi.int/

Rome Statute and Establishment of ICC

The cold war politics and the nationalistic defence of sovereignty characterized by the period between the Nuremberg trials to 1990s marked the lowest ebb as far as observance of IHL and IHRL is concerned. During this period, most countries especially those caught in between cold war rivalry experienced massive violations of these laws. Millions of people died in Vietnam, Cambodia, Afghanistan, Iraq, Iran, Mozambique, and Angola, Ethiopia and Somalia, to name but a few cases. Yet there was no concerted effort to address the violations. The reality has made Best observe that, 'since Nuremberg and Tokyo trials after the Second world War and from when Geneva Conventions were made, the other tribunals happened in 1990's. This shows that there has been a state practice to de-internationalize the enforcement of humanitarian law. No state is willing to prosecute, unless it can do it in perfect political safety'[105].

The de-internationalization process suffered a shock reversal after the violent breakaway of Yugoslavia. Events in locations such as Srebrenica where an estimated 8,000 Muslim men and boys were brutally slaughtered by Serb forces, Bihac where a UN safe haven for refugees was overrun by General Mladic Serb forces and Rwanda where genocide left an estimated 800,000 dead shocked the world conscience[106]. This awakened the commitment to punish persons responsible for such atrocious acts.

Importantly, it led to establishment of international criminal tribunals to bring to justice the perpetrators, co-perpetrators and abettors to these crimes[107]. Apart from the justice role played by the tribunals, they have made landmark rulings and extended the applicability of IHL

[105] G. Best, International Relations and Human Rights, op cit, 778
[106] On these conflicts, see S. Power, America in the Age of Genocide. Washington: Brookings instituition,1999
[107] The Categories are Elaborated in C. Than and E. Shorts, *International Criminal Law and Human Rights* .London: Sweat and Maxwell, 2003, pp 7-8

into the domain of state sovereignty bringing the concerns for humanitarian and human rights violations more firmly into the sphere of the international community and out of the exclusive jurisdiction of the state. It is against this background that the international criminal court was established with jurisdiction on IHL and IHRL violations.

War Crimes under the Rome Statute and their Expansion by ICTR and Special Court for Sierra Leone

War crimes are defined as grave or serious violation of the rules or customs of war or what is currently called IHL for which individuals can be held individually responsible[108]. The cardinal principles of IHL were clearly delineated in the *Nuclear Weapons Case* where ICJ ruled on the imperative to have protection of civilian population and civilian objects; and distinction between combatants and non-combatants[109]. These are further reinforced by the *Marten's Clause*.

War crimes are elaborated by the Rome statute. The statute defines war crimes as grave breaches of general conventions and additional protocols and other serious violations of laws and customs applicable in armed conflict'[110]. However, it is worth noting that in practice the definition is not limited and is interpreted in a manner which blurs the distinction between war crimes and crimes against humanity. For instance, when does rape become a war crime or crime against humanity and what is the usefulness of such categorization? Would a perpetrator be charged for the act under different conventions whereby he/she will be charged with war crimes and at the same time for crimes against humanity?

When the issue of multiple crimes arising from the same act and leading to cumulative charging arises, the Appeals Chamber of ICTY ruled that, 'multiple convictions entered under

[108] Ibid, p117
[109] Ibid, p 117
[110] See Article 8 of the Rome Statute.

different statutory provision but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of fact not required by the other'[111]. This vindicates Moir's observation that;

> 'the convergence of humanitarian law and human rights shows that war, peace, civil wars and international wars as well as international and domestic laws are increasingly intertwined. Consequently, the law of war and the law of peace, as well as humanitarian and human rights laws, which were originally clearly distinct in scope, are now often applicable simultaneously"[112].

Hence, we argue that war crimes and crimes against humanity are not distinct in application and they can be lumped together under the term international crimes. This way, we have murder, exterminations, enslavement, deportation, wrong imprisonment, torture, rape, prosecutions on political, racial, religious grounds and other inhuman acts in addition to violations of civilian military objectives and distinctions as constituting violations of international humanitarian law.

This view is in line with the dynamicity of law to encompass unforeseen situations which clearly infringes on its spirit. The dynamicity was reflected in the trial chamber of ICTR ruling on whether incitement constituted an international crime. In the *Media Case*[113], the chamber ruled that; one, radio and television *libre des milles Collines* (RTML) and *Kangura* (a local newspaper controlled by Hutu extremists) were found to be promoting a fusion of politics with ethnicity of civilians and combatants so that political interests [was equated] with identity and the Rwandan Patriotic Front, a largely Tutsi military force equated with Tutsi people as such

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[111] A.M. Danner, Constructing Hierarchy of crimes in international criminal law sentencing' *Virginia Law Review*, vol 87, No 3, May 2000, pp 415-501:501

[112] L. Moir, *Laws of Internal Armed Conflict*, op cit, p 230

[113] Prosecutor vs Nahimama, Barayagwiza and Ngeze, judgement sentence, case no ICTR-99-51-7. The case is detailed in C.A Mackinon, 'Prosecutor vs Nuhimana, Barayagwiza and Ngeze case no ICTR 99-52-7, in *American Journal of Law*, vol 98, No. 2, 2004, pp 325-33

effectively defining an enemy as Tutsi ethnic group[114]. Two, they [media] intentionally labelled Tutsi as 'hypocrites, thieves and killers marked by malice and dishonesty, inherently evil and symbolized by a snake'[115]. Further, the media suggested that 'Tutsi women intentionally use their sexuality to lure Hutu men into liaisons in order to promote the ethnic dominance of Tutsi over Hutu'[116]. Three, that the 'message of prejudice and fear paved a way to the massacres of the Tutsi population'[117].

On the basis of these facts among others, the chamber likened RTML and *Kangura*, to 'bullets in a gun'. The court found Nahimama, Barayagwiza and Ngeze – all linked to the two media guilty. The court ruled that, 'hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates lesser status not only in the eyes of the group themselves but also in the eyes of the others who perceive them as less than human"[118]. This amounted to persecution on the ground of one's identity and borrowing from the Nuremberg trials judgement, the judges observed that it led to, 'conditioning a population' and creating a climate of harm[119].

Once an act falls under international crimes (atrocious crimes against humanity), no amount of justification can amount to innocence, and various categories of persons can be held responsible. The main categories include, key perpetrators and co-perpetrators who take part in the crime in either partaking the purpose behind the crime (organizing), committing the actual crime or both. The abettor is the person who commits the actual crime with or without the

[114] Ibid, Paragraph 187
[115] Ibid, Paragraph, 187
[116] Ibid, Paragraph, 176
[117] Ibid, Paragraph, 243
[118] Ibid, Paragraph, 1072
[119] Ibid, Paragraph, 1073

knowledge of the principal and with the knowledge that his or her action assisted in the principal's wider goal (common purpose principle)[120].

The Rome statute strips the alleged criminal official immunity. Article 25(2) states 'any person who commits a crime within the jurisdiction of the court including war crimes shall be individually responsible and liable to punishment in accordance with this statute[121]. Further, article 27(1) rejects hiding behind the official status to commit crimes and states that, 'the statute shall apply to all persons without any distinction based on official capacity. In particular official capacity as head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the statute nor shall it in and of itself constitute a ground for reduction of sentence'[122].

In addition to holding individual as responsible for acts of omission or commission, it is now acknowledged that no amount of justification can suffice to erase responsibility. The view was upheld by the Special Court of Sierra Leone in appeal 'by Fofana, Kondewa and CDF that they were fighting to restore democratically elected government of president Kabbah[123]. The appeals chamber concluded that 'as a general principle, a convicted person's motives can only be considered as mitigating factor, [however] international humanitarian law specifically removes a party's political motive and justness of a party's cause from consideration. [The] consideration of a political motive by a court applying international humanitarian law not only

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[120] See C. Than and E. Shorts, *International Criminal Law and Human Rights*, op cit, pp 7-8. A neat categorization has been provided by ICC. See Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, Para. 396; Prosecutor v Jean-Pierre Bemba Gomba, Decision Pursuant toArticle 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gomba, ICC-01/05-01/08-424, 15 June 2009, Para. 81

[121] Article 25 (2) of the Rome Statute available at www.icc-cps.int/library/

[122] Article 27(1) Ibid

[123] Prosecutor vs Moinina Fofana and Allieu Kondewa, case no SCSC -04-14-A

contravenes, but would undermine a bedrock principle of that law"[124]. The ruling by the special court ruled out whatever justification any party may forward to legalize and legitimize their actions as long as they led to infringement of IHL, customary international law of war (e.g marten's clause) and hardcore international human rights law in situation of conflict.

CONCLUSION

The chapter has focused on the debates on applicability of international humanitarian law and the aspects of IHL which regulates non-international armed conflicts. The debates focus on and reflect the tension between state's claim to sovereignty under international law and ever expanding international obligations which eat into what has been the traditional sovereign domain. The following conclusions can be made; firstly, international humanitarian law has evolved to *jus cogen* status and thus creates obligations *erga omnes*. Secondly, since 1945, there has been a move towards developing international mechanisms for accountability for violations of IHL and more so after the cold war. Thirdly, since the conference of Tehran 1966, there has been increased intertwining of both IHL and IHRL making it hard to dichotomize the two especially during armed conflicts. Fourthly, individuals are bearers of rights and obligations under international law. Consequently violations of these laws are no longer justifiable either on the basis of one's official capacity or his cause; rather individuals must be held responsible for their actions.

[124] See V. Oostterveld, 'Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbur Kanu. Case No. SCSC-16-A, prosecutor vs Moinina Fofana and Allieu Kondewa, Case No. SCSC-04-14-A in *American journal of international law*, Vol 103, no., 2009.

CHAPTER THREE

VIOLATIONS OF IHL DURING THE KENYA 2007 POST ELECTION CONFLICT

Introduction

The last chapter has situated the international humanitarian law within the broader terrains of international relations and international law. This is important because the two disciplines have shaped the debates regarding the status of international humanitarian law of non-international armed conflicts. It has shown that there exist critical tensions between claims to sovereign rights and the need to enforce IHL of non-international armed conflicts whose definition under international law has been vague.[1] However the continued intertwining of IHL and IHRL coupled with a more liberal interpretation of sovereignty as not only a right but also a responsibility to protect and the fact that individuals have increasingly become subjects of international law means that the line between international and non-international armed conflicts has been blurred. [2] Further, the chapter has brought out key aspects of international humanitarian law of non-international armed conflicts. The main body of this law is article 3 common to the four Geneva Conventions of 1949 and Protocol II additional to the Geneva Conventions of 1977.[3] In addition, the international tribunals have contributed to the expansion of the frontiers of IHL by resorting to use of customary international law to place criminal responsibility on individuals where there are challenges about the competence of internationally formed tribunals and courts to try alleged crimes.[4] This way the responsibility for violations is shielded from jurisdictional challenges and based on the argument that IHL enjoys *jus cogen* status and thus

[1] See Chapter Two, pp.41-49

[2] L. Beck and S. Rite, 'International Humanitarian law and Human Rights Law' *International Review of the Red Cross*, 1993, No. 293, pp.94-119. Also A. Pellet, *State Sovereignty and Protection of Fundamental Human Rights: An International Law Perspective*. Pugwash University Occasional Papers, Vol, Feb 2000.

