

**UNIVERSITY OF NAIROBI
INSTITUTE OF DIPLOMACY AND
INTERNATIONAL STUDIES**

M.A. DESSERTATION

TOPIC:

**INTERNATIONAL HUMAN RIGHTS AND STATE MANAGEMENT OF
INTERNAL CONFLICT: A CASE STUDY OF THE ETHNIC CLASHES IN
KENYA, 1991 – 1997**

**PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE
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DIPLOMACY AND INTERNATIONAL STUDIES, UNIVERSITY OF
NAIROBI**

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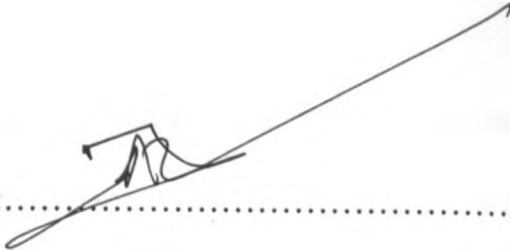


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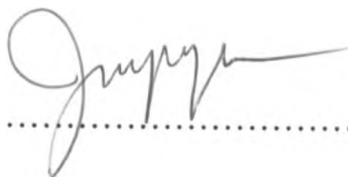


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DEDICATION

This work is dedicated to my wife and children without whose support and encouragement I would not have managed to realize this dream. Your prayers, more than all, counted a great deal to the realization of this work. I thank you all for this and may the Lord God whose name we keep invoking guide you too, into making similar achievements.

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ABSTRACT

This study investigates the relationship between human rights observance and conflicts. It also examines the role of government officials in conflict situations as well as how this impacts on human rights of the citizen. The study has relied mainly on secondary data, with the central assumption being that non-observance of human rights impacts negatively on conflict management. Both academic and legal materials have been used to arrive at the findings – that non-observance of human rights not only fuels outbreak of conflicts, but also prolongs it, thus making its management extremely difficult.

The study found out that governments, despite being signatory to various international instruments protecting human rights, would still proceed to violate the same rights. The study has also found out that when government agents violate citizens rights, individual violation of other individuals rights become quite common and difficult to handle.

The study also makes the case that inadequate infrastructure, poverty, dispute over natural resources- all impact negatively on human rights and may lead to conflict situations. Finally, it is established that the Government through its agent is the major violator of individual rights and freedoms. At Least this is what has been seen in the case of Kenya.

LIST OF ABBREVIATIONS

A.G.....	Attorney General
A.P.P.....	African Peoples Party
A.U.....	African Union
C.E.D.A.W.....	Convention on the Elimination of all forms of Discrimination against women.
C.C.P.R.....	Covenant on Civil and Political Rights (international)
C.E.S.C.R.....	Convention on Economic, Social and Cultural Rights ((international)
C.E.R.D.....	Convention on Elimination of all forms of Racial Discrimination
C.O.K.....	Constitution of Kenya (republic)
D.C.	District Commissioner
D.O.	District Officer
E.A.	East Africa
E.B.S.	Elder of Burning Spear
E.C.H.R.	European Convention on Human Rights
E.G.H.	Elder of Golden Heart
F.O.R.D.	Forum for the Restoration of Democracy
G.A.	General Assembly (of the U.N.)
G.O.K.	Government of Kenya
G.S.U.	General Service Unit
H.C.	High Court
I.C.J.	International Commission of Jurists.
I.H.R.	International Human Rights
K.A.N.U.	Kenya African National Union
K.A.D.U.	Kenya African Democratic Union
K.P.U.	Kenya Peoples Union
L.A.W.A.S.A.	Law Association of Asia and the Western Pacific
L.N.	League of Nations
L.S.K.	Law Society of Kenya
M.P.	Member of Parliament
N.A.R.C.	National Rainbow Coalition
N.D.P.....	National Development Party
N.G.O.	Non Governmental Organization
N.L.M.	Nairobi Law Monthly
O.A.U.	Organization of African Unity
P.C.I.O.	Provincial Criminal Investigations Officer

P.C.	Provincial Commissioner
P.P.O.	Provincial Police Officer
U.D.H.R.	Universal Declaration of Human Rights
U.N.	United Nations
U.N.H.R.C.	United Nations Human Rights Commission
U.S.A.	United States of America

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CHAPTER ONE

INTERNATIONAL HUMAN RIGHTS AND CONFLICT MANAGEMENT

1.0 Introduction:

The history of human rights stretches back to antiquity. During antiquity, it was necessary to clearly establish the relationship between the individual and the political community within which he lived to ensure the individual was protected against the arbitrary or oppressive conduct of those exercising state power. In antiquity, however, as Shimba points out, “**natural rights of man**” were protected only to the extent that rulers felt morally prohibited from infringing them (Kibwana 1990). Indeed, only much later did human rights become legally enforceable individual rights of the citizens.

Ancient Greece is ordinarily held to be the birthplace of the idea of human rights. Greek philosophers argued that in any society there were two types of law, the law of God and the law of man. Man’s law, it was argued, should not contradict the law of God or the law of nature. Temporal rulers were not allowed to engage in action which would take away basic rights of man in contravention of the law of God. In the early Greek states, the citizens enjoyed political and civil freedoms such as equal respect for all, equality before the law and freedom of speech. In Greek thought, these were part of the higher law which temporal rulers had to ensure was reflected in secular law.

During the Roman period, however, there was a change in emphasis to the effect that the higher law from which human rights flowed was derivable from the law of nature and was not necessarily God-ordained. During the Roman period, the idea began to take root that there were basic rights of man which political rulers could not divest man of, since those rights were derivable from the law of nature or constituted part of universal ‘**human reason**’. This shift

in emphasis, the secularisation in the conception of human rights made during Roman times, was extremely significant in the development of human rights, as we know them today.

However, although the Romans made this significant contribution, their conception