[3] See chapter two, pp.57-70

[4] Kallon Kamara, Decision on the Challenges to Jurisdiction: Lome Accord on Amnesty, SCSL-04-15-PT-060, 13th March, 2004, Para 45,47

creates obligation *erga omnes*[5]. This trend has been concretized by the Rome Statutes which directly places criminal responsibility on individuals irrespective of whether the conflict in question is international or non-international.

Integrating all these developments, we argue that the traditional dichotomy between IHL and IHRL has considerably been blurred. This means that instead of having divisions of the two when relating to violations, we can now talk of international crimes[6] in reflecting the nascent legal practice whereby international customary laws such as *marten's clause* has been included. The outcome has been a shift from rigid interpretation of IHL to a more liberal one incorporating international customary laws of war, codified IHL and aspects of IHRL.[7]

On this basis, the chapter examines the violations which took place during the Kenya 2007 post-election conflict by analysing both primary and secondary data collected in the study. The first part provides a background to the conflict. Conflicts do not just happen. They are reflective of a cycle which moves from conditions of peace to overt behavioural violence if measures are not instituted to reverse the process[8]. It reflects the already existing combustible structural and cultural dysfunctions which feed the triggers of violence. The second part examines the violent conflict which started after the announcement of presidential polls results. The emphasis will be whether as violence unfolded, there were violations of international humanitarian law of non-international armed conflicts as developed in the previous chapters.

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[5] See The Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium vs. Spain), second Phase judgment of 5th February, 1970, 1970, ICJ reports 3, p 32. Also See Prosecutor vs. Erdemovic case No. ITY-96-27-T, Para 28. Cited in L.C .Green, *The Contemporary Law of Armed Conflict* (3rd ed) .Manchester: ferns publishing, 2008

[6] International crimes are crimes that attack the fundamental values of the international community. Crimes under international criminal law are war crimes, crimes against humanity, genocide and crimes against aggression. See G. Werlie, *Principles of International Criminal Law*. Hague: T.M.C Asser Press, 2005, pp.27-38

[7] See Chapter Two, pp.67-68

[8] We have borrowed the view from, J.P Lederach, *Building Peace: Sustainable Reconciliation In Divided Societies* Washington: Life and Peace Institute, 2006.

Background to the Kenya 2007 Post-Election Conflict

Conflict exists when there are mutually incompatible goals and interests[9]. The incompatibility of goals and interests is an ever present phenomenon whether in the simplest dyadic interactions or in a complex web of interactions involving groups. Thus conflict is a pervasive and inevitable social process irrespective of time and space[10]. It has both constructive and destructive functions in any given society. It signals the birth of what is new and accompanies the demise of what is worn out. It points out the need to address dysfunctional social relations and make them legitimate. When wrongly handled, conflict is highly destructive and in its extreme, it can lead to genocidal outcome[11].

Mwagiru observes that conflicts have memory. They are nothing new but reflective of the past inter and intra group interactions. History is important in understanding conflicts that groups become involved in because it is history that can help explain people's motivations and why they believe in what they believe. Besides, history is important because it justifies the aims of the group and also affects the strategies of that group[12]. This argument is captured by Mamdani's enduring statement that, 'violence is not its own meaning, to be made thinkable it must be historicized'[13].

The Kenya 2007 post-electoral conflict is comprehensible from a historical perspective. It reflects what has all along ailed the Kenyan state since independence. The primary dynamics includes the failure of state building project and institutional breakdown especially institutions

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[9] W. Heinrich, *Building the Peace: Experience and Reflections of Collaborative Peace Building: the Case for Somalia* (2nd ed) .Upsalla: Life and peace Institute, 2006

[10] J. Bercovitch, H. Allison, 'The study of International Mediation: Theoretical Issues and Empirical Evidence' in Bercovitch, J. (ed), *Resolving International Conflict: The Theory and Practice of International Mediation.* Boulder: Lynner Reinner, 1996, p.15

[11] A. D. Reuck, 'The Logic of Conflict: Its Origin, Development and Resolution', in Banks, M (ed), *Conflict In World Society: A New Perspective on International Relations.* Brighton: Wheat sheaf Books, 1984, pp.96-111:99

[12] M. Mwagiru, *The Water's Edge: Mediation of Violent electoral conflict in Kenya.*Nairobi: IDIS, 2008, p.10

[13] M. Mamdani: *When Victims become Killers: Colonization, Nativism and the Genocide in Rwanda.* Princeton: Princeton University Press, 2000, p.364

regulating political competition. This is compounded by gross inequalities at individual and regional levels, ethnicisation of political discourse and prevalence of culture of impunity. These dynamics are elaborated below.

Failure of state building project

Kenya, like other post-colonial territories is a product of colonial rule. The establishment of colonialism involved contradictory forces. On one hand, there was territorial partitioning of territories by cartographers who disregarded the realities on the ground and were more concerned with drawing cartographic lines on territories they were unfamiliar with. As a result, they simultaneously fragmented pre-colonial communities by dividing them among different states and integrated others within super imposed territorial units[14].

To further consolidate their domination, they adopted a policy of divide and rule. Previously peaceful communities were manipulated to view the 'others' as enemies. In other situations, identities were socially constructed and fixed. Further, myths were perpetrated around such identities which portrayed some groups as superior and others as inferior[15]. The outcome of the colonial project was multi-national states, sharply divided yet expected to be benchmarked around the notion of citizenship.

Faced by the twin forces of sub-national exclusivity and need to create a 'citizen' identifying himself with state, the immediate post- colonial task revolved around state-building. In much of Africa, the task was a monumental failure. Mamdani observes that state in Africa (was) flawed both as a concept and its logic. Conceptually, the post-colonial state was a continuation of the colonial state characterized by administrative apparatus designed to conduct

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[14] T. B Hansen et al, State *of Imagination: Ethnographic Exploration of Post-Colonial State*. London: Duke University Press, 2007.

[15] Social Construction of Identities has been elaborated in J.D Fearon and D.D Laitin, 'Violence and the Social Construction of Ethnic Identity' in *International Organization*, 54,4, 2000, pp.845-877

excessive forms of governance and control of population and territory in a crudely extractive manner. The outcome of this continuation was excessive centralization and bifurcation of rural and urban segments, habits of summary government at a distance, lack of independent institutions and heavy handed techniques of controlling the population.[16] Further, the logic of modernization prompted ideas of 'stronger' and more 'effective government'. The outcome of this thinking was a highly authoritarian and personalized system which treated individuals and groups as subjects rather than citizens .Consequently, the state remained a political refugee and this encouraged the use of sub-national conceptions of citizenship[17].

In Kenya, the state building was a continuation of colonial techniques of control, divide and rule. This led to the attempt at creating a state around the core Kikuyu ethnic community. Instead of creating a political identity rooted in the spirit of unity in diversity, identities were activated along 'we-they' and any opposition against the government was viewed as against national interest. Consequently, the state-building was equated with *Kikuyunization* project and opposition to the Kikuyu dominated regime was viewed as a challenge not only to the leadership but to the Kikuyu community[18].

Thus, right from the outset, the seeds of ethnic animosity and sub-national conception of citizenship were sown for some groups were marginalized and authoritative allocation of values biased towards those communities which controlled the centre of power. Importantly, the reality that control of political power brought with it a larger share of the national cake and personal

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[16] M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonization*. Kampala: Fountain Publishers, 2004

[17] We have borrowed the idea from Layton view that 'adoption of identities is a rational strategy when resource allocation and personal survival depends on how the government is constituted and in whose name. See R. Layton, *Order and Anarchy: Civil Society, Social, Social Disorder and War*. Edinburg: Cambridge University Press, 2006, p. 34

[18] The View is captured by Ayoob's argument that 'the close perceptual Connection between the ethnic and their constituent interests leads to an assumption that the fall of the ethnic client means the end of the ethnic group'. See M. Ayoob 'State Making, State Breaking and State Failure' in Crocker, C.A et al (eds) *Turbulent Peace: The Challenges of Managing International Conflict.* Washington: US Institute of Peace, 2001, p.130.

wealth led to personalization of the state and politics became some sort of business. Politics provided the surest path to personal wealth and political competition became a matter of life and death. This has been termed as political spoils system.[19]

The view is captured by Shwab who observes that in much of Africa,

> 'because of ethnics fractiousness that is remnant of the colonial era and the uncommon poverty that strangles the continent, the struggle for power is seen as a contest for survival in a region in which a middle class bourgeois hardly exists and where few countervailing institutional structure endure to provide wealth and opportunity on a scale provided by government or the military, securing and holding of the sole avenues of power agendas what would term the 'cling obstruction', particular individuals attain and control any way they can and mercilessly cleave to it"[20].

In the quest for control of power, ethnicity became the main ideology, and ethnic identity the pole around which group members can mobilize and compete effectively for state-controlled power, economic resources, contracts award and constitutional protection[21]. Politics so organized means that those in power cling to it by all means and those excluded concludes rightly or wrongly that the state policies threaten political interests of their groups and their security[22]. The outcome is ethnic insecurity dilemma[23].

Ethnic insecurity dilemma has built up in Kenya since independence. For instance, during the agitation for independence, political parties reflected this predicament. The Kenya African National Union (KANU) which was predominantly a Kikuyu-Luo alliance while Kenya African Democratic Union KADU), a conglomeration of a number of ethnic parties some of which had made a common cause with the white settlers as minority groups with a goal of primarily

[19] A good example has been provided in, C. Allen, Warfare, Endemic Violence and State Collapse in Africa' *Review of African Political Economy*, vol 26, No 81, 1999, pp.367- 384.
[20] P. Shwab, *Africa: A Continent Self-Destructs*. Palgrave St. Martin Press, 2001, p.36
[21] D. Rothchild, *Managing Ethnic Conflict in Africa: Pressures and Incentives for Cooperation*. Washington: Brookings Institution Press, 1997, p.4
[22] Ibid, p.53
[23] We have borrowed the idea of ethnic insecurity dilemmas from D.A Lake and D. Rothchild, 'Spreading Fear: The Genesis of Transnational Ethnic Conflict' in Lake, D.A and Rothchild, D., *The International Spread of Ethnic Conflict: Fear Diffusion and Escalation*. Princeton: Princeton University Press, pp.10-13

blocking Kikuyu migrant labourers and squatters, the backbone of Mau Mau revolt from making land claims in Rift Valley[24].

Since then, whichever ethnic group took power sought to bolster its own security at the expense of the others. Kenyatta privileged the Kikuyu especially the Kikuyu elites' security over other ethnic elites. When Moi took over in 1978, he sought to redress this imbalance through pursuing a set of redistributive policies that favoured his own ethnic group – the Kalenjin and disadvantaged the others. Consequently, he turned Kenya into his personal fief, a kleptocracy under which KANU leaders looted with impunity. Corruption became the principal mechanism for regime maintenance, income per capita declined from 271 to 239 US dollars and poverty levels correspondingly rose from 48 to 56 percent[25].

Ethnic insecurity dilemma was exacerbated by democratization process after the end of the cold war period. Political liberalization in Kenya took place in an environment characterized by negative inter-groups strategic interactions, problem of credibility on political commitments for no ethnic group would trust that the other one will not renege on a political deal in the near future and massive manipulation of political information conditioning the ethnic groups that failure to win elections translated to catastrophic consequences[26].

As a result, the democratization process in Kenya inevitably took an ethnic dimension. Commenting on the parties formed after political liberalization, Jonyo[27] observes that all political parties (were) ultimately built on ethnic foundation. The ruling party KANU was associated with Kalenjin and other smaller tribes, Maasai, Samburu, Turkana e.t.c, the Democratic Party and

[24] J.M. Klopp 'Ethnic Clashes and Winning Elections: The case of Kenya's Electoral Despotism' in *Canadian Journal of African Studies*, Vol 55, no 31, 2001, pp.473-517: 476
[25] J. Barkan. 'Politics of Independent Kenya' in *Foreign affairs*, vol 83, No, pp.88-90.
[26] The Concepts of Inter-group Strategic Interaction, Credibility Commitment and Information Failure are well developed in D.A Lake and Rothchild, Spreading Fear: The Genesis of Transnational Ethnic Conflict' Op cit, pp.10-13
[27] F. Jonyo 'Ethnicity in Multiparty Politics' in Chweya ,L (ed) *Electoral Politics in Kenya* .Nairobi, Clari press, 2002, pp. 96-99

Ford Asili (with) Kikuyu, Ford Kenya with Luhyia, SDP with Kamba, and NDP with Luo. Since then, political parties are simply but ethnic entities based on struggle and competition to capture state power and the inherent influence upon the direction of national resources allocation which the possession of power entails. Essentially, they are based on belly politics and 'it is our turn to eat'[28] conditioning the political behaviour.

This logic of political competition has had tragic outcome. Opportunistic politicians have created a tendency of instrumentally mobilizing appeal to communal or ethnic impulses as the most effective strategy of winning elections[29]. Further, it has led to political spoils system where elite politicians are viewed as power brokers capable of enhancing ethnic claims to state resources[30]. This view has engendered what Mamdani characterizes as decentralized despotism, where a clique of political leaders can generate and benefit from a series of 'localized' clashes in its struggle to remain or capture power[31]. A respondent interviewed convincingly stated that,

> 'at the core of this trend of electoral process is the issue of the control of the state, the locus of political power and wealth accumulation. This behaviour by the élites not only encourages political patronage and undermines democratization but also perpetuates ethnic polarization and differences. Ethnic conflicts in the Rift Valley, Nyanza, Coast and Western Provinces which continued prior to, and after, the 1992, 1997 and 2007 elections can be understood in this context. Specifically, ethnic cleansing is a consequence of élite manipulation'[32]

Decentralized despotism has manifested itself whenever there is intense political competition in Kenya especially around electioneering period. In 1992, the dominant and incumbent KANU elite employed ethnic conflicts disguised as land clashes. Klopp,[33] analyzing the political competition in 1992 corroborates this view. She states that ' a movement was thus

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[28] Ibid, p.94

[29] M. E. Brown 'Causes and Implications of Ethnic Conflict' in Lake D.A and Rothchild, D (eds) *The International Spread of Ethnic Conflict*, op cit, p11

[30] D. Welsh. Ethnicity in Sub-Saharan Africa' in *International Affairs*, 72, 1996, pp 4787-491: P.486

[31] M. Mamdan, *Citizen and Subject*, Op cit, pp.52-61

[32] An interview with a Kenya National Commission on Human Rights Official conducted on 10th June, 2010

[33] J. Klopp 'Ethnic, Clashes and winning elections in Kenya' Op cit, p.484

afoot to counter calls for multipartyism by appealing to reconfiguration of Kenya along territorially defined ethnic domains which would ideally at least follow provincial boundaries. *Majombism* as a call to align boundaries of the former reserves (province) with imagined ethnic boundaries, played on the colonial construct of Africans as existing peacefully only within segregated tribes. [In a series of political rallies in Rift Valley province] ethnicising the opposition as Kikuyu, speakers made the implications of *majimbo* when they asserted that all those Kikuyu settled in the Rift Valley would have to pack and resettle in central Kenya"[34]. This argument operated on the localized '*indegene*' and 'foreigner' dichotomy and eventually led to ethnic clashes.

Subsequent commission of inquiry[35] linked politicians to the violence as instigators and financiers. It further recommended their prosecution. Failure to prosecute the identified merchants of ethno-based political violence led to recurrence of the same in 1997. Consequently, between 1991-2001 over 40000 people had been killed and 600,000 displaced due to political violence as political leaders intimidate their opponents, kill and displace them to ensure that they do not vote[36]. The failure to prosecute has thus engendered a culture of impunity, where leaders manipulate ethnic sentiments, incite violence and subvert the state institutions in order to gain state power, consequently militarizing political competition. This approach to political power led to a near state of conflagration in 2007 after the presidential polls results were announced, giving president Kibaki a slim lead over his main rival Raila Odinga.

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[34] E.A. Atieno 'Ethnic Cleansing and Civil Society in Kenya, 1969-1992' in Sikainya A. et al (eds) ,*Post-Conflict Reconstruction in Africa*.Asmara: World Pressure, 2006, p.84

[35] The main Commissions are the Parliamentary Select Committe to Investigate Ethnic Clashes in Western and Parts of Kenya 1992(Kiliku Committee) and the Judicial Commission of Inquiry on the Tribal Clashes (Akiwumi Commission), and the Task Force on the Establishment of Truth, Justice and Reconciliation Commission.

[36] P. Mutahi 'Political Violence in the Election' in Maurvie, H et al (eds) The Moi Succession Elections, 2002, Nairobi: Transamara African Press, 2005, p.68

The Post-electoral Violent Conflict

The announcement of the presidential polls results which gave president Kibaki victory led to eruption of violence which dangerously took civil war dimensions. Prior to the elections, the campaigning period had pitted ethnic based parties against each other. The competition for political supremacy pitted the Party of National Unity (PNU), a predominantly Kikuyu, Embu and Meru ethnic groups against the Orange Democratic Movement (ODM), a predominantly Luo-Kalenjin and Luyha alliance. The competition reflected the long time inter-elite rivalry which revolved around Kikuyu-Luo poles[37].

The elite magnified the underlying communal anger through exciting myths and emotions by disseminating negative and dehumanizing campaigns through public rallies and mass media[38]. PNU for instance, portrayed Raila Odinga, the ODM presidential candidate as uncircumcised and a Luo who is not fit to run Kenya. On the other hand, ODM portrayed Kikuyus, as 'power-hungry, greedy and thieves who have expropriated the national wealth and sought to monopolise political power. Consequently, the extremist campaigning style conditioned their respective supporters that the elections were a life and death contest. This heightened groups' insecurity dilemmas to the point that anything short of victory was unacceptable to either of the parties. Further, the poisoned electoral environment provided different groups with a cause to address and redress perceived and real historical injustices. As one respondent observed,

> 'in the election campaign, the opposition – ODM and ODM-Kenya – played on the perception that Kibaki favored his own group, using highly emotional appeals that tapped into a sense of injustice and resentment. As evidence, the opposition claimed that Kibaki had disproportionately appointed Kikuyus to top positions in the cabinet and the government administration. Moreover, the opposition charged that Kibaki unfairly favoured the Kikuyu region – Central Province – in the distribution of funds for social services and infrastructure, while neglecting other parts of the country. At the same time, the opposition claimed that Kibaki had callously persecuted certain groups, for example

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[37] J. Klopp 'Kenya's Unfinished Agenda's' *International Affairs*, Vol 62, No 2, 2008. Pp.144-147
[38] Ibid, p.145

> by evicting Kalenjin squatters from the Mau forest and deporting Muslims from Coastal regions. Opposition appeals tapped into long-standing grievances against Kikuyus, who have historically dominated Kenya's economy. And campaign rhetoric played on grievances over access to land, arguing that Kikuyus had unfairly benefited from land redistribution schemes following independence, taking land that rightfully belonged to other communities'[39]

Consequently as another respondent noted,

> 'the crisis in Kenya was not electoral in itself. It was as a result of how the election were presented as a contest between the Kikuyu – accused of stealing the country's fortunes and monopolizing power – and a coalition of other tribes. The ODM alliance appeared incapable of convincing the Kikuyu elite that Raila's presidency will not signify their end as they thought. The Kikuyu thought that if ODM wins, the tribe will be destroyed, they will be dispossessed of their properties and those who have settled in various parts of the country will be decimated'[40]

The announcement of the results which gave Kibaki a lead of 4,584,721 votes against Raila's 4,352,993 votes, coupled with expressions of doubts about the transparency of the electoral process by electoral observers, the electoral commission and pre-election opinion polls which had projected Raila's victory led to eruption of violence in predominantly ODM regions[41]. What initially seemed like a spontaneous eruption of anger, quickly turned out to orgies of organized violence, displacement and destruction of livelihoods. The violence took a dangerous ethnic ideology leading to dichotomization of 'indigene' versus 'foreigners', whereby the later had to move from the former's ancestral land. In the process international humanitarian crimes were committed as analyzed below.

Evidence of Organization of the Violence

One of the key requirements in order to hold to account individuals alleged to have committed international crimes is evidence that there was an element of organization, or that, though the violence was spontaneous, it can be inferred that the plurality of persons acted in

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[39] An interview with Kenya National Commission of Human Rights conducted on 4th June, 2010
[40] Ibid
[41] See K. Mbugua 'Kenya Crisis: Elite and Factional Conflicts in Historical Context' *Conflict Trends*, Issue 1, 2008.

unison to put into effect a joint criminal enterprise[42]. The inference is based on three elements as outlined in the *Tadic Case*. First, there must be a commission of crime with or without the knowledge of the principal. Second, there must be a positive relationship between the abettor's act and the wider goal being pursued in the circumstances where the crime was pursued, and third, the perpetrator has knowledge that his or her actions assist in the commission of specific crimes by the principal[43].

Though ODM has insisted that the violence was spontaneous, evidence gathered by the Independent Commissions, mainly, Kenya National Commission on Human Rights (KNCHR) and the Commission of Inquiry on Post Election Violence (CIPEV) indicate that there was an element of organization. The report by CIPEV notes that;

> 'though initially, the violence witnessed was spontaneous, and was in part a reaction to the perceived rigging of elections, subsequently, the pattern of violence showed planning and organization by politicians, businessmen and others who enlisted criminal gangs to execute violence[44]'.

To substantiate this position, the report gives pointers to the organization. These are: one, that in some instances, warnings were issued to the victims before the attacks; two, violence involved large number of attackers often mobilized from areas outside the location of violence; three, petrol and weapons were used in various places to carry out the attacks and destruction which required arrangements as regards acquisition, concealment and transport and four, sometimes the attacks specifically targeted members of a given ethnic group to the exclusion of the others[45].

The view is corroborated by KNCHR report concerning Rift Valley Province which was the epicentre of the violence. The report states that,

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[42] C.D. Than and E. Shorts, *International Criminal Law and Human Right* .London: Sweet and Maxwell, 2003, p.7
[43] See report by Commission of Inquiry on Post-electoral Violence, p.347
[44] See report by Commission of Inquiry on Post-electoral Violence, p.347
[45] Ibid, p.437

'there were methods of the attacks pointing to some good level of coordination and organization.....the attackers moved in groups that would comprise an average of 100 young men in any given episode. There were reports of training of the youths by former and retired local security officers from the community in the region's forest and the homes of well known leaders from the region[46]'.

It further notes that in Kericho, Bureti and Londiani, the attackers reportedly sent signals before raiding certain people's homes by telephoning them and giving notices to those who were alleged to be supporting PNU and belonged to non-Kalenjin communities. On this basis, the report concludes that there was intent to forcibly evict victims from the region as the attackers duly notified the victims of the imminent attacks and eviction[47]. The two reports findings show that there was an element of organization which targeted specific groups on the basis of their ethnicity.

Commission of violence against persons not actively involved in combat

The fourth Geneva Convention of 1949 and the additional protocol II expressly prohibit violence to life, health and physical wellbeing of persons. In addition, it outlaws murder, outrages against personal dignity, collective punishments and threats to commit the foregoing acts among others in a situation of conflict[48]. Essentially, it calls for humane treatment of persons not actively involved in violence at all times and when these are violated, international crimes are committed.[49] In the Kenya 2007 post-election conflict, there are indicators that these prohibitions were not observed as elaborated below.

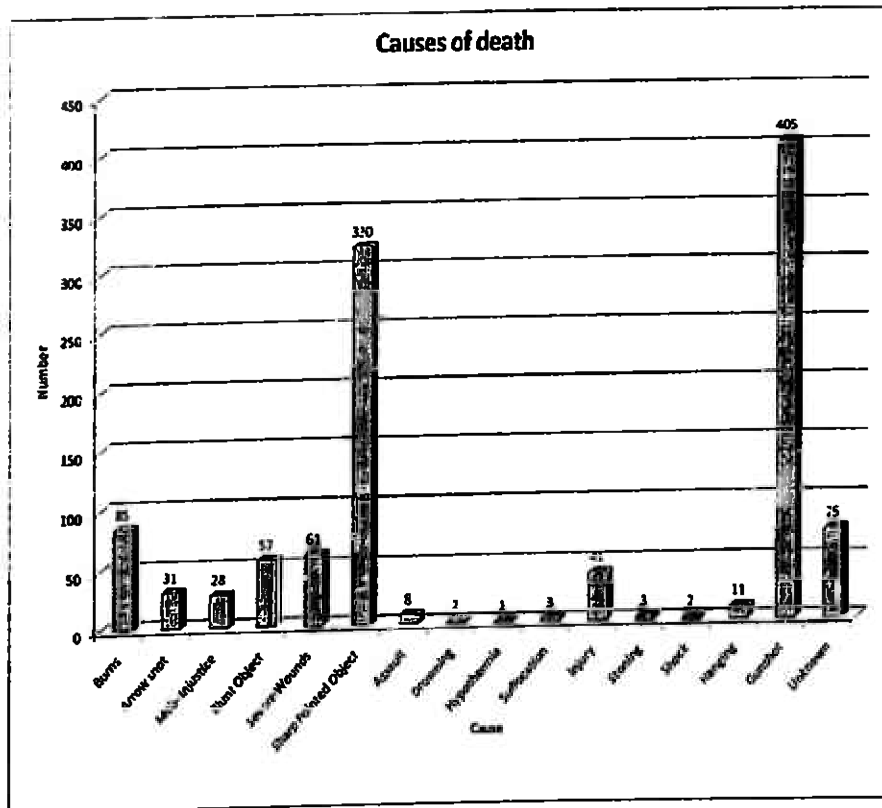
Discriminatory killings

The right to life is a fundamental human right. The international criminal law lays down restrictive criteria upon which human life can be taken. The main criteria is when a properly

[46] KNCHR, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post – 2007 Election Violence'*, 15th August, 2008, p.55
[47] Ibid, p.55
[48] See a summary by J. P Lawyer, 'Refugees and Internally Displaced Persons. International Humanitarian Law and the Role of ICRC' in *International Review of the Red Cross*, March, 1995, PP.161-186: 164 - 165
[49] For a detailed discussion see Chapter two, pp.60-67

constituted authority following the due process of law sentences a person for execution or when military necessity leads to 'incidental civilian deaths'[50]. Any other process of taking human lives is prohibited and violators are held accountable under the international law.

The report by CIPEV gave the total number of deaths as 1333. The dead were either victims of excessive use of force by security agents or organized groups sympathetic to either ODM or PNU. The report provides a chilling list on the cause of deaths. The causes included burns, arrow shots, mob-injustice, blunt objects, severe wounds, sharp pointed objects, assault, drowning, hypothermia, suffocation, injury, stoning, shock, hanging and gunshots"[51] as shown below.



(Source: CIPEV report, p312)

The discriminatory killings were epitomized by the burning of innocent civilians in a church at Kiambaa where they had taken refugee. The KNCHR report graphically details the

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[50] See J. Someyer, 'Jungle Justice: Passing Sentence on the equality of belligerents in non-international Armed conflict', *International Review of the Red Cross*, vol 89, No 867, 2007, pp.655-690:656-7

[51] CIPEV Report, Op cit, p.312

process and the motivations behind it. It notes regarding the burning of people in Kiambaa church that;

> 'after torching the neighbourhood, the raiders surrounded the church compound, doused blankets and mattresses with petrol and set the church ablaze. The few men who were at the scene attempted to defend the victims but they were overpowered by the raiders who hacked them to death in cold blood. An estimated 37 people were burnt to death in the church, most of whom were women and children'[52].

In a BBC interview, a Kalenjin youth from Kiambaa said in relation to the burning, "we want to send a very strong message to Kibaki. Because we cannot get him, we are going to work on his ethnic group the Kikuyu"[53]. These deaths were not only cruel and organized but also were based on the identity of persons seeking refuge in the church.

Use of sexual violence against women

In addition to the general protection of civilians under the fourth Geneva Convention, articles 27 paragraph two and articles 75 and 76 of the Additional Protocol I clearly states that, 'women shall especially be protected against any attack on their honour, in particular against rape, enforced prostitution or any other form of incidental assault'. Krill forcefully states that, (these) prohibitions remain in all places and in all circumstances, and women whatever their nationality, race, religious beliefs, age, marital status or social conditions have an absolute right to respect for their honour and their modesty; in short their dignity as women"[54]. Sexual violence, especially rape as a violence strategy has been acknowledged as an international crime on its own right.

Thus, whenever rape is used as a violence strategy, international crime is committed. During the Kenya 2007 post election violence, some members of security forces and ordinary

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[52] KNCHR report, Op cit, p.67
[53] Ibid, p.67
[54] F. Krill, The Protection of Women in International Humanitarian Law', *International Review of the Red Cross*, Nov-Dec, 1985, p.7

citizens, neighbours, and gang members perpetrated sexual violence. The KNCHR has detailed instances of rape in various regions. In Nairobi, for instance, the report notes that,

> 'there was widespread rape in city's informal settlements...one doctor says that between 29th and 30th December, 2007, he received about 50 victims of sexual assault in his clinic in Mathare. A lot of these were cases of gang rape... [with] Kikuyu women being targeted by Luo and Luyha men and Luo women being targeted by Kikuyu men"[55]

The report further notes, that 'the incidences of rape [were not coincidental] but appear to have been targeted to punish the victims for their perceived political positions based on their ethnic identities[56]. A corroborating view was provided by a respondent, who noted that,

> "Since the violence started, we were seeing similar numbers of cases to what we would normally see over the same time span, but there was one major difference: 90 percent of the cases we were seeing since the political crisis began were gang rapes. The gangs ranged from groups of two men to as many as eleven. For instance there was a lady fleeing in Mathare who was fleeing from the violence when she encountered a group of approximately twenty men. Some of them carried her forcefully and took her to a nearby stream at a place called Ngomba where they proceeded to rape her in turns. These rapes were targeted against those labelled as enemies on the basis of their ethnicity'[57]

Related to sexual violence was mutilation of perceived enemies. Mutilation involves an act which intends to cause severe physical pain on a person. As such, it is an outrage against human dignity and is prohibited by the common article 3 to Geneva Conventions and the Additional Protocol II of 1977. In Kenya, the most chilling forms of mutilations were sexual based as detailed in CIPEV reports, which talk of horrendous female and male genital mutilation. It states that 'women and children's labia and vaginas were cut using sharp objects and bottles stuffed in them. Men and boys, in turn, had their penises cut off and were traumatically circumcised, in some case using cut glass"[58].

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[55] KNCHR report, Op cit, p.41
[56] Ibid, p.67
[57] An interview with Kenya Red Cross Society Official who was a camp manager in Mathare area, Nairobi during the crisis, conducted on 11th June, 2010
[58] CIPEV report, Op cit, p.348

This is corroborated by KNCHR report. Paragraph 126 quotes verbatim a case of brutal mutilation. The respondent states that,

> 'personally I witnessed the members of this group (Mungiki) led by their commander forcefully and crudely cut the foreskins of eight male adults, mainly from Luo community. They would stop *matatus* and force them to alight....the Mungiki then ripped the trousers and underwear of the person using sharp pangas, exposing person's private parts. If the person was found to be uncircumcised, they crudely pulled out and cut the foreskin'[59].

The forced circumcision was particularly atrocious and some victims bled to death.

Forced Mass Displacements of People

Forced mass displacements is prohibited under article 17 of the Additional Protocol II of 1977, unless they are for strictly military reason or for the displaced own security. The allowance for military necessity[60] and groups' security means that any other process which forcibly displaces people as a part of conflict strategy is a violation of international humanitarian law and constitutes an international humanitarian crime.

Forced displacement in Kenya 2007 post-election violence which was underpinned by ethnicity left an estimated 350,000 persons [61]internally displaced. The displacements were informed by 'indigene' vs. 'foreigner' discourse whereby groups claiming ancestral roots in their areas of residency forcefully evicted 'new comers' who had either settled there permanently or had moved temporarily in search for sustenance. Indeed the movement of IDPS reflected this view. For instance, in central province, there were non-Kikuyu IDPs who were forcibly evicted from their residence in central Kenya by Kikuyu people and at the same time, there were

[59] KNCHR report, Op cit, p.36

[60] Military necessity has been defined as measures of regulated force not forbidden by international law which are indispensable for securing prompt submission of the enemy, with the least possible expenditure on economic and human resources'- US Air force Law of war Manual, cited in L.D Beck and Sylvain R., International Humanitarian law and Human Rights Law, *International Review of the Red Cross*, 1993, p 99

[61] KNCHR report, Op cit, p.3

incoming IDPS who were primarily Kikuyu people displaced from all over the country including the Rift Valley, Coast, Nyanza and Western provinces[62]. A respondent noted that;

> 'in Kenya, there exist two competing notions of citizenship. A local one based on ethnic identity and a national one legally defined by the law. This duality in practice confers indigenous rights to groups inhabiting a given region and a belief that anyone else is a foreigner. In such an environment, electoral competition has always played on the 'local/ foreigner' dichotomy best represented by Majimboism which to many means pure ethnic homelands. In 2007 electoral campaigns, Majimboism was presented by ODM as a key campaign pledge and once the ODM lost the elections, their supporters undertook to effect on the ground what they had hoped to effect once they were in power. As a result, groups labelled as 'foreigners' were forcibly kicked out especially in Rift valley province'[63]

The forced displacement amounted to violations of IHL and was also linked to the destruction of sources of livelihood through looting and destruction of properties. This violated the principle of distinction between civilian and military objects. Further it violated the prohibition against destruction of objects indispensable to survival of the civilian population (e.g food stuff, crops, livestock, drinking water installations and irrigation works) as a method of warfare[64].

In the Kenya 2007 post-election conflict, looting and destruction of properties was pervasive in all locations affected by the violence. It involved participation of both government security agents, ordinary citizens and organized groups engaging in the violence. Indeed, everywhere the violence spread in the country, there were killings and destruction of private properties particularly the homes and business premises of those considered to be from outside the region where violence occurred.

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[62] Ibid, p.54
[63] An interview with the KNCHR official conducted on 10th June, 2010
[64] The military and civilian objectives and distinction was elaborated, by the ICJ advisory Opinion, in *Nuclear Case.* See C. D. Than and E. Shorts, *International Criminal Law and Human Rights*, Op cit, p.117

A summary by CIPEV report[65] notes that more 64, 832 residential house were destroyed; in Kisumu 50, Nandi north 335, Mombasa 24 and Kericho 1960 commercial buildings were destroyed. Further, in places like Kipkelion, there was massive destruction of crops. 36, 566 bags of maize, 8,100 bags of beans, 800 bags of Irish potatoes, 40 tonnes of cabbages, 30 tonnes of kales, 20 hectares of sugar cane, and 3,219 plants of coffee were destroyed. These targeted destructions greatly jeopardized people's source of livelihoods and amounted to violations of IHL.

Incitement and Spreading of Hate Messages

Incitement to violence and spreading of hate messages encouraging people to commit atrocities constitutes an international crime. The link between incitement and international crimes is founded on the argument that it lays the psychological justification for violence and related atrocities. Essentially, it aims at 'conditioning' a group, creating a climate to commit harm and an environment of fear[66]. This was elaborated by the ICTR in the *Media Case*, when it found Nahimama, Ngeze and Barayagwiza guilty of propagating hate speech. A part of the ruling noted that, 'hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates lesser status not only in the eyes of the group themselves, but also in the eyes of others who perceive them as less than human'[67].

There was prevalence of hate speech and incitement before and after the Kenya 2007 General Elections especially through the vernacular radio stallions, short text messages (SMS), and internet. Among the three, the vernacular radio stations played the main role. This is because

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[65] CIPEV Report, Op cit, pp 338-341

[66] This was elaborated in the Nuremberg trials and formed the basis of judgement during the *Media Case*. See Nahimama, Barayagwiza,and Ngeze case, ICTR, http://www.ICTR.org, Also chapter two, pp.69-70

[67] Ibid, Para ,1072

of their accessibility and reach to the grassroots levels and call-in live' programs, where listeners could air their views.

The main vernacular radio stations singled out were Kass FM (Kalenjin), Kameme (Kikuyu), Inooro (Kikuyu), Cooro (Kikuyu), Bahasha, and Nam Lowlwe (Luo). In different instances, these stations broadcasted messages and played music which amounted to incitement. Among these radio stations, Kass FM was singled out to be the main inciter. In conjunction with politicians, it used derogatory language against Kukuyus, mouthed hate speech, and routinely called for their eviction, thereby helping to build up tensions and eventually exploded in violence'[68]. The KNCHR, in its report, gave examples where the Kikuyu and Kisii residents in the Rift valley were referred to as *madoadoa* (stains) before and during the post-election. In other instances they were referred to as weed that needed to be uprooted[69]. In another instances, the report notes, 'many of the ethnic hate messages and much of ethnic stereotyping appeared on live phone-in programs. It was common to hear descriptions on Kass FM before the elections of the kikuyu as greedy, land hungry, domineering and unscrupulous as well as veiled threats like 'the time has come for us to reclaim our ancestral lands, or the people of the milk (Kalenjin) must clear the weed (kikuyu)[70]. Bahasha FM which was sympathetic to PNU and based in Rift Valley, on 30th of January 2008 noted, 'Kikuyu are like mongoose which is ready to eat chicken. All other tribes, that is, Luo, Kisii, Luyha are all animals in the forest; they cannot be able to lead this country like Kikuyus"[71].

Another media used was the SMS, E-mails and internet blogs. SMS among the PNU supporters for instance read, "for Jaramogi so hated the world, that he gave his only

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[68] CIPEV report, Op cit, p.299
[69] KNCHR report ,Op cit p.140
[70] Ibid,p.140
[71] CIPEV report, Op cit,p,302

uncircumcised son Raila to destroy us[72]. Further, there was an e-mail circulating among the Kalenjin urging them, 'to defend themselves to the bitter end and ensure every family is fully equipped with our normal tools, and that (if they) can afford ferry two warriors from upcountry fully armed and house them until they have these things sorted out"[73]. It is not coincidental that Rift Valley was the worst affected region by the violence. The vernacular media had created the ripe moment for conflict.

Chapter Overview

The analysis of Kenya 2007 post-election conflict shows that there were actions committed which constituted international crimes as defined in the IHL and related aspects in IHRL. There was evidence of organization which can be inferred from the nature of attacks and the fact that there were prior warnings before such attacks. Also there is evidence of targeting of individuals not because of their personal attribute but because they belonged to an ethnic group labelled the enemy. The targeting were attempts at ethnic cleansing especially against the Kikuyus living in Rift Valley. In addition, there were forced displacements and destruction of people's livelihoods. Further, there was use of sexual assault as a violence strategy, with victims of rape targeted on the ground of their ethnic and political affiliations. Lastly, there is evidence of incitement to commit the above crimes through the mass media, E-mails, internet blogs and short text messaging.

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[72] I received such a message prior to elections

[73] CIPEV report, Op cit, p 299

CHAPTER FOUR

ANALYSIS OF THE IMPLEMENTATION CHALLENGES OF IHL OF NON-INTERNATIONAL ARMED CONFLICTS IN KENYA 2007 POST ELECTION CONFLICT

Introduction

The chapter provides an analysis of the challenges Kenya faced in implementing international humanitarian law of non-international armed conflicts during the 2007 post election violence. It builds on the conflict analysis done in previous chapter. To do so, it incorporates findings from both primary and secondary data. The chapter has several sub-sections. Sub-section one sets the stage of analysis by providing a brief summary of conclusions drawn from the preceding chapters. The subsequent sections provide an analysis of the implementation challenges of IHL experienced during the Kenya 2007 post-election violence.

Overview of the Key Debates

The study so far has brought out several issues which delineates the terrains of international humanitarian law. Among the most important issues which have been brought out is that sovereignty no longer mean only rights of states under international law. Instead, it entails responsibility to protect the citizens and their livelihoods from harm among other things.[1] This progressive interpretation of sovereignty means that states are increasingly bound by international law especially when it comes to respecting of human rights on conditions of peace and war.[2] Further, individuals take new subjects of international law, with a host of rights and responsibilities. Thus, they can seek protection under international law and at the same time, they are held to account for violating these laws. The outcome has been the blurring of traditional

[1] See Chapter one, pp.6-7, Also chapter two, pp.32-37

[2] See Chapter two, pp.31-40

dichotomy between domestic and international, and stripping individuals of official and unofficial defence for their involvement in violations of international humanitarian and human rights laws.[3] Consequently, this marked the end of the water tight contention on whether a domestic situation characterised by egregious violations of International Humanitarian Law and International Human Rights Law really qualifies as a non-international armed conflict.

Additionally, the study analysis of post-election violence indicates that there were acts which amounted to violations of IHL. These include commission of acts of violence against civilians, destruction of sources of livelihoods, organized forced mass displacement of people, ethnic cleansing, mutilation and incitement to violence.[4]

The violations were not spontaneous but they reflected a structured, planned and well organized strategy of violence. Groups of youths were recruited, trained, armed and transported in strategic positions to uncast terror, kill, rape and destroy property belonging to 'enemy' communities. Further, evidence indicates that police officers used excessive force in response to the violence. More than 40 percent of the dead victims died from gunshot wounds.[5]

Indeed, the pre-trial chamber II of the international Criminal Court drew similar conclusion in its decision to grant the ICC chief prosecutor permission to carry out investigations and prosecute perpetrators of the post election violence. The extensive ruling with more than 650 pages made very crucial observations. The chamber noted that, 'multiple crimes committed during the post election violence of 2007-8 occurred in the context of widespread and systematic attack against the Kenyan civilian population or in furtherance of a state or organizational policy

[3] Ibid
[4] See chapter three, pp.83-4
[5] Ibid

to commit such acts on Kenyan territory.[6] Also, the prosecutor's application and the supporting materials provides a reasonable basis to believe that the widespread and systematic attacks directed against the civilian population, involving a course of conduct comprised of multiple commission of acts against specific segments of civilian population, conducted *inter alia* by members of organised groups associated with the main political parties, the PNU and ODM. This evidences that the violence was used in furtherance of state or organization policy.[7]

Additionally, the systematic attacks especially those by ODM were channelled through community structures at local level. Local leaders and elders including church and government officials called ordinary citizens to targeted acts of violence against civilians belonging to perceived rival communities based on ethnicity and political affiliation. Politicians stoked ethnic tension to mobilize political support among their ethnic groups.[8] Regarding PNU, the chamber ruled that, it used government institutions to carry out the crimes. Information available provides instances in which police units approved the use of live bullets to counter riots as well as the existence of unofficial 'shoot –to- kill' policy. It also appears that in many instances the victims of police shooting were attempting to escape violence and did not pose any mortal threat to the police as, "unarmed women, elderly persons, children and teacher [were] subjected to beatings, torture and killings".[9]

These observations among others indicate beyond doubt that there were violations which amounted to non-adherence to IHL and IHRL. The use of IHL and IHRL is reflective of the

[6] See The ICC Pre-Trial Chamber 11 decision on Kenya, ICC-01/09-3-Anx5, Annex 5 to Request for authorisation of an investigation pursuant to Article 15

[7] See The ICC Pre-Trial Chamber 11 decision on Kenya ICC-01/09-3, Request for authorisation of an investigation pursuant to Article 15, 26 November 2010, para.77

[8] See ICC-01/09-3, Request for authorisation of an investigation pursuant to Article 15, 26 November 2010, paras.83 and 85-86.

[9] Ibid

increasingly intertwining of the two as discussed in chapter two.[10] The non-observance of these laws raises the main question of the study, that is, what were the challenges which hampered the implementation of these laws during post election violence? The following section answers this question by drawing from both primary and secondary data gathered during the research. The main findings can be categorised as concerning, the institution of policing in Kenya; the role of the organised gangs and militias and the relationship with the political elite; absence of national programme of creating awareness on international humanitarian and human rights in general, and general weakness of accountability mechanisms, leading to entrenchment of the culture of impunity in Kenya.

The Institution of Policing in Kenya

Data collected indicates that the main challenge is attributable to the weakness of the institution of policing in Kenya. This weakness has been as a result of recruitment and training policy, political interference, lack of coordination with other security agencies, policing culture of repression and social control, inadequate resources and manpower, poor remuneration and social welfare, and de-professionalization of the police force.

The recruitment and training policy was identified as key issue by various respondents. A respondent noted that, in Kenya police Service, there are no adequate established procedures for recruitment. The checks and even psychological tests that could measure accurately the suitability of candidates are totally absent. Not everybody could be a police officer or be suitable for police tasks. There are no impartial, written or physical examinations. As a result, some of the persons recruited have dangerous criminal tendencies.[11] Consequently, the absence of a

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[10] See chapter Two, pp.63-5

[11] An interview with Kenya National Commission on Human Rights (KNCHR) official conducted on 6th, April, 2010.

meritocratic recruiting policy brings on board some individuals who lack respect for human rights and views policing through colonial prism of social control and repression.[12]

Lack of clear recruitment framework has been compounded by malpractices during recruitment and prioritization on attributes which do not translate directly to good policing. A respondent noted that during recruitment,

> 'usually all that matters is whom you know in recruitment team. So long as you know one of the recruitment officers and you comply with his terms, your candidate will certainly be taken. People who have paid their way into police force have no obvious reasons, no moral responsibility to keep any ethical or moral standards. The outcome has been recruitment of candidates of dubious character and we are harvesting the fruits of these malpractices every day'.[13]

This malpractice has been worsened by the prioritization of physical attributes as a key requirement for someone to qualify to join the police force. Usually, it is those with a given physique who are recruited. This is a colonial relic, whereby, the colonial policing was modelled as an institution of repressive social control. These concerns could only be addressed though physical intimidation, repression and sheer brutality.[14] A respondent stated that; "in a democratic polity, such policing model has no place, and importantly, there is no guarantee that a recruit with strong physique will make a good cop".[15]

Hence, the culture long maintained that police jobs are for the physically strong, uneducated and poorly trained people must change. The police entry qualification must never be anything less than a good school certificate. The higher cadre of police must go for graduate qualifications. Doctors, lawyers, social scientists must be recruited into police force to man

[12] See International Centre for Transitional Justice, *'Security Sector Reform and Transitional Justice in Kenya'* Briefing, January, 2010, p.5
[13] An interview with Kenya National Commission on Human Rights (KNHCR) official conducted on 6th, April, 2010.
[14] An interview with a Kenya Society for the Red Cross Official conducted of 5th, April, 2010.
[15] An interview with a Kenya Police Officer conducted of 7th, April 2010.

strategic areas and be paid well. This is the only way to improve the quality of persons joining the police force.[16]

Apart from recruitment policy, respondents noted that the quality of training is inadequate and incapable of producing human rights respecting officers. A respondent noted that the longest training police officers undergo is between six to nine months. Much of the time is dedicated to physical drills. As such, there is no enough time to turn recruits into a police material, in terms of educating them in human rights, intelligence driven policing, quality criminal investigations, and principles of democratic policing. [17]

These weaknesses in recruitment and training have been exacerbated by political interference in the policing activities, leading to further erosion of professionalism. The interference operates at all level of the police hierarchy. A respondent observed that the power to appoint the police commissioner lies with the president. The rationale of empowering the president to make such an appointment is to ensure that the occupant of this important and sensitive office is chosen and answerable to the highest authority. Unfortunately, this has created an avenue for political interference and intimidation for the commissioner serves at the president's pleasure, making him vulnerable. Further, police officers' dependence on patronage to advance in their career has made officers acquiescent to politicians, businessmen, bureaucrats and their friends even when tasks given clearly contravene the law. [18]

Indeed, the observation of political interference has been corroborated by the findings of the Commission of Inquiry into Post-Election Violence (CIPEV) and the pre-trial chambers of the International Criminal Court (ICC). CIPEV report for instance documented that most of

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[16] An interview with a Kenya Police Officer conducted of 7th , April 2010

[17] An interview with a Kenya Police Officer conducted of 7th, April 2010.

[18] An interview with Kenya National Commission on Human Rights (KNHCR) official conducted on 6th, April, 2010.

killings by police officers happened in ODM strongholds and this reflected the government's policy of using the police to further its political goals.[19] The same was confirmed by ICC pre-trial chamber which noted that, "PNU used government institutions to carry out crimes. Information available provides instances in which police units approved the use of live bullets to counter riots as well as the existence of unofficial 'shoot-to-kill policy".[20] Related to political interference from the government side was political partisanship in dealing with the violence. Prior to the violence, the police deployment policy was flawed leading to transfer of officers to their ethnic homelands. Consequently, most of the officers shared similar sentiments with their kin and when violence broke out, they took sides.

The CIPEV report documented evidence of a divide within the police forces in Rift Valley. In this Kalenjin predominant region, Police officers stood by and watched as homes of the non-Kalejin were being burned and looted. In some cases, it would appear the police members watched as individuals were killed in their presence. In Naivasha, one witness stated that, 'Kikuyu members of police were reluctant to assist and there was evidence of open defiance by some officers in relation to their superiors'.[21] Consequently, the Police Force in some cases behaved more like ethnic or political party militias leading to near collapse of the internal security apparatus. As a respondent noted, much of the violence would have been averted, had the police responded professionally and adequately, both before and during the violence.[22]

The political interference and partisanship meant that, despite presence of accurate intelligence generated by the National Security Intelligence Service (NSIS) on impeding

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[19] See CIPEV report , PP.428-32

[20] See ICC pre-trial chamber decision, ICC-01/09-3-Anx4, Annex 4 to Request for authorisation of an investigation pursuant to Article 15, p. 105, at Para 405; Also ICC-01/09-3-Anx3, Annex 3 to Request for authorisation of an investigation pursuant to Article 15, p.25.

[21]See CIPEV report, p.432

[22] An interview with Kenya National Commission on Human Rights (KNCHR) official conducted on 6th ,April, 2010

electoral violence, there lacked a coherent policy of containing the same. There lacked a national security policy or higher strategic framework to guide operational strategies and tactics to prevent or at least prepare adequately for such events.[23] When the mass violence broke out, police were simply overwhelmed by the sheer magnitude of widespread lawlessness, which would have been pre-empted had security agencies acted before the elections and arrested those responsible for organizing, financing and inciting violence.

The other critical issue which came out concerns the police capacity to respond to the violence. A respondent noted that, during normal times, the police are incapable of dealing with normal law and order issues. As such, those who expected the police to handle the post-election violence had placed too many expectations on an already overstretched and demoralised force.[24] This is corroborated by respondent working in one of the security agencies. He noted that, "the police population ratio of 1: 1000 is way below the United Nations recommended ratio of 1: 450. This makes it impossible to contain lawlessness, especially if it breaks out in large scale as it was witnessed during post-election violence. In the face of lawlessness, it is unrealistic, for a single police officer to control even 100 persons, leave alone 1000".[25]

The inadequate manpower was further compromised by the existing police scheme of service. In terms of remuneration, police constables who are the core of policing for they are always on the ground earn meagre eleven thousand Kenya shillings; lack comprehensive insurance cover in case of injury or killed in the line of duty and do not have adequate gear to carry out their work. The outcome has been a demoralised, poorly equipped police force, which

[23] See CIPEV report, pp.370 - 3

[24] An interview with a Kenya Police Officer conducted of 7th, April 2010.

[25] An interview with a Kenya Police Officer conducted of 7th, April 2010.

responds with maximum offensive force, in order to safeguard its safety, or adopts a 'do nothing' attitude, if it feels that taking action jeopardizes the safety of the officers.[26]

Entrenchment of the Culture of Impunity in Kenya

The other issue which emerged regards to the policing culture which condones impunity. A respondent noted that, long before the post-election violence broke out, impunity was deeply embedded within the police force.[27] Another respondent noted that, police are the only public servants who are least accountable to the public for their actions; they see themselves as the law.[28] The entrenchment of impunity was also being noted by the Kenya National Taskforce on Police Reforms. The task force concluded that, there is evidence of police participation in political violence, political partisanship and prevalence of excessive use of force when dealing with public disorder including extra-judicial killings.[29]

A respondent noted that, impunity is so deep rooted such that, even after the police force has been largely indicted by various commissions, it has persisted after post-electoral violence. She noted that, from January 2008 to January 2009, there were 1200 media mentions of police brutality and violations against fundamental human rights of Kenyans by the police. Also, evidence of extra-judicial killings has emerged. She provided information given by the late Constable Kiriinya before he was killed, on police involvement in extra-judicial killings. A part of the report read,

> 'during the murder missions, officers disguised themselves in hired cars and typically strangled their victims, shot them from behind or clubbed them or hacked them to death.

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[26] Ibid
[27] An interview with Kenya National Commission on Human Rights (KNCHR) official conducted on 6th ,April, 2010
[28] Ibid
[29] See a summary of the findings, P. Gastow, *The Kenya National Task Force on Police Reforms: Some Key Recommendation*. Geneva: DCAF, 2009

> The bodies were disfigured to prevent identification and dumped in the forests or remote woodland areas around Nairobi. Officers in the death squad were given bonuses of up to around 15, 000 shillings for good work after execution'.[30]

The fact that police hierarchy can sanction killings is indicative of the long entrenched culture of impunity.

The pervasive lack of accountability in Police has been linked to lack of an effective civilian oversight mechanism which can hold the police force to account. Currently there exist, only internal mechanisms of accountability within the police force. Kadongo observes that the disciplinary proceedings provided in the Police Standing Orders are conducted in a way meant to benefit the police against the complainants since the complainants are not a party to those proceedings and are not informed of the outcome.[31] Further, alternative avenues through which individuals can institute private prosecution against police officers as provided by the criminal procedure code (Cap 75, Laws of Kenya) are highly prohibitive. He notes, 'private prosecution is hindered by the investigative and procedural legal hurdles that the average unrepresented litigant is unlikely to cope with, not to mention the alternative prohibitive cost of hiring a lawyer for that purpose'. Further, the constitutional power of the Attorney General to enter a *nolle prosequi* at any stage of the proceedings without any legal duty to offer an explanation to the person who instituted those proceedings interferes with an otherwise excellent idea of holding the police accountable through legal proceedings'.[32]

A related observation was made in the report by United Nations Special Rapporteur on Extra-Judicial, Arbitrary or Summary Execution, Prof. Philip Alston. During a fact finding mission in Kenya, he concluded that there exists 'zero – sum accountability'. The police who kill

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[30] An interview with Kenya National Commission on Human Rights (KNCHR) official conducted on 6th ,April, 2010

[31] V. O. Kadogo, *Police accountability in Kenya'* Nairobi: Independent Legal Monitoring Unit, pp.2-3

[32] Ibid, p 3

are the very same police who investigate police killings. There is no independent police internal affairs unit which could reliably assess the legality of the use of force. In such cases, inquiries are opened which drag on interminably and usually to no effect. Also, police refuse to permit families of the deceased or witnesses to register complaints. Those who persevere are often threatened with violence.[33]

A respondent observed that in the face of this glaring evidence, it is rather naive to expect the police force to investigate itself and prosecute its ranks. Aware of these loopholes, some bad officers cannot desist from engaging in impunity. Consequently, officers who have been linked to the post election violations of human rights or have acted contrary to the professional code of ethics have remained in the police force.[34] Though there is need to vet and weed out such officers, there exists a problem in case it is done. An officer observed that, 'vetting is a tricky process for substantial number of officers will definitely be filtered out. What do you do with thousands of disgruntled officers? Wouldn't frustration force them to join criminal networks increasing such groups' organization and execution capabilities? This is the dilemma".[35]

The way out is to urgently constitute a civilian police oversight authority with powers to summon, investigate and institute proceedings against rogue officers. This should be complimented with enhanced independence of the police force to shield it from political interference and intimidation. A respondent aptly summed it up thus, 'police impunity exists in the absence of effective mechanism for investigating and punishing police misconduct. It can also exist when powerful individuals outside the chain of command can shield favoured officers from investigation or intimidate others who are determined to carry out investigations. Officers

[33] See a press statement by UN Special Rapporteur on extra judicial, arbitrary or summary execution', 16th – 25th, February, 2009, p 3

[34] An interview with Kenya National Commission on Human Rights (KNCHR) official conducted on 6th ,April, 2010

[35] An interview with a Kenya Police Officer conducted of 7th , April 2010

have been deployed to hardship areas, stagnated in one rank or interdicted for attempting to move against politically influential individuals and their clients. To avoid this, the more professional officers are unwilling to conduct investigations which may cost them their careers'.[36]

These observations points out to the systemic culture of impunity. A respondent argued that police forces can only do what policy allows them to. If the policy makers themselves especially the politicians do not have any problem with impunity, this will have a multiplier effect in other levels of the society.[37] This seems to be the state of affairs in Kenya whereby some highly linked government officials have been connected to instigating, financing and arranging political violence against their opponents. Nowhere is this true than during the post-election violence. Worse still, the government to date has not initiated any prosecutions against such individuals and parliament failed to enact legislation for establishment of special local tribunal to hold the perpetrators to account. [38] This points out to an official policy of condoning impunity.

Indeed the use of political violence as a strategy to win political power was nothing new during the 2007 elections. Mutahi points out that between 1991 – 2001, over 4000 people had been killed and 600, 000 displaced due to political violence as political leaders intimidate their opponents, killed and displace them to ensure that they do not vote. Despite subsequent findings by commissions of inquiry that political leaders were involved, no high profile prosecution has taken place.[39] To the contrary, some of the individuals implicated now sit in the cabinet. This creates an attitude that impunity pays politically and hence, there lacks concerted effort to

[36] Ibid.
[37] Ibid.
[38] See the ruling by pre-trial chamber II, ICC-01/09-15, Decision Requesting Clarification and Additional Information, 18 February, Para. 54.
[39] See chapter three, p.81

address it. What happened in 2007 differed from previous cycles of violence, only by magnitude but the strategies applied were the same.

Organised Criminal Gangs and Militias in Kenya

A closely connected challenge relates to the presence of organized criminal gangs and militias in Kenya which have proliferated since the advent of multi-party politics. A respondent observed that these gangs are not only organized criminal gangs but they also double as political militias when need arise. Some of them have illicit relationship with the Kenya's political elite all the way to the top and this guarantees them protection whenever they are targeted by law enforcement officers.[40]

The involvement of these gangs was evidenced by the ICC pre-trial chamber which noted that, 'political and business leaders hired organized criminal gangs with notorious records to carry out the attacks. This method was reportedly characteristic of the acts carried out, *inter alia*, by the *Mungiki* gang who were allegedly hired by kikuyu political and business leaders from Nairobi and the Rift Valley province. Similar involvement by criminal gangs such as the *Chinkororo, Sungusungu and Kalejin warriors* were reported.[41]

The gangs enjoyed protection from their political patrons. Whenever members were arrested, their patrons would pressurise the police officers to release them. The CIPEV report provides an instance when this happened and it notes that police in Nyanza province arrested criminal gang members including *Chinkororo* and *sungu sungu* who were intimidating citizens. After some arrests, the Commissioner of Police gave instructions for them to be released. It is assumed that this directive was due to the fact that a senior politician was purported to be behind

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[40] An interview with a Kenya Police Officer conducted of 7th , April 2010

[41] See ICC-01/09-3-Anx6, Annex 6 to Request for authorisation of an investigation pursuant to Article 15, p. 14;Also ICC-01/09-3-Anx3, Annex 3 to Request for authorisation of an investigation pursuant to Article 15, pp. 43 and 45; ICC-01/09-3-Anx4, Annex 4 to Request for authorisation of an investigation pursuant to Article 15, p. 85

Chinkororo. Such protection from the highest levels of police hierarchy left the police officers on ground incapacitated even when they had evidence connecting the gangs to political violence. Also, it encouraged the gangs to engage in brutal violence, knowing that their patrons will protect them.[42]

Another instance of impunity regards the symbiotic relationships between politicians and their supporters. A case was provided regarding the arrest of three councillors on the grounds of inciting their supporters to violence. A police witness stated that, 'when you arrest the so called politicians, people don't look into the crime. They say that the police have arrested one of their own. We arrested some councillors in Buret and the crowd was rowdy. They stormed the whole Buret police station so much that we were compelled to release those councillors'.[43]

Lack of Awareness of IHL among Security Agencies and General Public in Kenya

The other issue which respondents identified regards lack of awareness of IHL. As observed within the internal security agencies, there lacks evidence that IHL and human rights in general are taught to the members of security agencies. This is despite the fact that Kenya has ratified the key conventions which make up IHL. Kenya acceded to the Geneva conventions of 1949 on 20th September, 1996, and ratified the two additional protocols of 1977 on 23rd February 1999. In addition, the country signed and ratified the 1998 Rome statutes of International Criminal Court on 11th August, 1999 and 15th March, respectively.[44] The implementation mechanisms of these conventions are self-regulating and require international and national enforcement. At national level, the parties to the conventions are required to disseminate international humanitarian law.

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[42] See CIPEV report, p 468

[43] Ibid.

[44] See chapter one, pp 1 – 3.

The requirement arises from one of the fundamental principles of treaty law, the principle of *pact sunt servanda*. According to this principle, every state has an obligation to take whatever legislative and other steps necessary to prevent and punish violations of the rules. The imperative arising from this principle is that all treaty and customary law obligations must be fulfilled in good faith.[45]

Kenya has taken the necessary legislative measures to domesticate the required conventions through acts of parliaments. However, it has not disseminated these laws as widely as required. As one respondent noted;

> 'except within some section of elites in civil society organisations, academia, legal profession, and state law offices, majority of Kenyans are ignorant of these laws. There is no comprehensive program of educating citizens on international humanitarian law. Thus, it would be a long shot to expect the persons participating in political violence, to be aware that they are accountable to Geneva conventions'.[46]

Another respondent was of the view that, the perpetrators of post-election violence never considered themselves as engaged in armed conflict. Instead, they viewed themselves as involved in mass demonstration against rigged elections. Nobody expected the IHL to apply in this situation. This view permeated even within the security agencies. They approached the violence as strictly law and order issue. Had the CIPEV not brought in the issues of potential involvement by the ICC, the violence would have passed as a case of lawlessness associated with elections in Kenya.[47]

This respondent view raises the question of whether the PEV actually met the threshold of non-international armed conflict and whether non-state actors were organized in a way which would have made application of IHL possible. There is no doubt that along the *Tadic case* definition that 'an armed conflict exists whenever there is resort to armed force....between

[45] See chapter one, pp 21 – 22.

[46] An interview with an official of the Kenya Red Cross Society on 5th of April, 2010

[47] An interview with a Kenya Police Officer conducted of 7th , April 2010

government authorities and organized armed group or between such groups within the state, there is evidence that the PEV qualified to be non-international armed conflict. The definition only requires evidence of organization.[48] The organization need not be a complex bureaucratic structure easily identifiable. In prosecutor V Germain Katanga and Mathie Ngudjulo Chui, the ICC noted that, 'any group of people can be categorized as an organization if it has at its disposal material and personnel, the potential to commit a widespread or systematic attack on a civilian population.[49] Regarding Kenya, the criterion was met. The CIPEV report concluded that there existed predetermined objective, a common identity of groups involved, evidence of meetings, financing, logistic arrangements, public discourse instigating the violence, ability to pursue the objectives and sufficient resources.[50]

The glaring failure to disseminate these laws has also been attributed to International Committee of the Red Cross. A respondent noted that the ICRC is the custodian of Geneva conventions and this gives it a duty of creating awareness of International Humanitarian law. However, because ICRC mission is best achieved by maintaining neutrality, it does not get actively involved in some of the shortcomings of Kenya's implementation of IHL. [51] Rather, much of it works concerns developing publications which are accessible to interested groups.

Related to the ICRC failure to actively create awareness of this law is an absence of civil society organisations which are specifically involved in disseminating IHL. A respondent observed that, 'despite the fact that Kenya has large numbers of non-governmental organisations involved in human rights sensitization and awareness creation, none has a clear program on IHL. This is partly because, NGOs focus on urgent issues which are bound to attract donor funding,

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[48] See chapter Two, p.47
[49] See prosecutor V. German Katanga and Mathew Ngudjolo Chui, Decision on the confirmation of charges, ICC – 01/04 – 01/07 – 717, Sept, 2008, p.396
[50] See Chapter three, p.83
[51] An interview with an official of the Kenya Red Cross Society on 5th of April, 2010

and partly due to the fact that no one expected that Kenya, a perceived Island of stability will sink to a level whereby observance of IHL will be required.[52] As a result, IHL has not attracted much NGO involvement and even after the post-election violence, the situation has not changed much.

Conclusion

The chapter has so far brought out the main challenges which hampered the implementation of international Humanitarian law during the Kenya 2007 post-electoral violence. The key challenges relate to the institution of policing in Kenya whereby the recruitment, training and deployment policy have hampered the development of human rights respecting police service.[53] Further, the police force was deeply partisan, demoralised and lacked adequate manpower and logistic capacity to respond to the violence. Importantly, the entrenched culture of policing based on social control, repression and impunity encouraged excessive use of force against unarmed civilians. Further, the security agencies were manipulated by politicians to further what was essentially political policy rather than acting independently.

Apart from security agencies, the entrenched strategy of using political violence by politicians aware that they will not be held to account was a major challenge. This is because it encouraged them to organize violence and enter into illicit relationship with criminal gangs to further their strategy. Ultimately, the failure by security agencies and complicity by politicians reinforced each other, making observance of human right an unnecessary burden.[54]

[52] Ibid.

[53] See International Centre for Transitional Justice, '*Security Sector Reform and Transitional Justice in Kenya*' Briefing, January, 2010, op ct, p.5

[54] ICC-01/09-3-Anx6, Annex 6 to Request for authorisation of an investigation pursuant to Article 15, p. 14; Also ICC-01/09-3-Anx3, Annex 3 to Request for authorisation of an investigation pursuant to Article 15, pp. 43 45; ICC-01/09-3-Anx4, Annex 4 to Request for authorisation of an investigation pursuant to Article 15, p. 85 op cit

Also there is general lack of awareness of the obligations created by IHL and groups engaged in post-election violence did not perceive it as a non-international armed conflict[55]. This way, the post election violence was treated as mass riots or mass demonstration. Indeed had the ICC not intervened, PEV would have been treated just like the previous cycles of electoral related violence.

[55] See Chapter one p 2 on Article 19 of Protocol II Additional to Geneva Conventions of 12th August, 1949 and Article 3(1) Common to the Four Geneva Conventions of 1949.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

Introduction

International humanitarian law is critically important in offering protection to combatants and civilians in times of armed conflicts. Its development reflects the reality that armed conflicts at international and national levels remain a tool of policy for actors. As such, armed conflict cannot be eradicated but rather the nature and the strategies used in its execution need to be controlled to prevent actions which do not constitute subjecting individuals and groups to unnecessary human sufferings.[1]

IHL enjoys *jus cogen* status and hence creates obligations *erga omnes.* [2] Importantly it creates water tight prohibitions and the increasingly intertwining of IHL and IHRL, coupled with establishment of International Criminal Court evidences the importance attached to respecting of IHL.[3]

This chapter synthesis the findings of the study within the framework of objectives set and hypotheses developed. It provides a summary of the study, tests the hypothesis and answers the question on whether the objectives have been met. Further, it makes recommendations on how these challenges can be addressed.

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[1] See Chapter one, p.2
[2] See chapter two, p.38-40, Also Prosecutor vs. Erdemovic case No ITY-96-27-T, Para 28. Cited in L.C .Green, *The Contemporary Law of Armed Conflict* (3rd ed) .Manchester: ferns publishing, 2008; S.Kamen 'States Entitlement to Take Action to Enforce International Humanitarian Law' *International Review of the Red Cross*, may-June, 1989, p 16
[3] See Chapter two, pp.63-5; Also See L. Beck and S. Rite, ' International Humanitarian law and Human Rights Law' *International Review of the Red Cross*, 1993, No. 293, pp 94-119

Summary of the Research

The first chapter has dealt with the background of the study, reviewed the available literature, and set the objectives and hypotheses. Further it has provided a theoretical framework to guide the study. The framework is rooted in the understanding that the strict dichotomy between domestic and international has been blurred due to increasing consensus that there exists cosmopolitan values which accrues to individuals as members of humanity. More so their violations are violations against humanity and thus call for international response.[4]

Chapter two has analysed the main debates on international humanitarian law and its implementation. It has done so through situating the debates on implementation of international humanitarian law within international relations framework. The main conclusions made are that firstly, sovereignty is no longer a right but also a responsibility. This has led to more liberal interpretation of sovereignty. Secondly, the obligations created by IHL binds both state and non-state actors engaged in organized use of armed conflict as policy strategy and these obligations do not affect the status of belligerents. Thirdly, the definition of non-international armed conflict need not meet the high threshold as defined by Geneva Conventions of 1949 and their Additional Protocols of 1977. Instead, evidence of organization qualifies a situation to be characterized as non-international armed conflict.

Chapter three has provided an analysis of the Kenya 2007 post-election conflict and attempted to determine whether violations of IHL and aspects of IHRL applicable to non-international armed conflict were committed. The chapter concludes that the PEV has a historical basis reflecting the failure of state-building project.[5] As a result, there exist competing sub-national forces which at different periods have threatened to unravel into armed conflict. Usually

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[4] See Chapter one, p.25; S.C. Roach, 'Value Pluralism, Liberals and Cosmopolitan Intent in International Criminal Court' *Journal of Human Rights*, 4 ,2005, pp 475-490:476

[5] See chapter three, pp.76-83

the conflicts are related to political competition, especially during the electioneering period. During 2007-2008 PEV, the magnitude of the conflict is what made it different from previous ones. During this conflict, there were violations of IHL. These violations include targeted killings on the basis of ethnicity and forced mass displacement, use of sexual violence, incitement and spreading of hate messages.[6]

Chapter four has provided an analysis on the challenges facing the implementation of the IHL in Kenya. The analysis shows that the main challenge is attributable to the dysfunctions within the institution of policing, culture of impunity due to absence of holding merchants of violence to account, lack of awareness of IHL, and failure of the government and non-governmental organizations to disseminate these laws. On the institution of policing, analysis indicates that the police recruitment and training policy, human resources and logistical incapacity, de-professionalization of security agencies; political interference, lack of civilian oversight mechanisms and poor remuneration and welfare of the police forces remains a key challenge and unless addressed, the violations will persist.[7] Also, the systemic culture of impunity which in extremes involved organizing, financing, protecting and hiring of criminal gangs by political elites remains a key obstacle for it entrenches use of violence strategy to win political power.[8] Lastly, there is glaring lack of awareness of the IHL despite the government ratification and domestication of the main legal instruments of IHL.

The summary of the research shows that the study objectives have been met. The overall study objective was to examine the challenges facing implementation of international humanitarian law of non-international armed conflicts. This objective has been met through analysis of relevant conceptual and practical issues which have hampered the implementation of

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[6] See Chapter three, pp.83-93
[7] See Chapter Four, pp.96-103
[8] See Chapter Four, pp.104-5

this law. Further, the study has analysed the Kenya 2007 – 2008 post-election violence, brought out the violations that were committed and explained why these violations occurred despite of the fact that Kenya has ratified the international legal instruments related to non-international armed conflicts[9].

The study has confirmed the three hypotheses. The first hypothesis was that during PEV there were actions which amounted to violations of IHL. These have been explained in chapter two and three. The second hypothesis was that Kenya lacks effective legal and institutional mechanisms for enforcing IHL of non-international armed conflicts. This has been examined in chapter four. The third hypothesis which stated that Kenya lacks effective institutional arrangements for disseminating international humanitarian law of non-international armed conflict has also been confirmed. The study has shown that there lacks awareness of these laws even within the police forces. This evidences absence of effective dissemination of these laws[10].

Recommendations

On the strength of the research findings, several recommendations can be made:

First, there is need to have comprehensive police reforms. The reforms should have two objectives namely, enhancing the organizational effectiveness and promotion of human rights respecting policing. The organizational/operational effectiveness should address the police capacity to gather actionable intelligence, respond to violence effectively, and resist political interference. These call for increasing of police-population ratio to the UN recommended average, improving police remuneration and welfare, passing and implementing the necessary legislations to make the police force immune to political interference.

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[9] See Chapter three, pp.71-91

[10] See chapter four, pp 107 – 110

Regarding human-rights respecting police force, there is need to incorporate human rights in police training manual and establishing of a civilian oversight institution agency. The agency should be legally empowered to receive complaints from public and police officers, issue summons, conduct investigations and prosecute officers who engage in human rights violations. Importantly, it should be shielded from attorney Generals' power to enter *nolle prosequi.* Further, the obstacles which citizens face when they institute private proceedings against the officers need to be addressed.

Second, the systemic culture of impunity needs to be addressed. This includes the persistent failure to hold to account individuals and groups for deploying violence as a strategy to gain or retain political power. This practice need to be reversed. Impunity thrives because individuals and groups go unpunished. Thus, the perpetrators of 2007-08 PEV need to be punished in order to make unambiguous statement that impunity does not pay.[11]

Third, there is need to tackle the threat posed by criminal gangs, political and ethnic militias. The ease with which these groups can be mobilized to unleash political violence was evidence during 2007-08 PEV.[12]

To eliminate the threats posed, there is need for sustained crack down of such groups, their prosecution as well as development of policies which can address the root causes of their establishment and continued existence.

Four, the ratification and domestication of IHL is not enough. In addition, the government and non-governmental agencies need to run education programs which will sensitize the general public about IHL[13]. This can be done through the already vibrant media,

[11] See chapter four, pp 101- 105.

[12] See CIPEV report, p 468

[13] See Article 19 of Protocol II Additional to Geneva Conventions of 12th August, 1949

incorporation of IHL in schools curriculum, publication and freely distributing materials to the public. The materials should be published in a language accessible to the population.

Appendix: Structured Interview Questions to all Respondents

Dear Respondent,

This research is meant for academic purpose. It will try to find out what challenges of implementing International humanitarian law of non international armed conflicts Kenya faced during the 2007 post election violence.

You are kindly requested to answer all the questions as honestly and precisely as possible. All responses you give to the questions will be treated with utmost confidentiality. Kindly write the name of your organization only in the space provide below. DO NOT write your name on this questionnaire. Please fill in all the answers and information in the space provided.

General Information

Name of the organization--

Position --

Education--

Gender--

Age--

Section One: Electoral Violence in Kenya

1. Kenya has experienced a trend of electoral violence since 1990s. In your own opinion, what do you think is the cause of the electoral violence the country experience during election time? --

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2. What made the electoral violence experienced in 2007 post election different from the previous trends of electoral processes? ---

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3. How did the political parties contribute to the electoral violence witnessed in the 2007 post election violence? ---

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4. How did the land factor contribute to the 2007 post election violence?---

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5. To what extend did the campaign slogan of majimboism contribute to the displacement of people? --

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6. In your own opinion, how do you think the displacement of people was used as a tool winning elections? --

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7. What types of criminal violations did you witness during the 2007 post election violence? --

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8. How were the criminal violations committed during the 2007 post election violence different from normal criminal violations committed in other times? ------------------

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Section Two: Law enforcement

1. What are the challenges encountered by law enforcement agencies during the 2007 post election violence? ------------------

2. Do you think the police were well prepared to deal with the breakdown of law and order posed by the 2007 post election violence? ---Yes-----------No----------Explain-----------

3. In your own opinion, what are the major weaknesses in the policing institution in Kenya that contributed to the police failure to control post electoral violence in 2007? ----------

4. In your own opinion, do you think politics interfere with the institution of policing in Kenya? ----Yes-------------------No ----------------. Kindly explain-------------------------------

5. Do you think Kenya police had adequate capacity to handle the wide spread violence witnessed in 2007 post election violence? ---. Kindly give your reasons-------------------------------

6. Do you think police committed any criminal violations in the cause of duty during the 2007 post election violence? ---------Yes------------No ---------. Kindly explain-----------------

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7. Do you think Kenya police are well trained to promote and ensure respect of human rights in the event of internal conflict? --------Yes---------No---------. Kindly explain---------

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8. What are the internal mechanisms for complains and redress system in police do you know and do you think they are accountable? --

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9. How effectively can Kenya Police hold accountable its own officers involved in crimina behavior? ---

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10. Do you think that the involvement of other security agencies in controlling the 2007 post election violence adversely affected the efficiency of police? ----Yes-----NO---. Kindly give reasons--

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Section Three: Organized Criminal gangs and Militias in Kenya

1. In your own opinion, what do you think is the origin of organized criminal gangs and militias in Kenya? ---

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2. What is the relationship between Kenya's political elites and organized criminal gangs and militias? ---

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3. Do you think organized criminal gangs and militias were involved in the 2007 post election violence? Yes-----No-------. Kindly Explain--

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4. Are there any criminal violations committed by organized criminal gangs and militias during the 2007 post election violence? --------Yes---------No----------. Please explain-------

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5. In your opinion, why do you think it has been difficult for perpetrators of the 2007 post election violence to get punished?---

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Section Four: Awareness of International Humanitarian Law in Kenya

1. Explain what you know about International Humanitarian Law------------------------------

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2. How did you come to know about the international humanitarian law? ---------------------

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3. Are Kenyans bound by the international humanitarian law? ---Yes-------No.----------------

Kindly give reasons--

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4. What are some of the international humanitarian law provisions do you know? -----------

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5. Do you think that there were any violations of international humanitarian law during the 2007 Kenya post election violence? ----Yes -------No---------. Kindly explain--------------------
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6. Do you believe that the Kenya 2007 post election violence was an internal conflict to be regulated by IHL or normal criminal violations within the regulation of the criminal law of Kenya? --
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7. What is International Committee of the Red Cross(ICRC) and its role in Kenya?------------
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8. Do you think ICRC has played its role effectively in Kenya? -------------------------------
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Thank you for your time and cooperation.

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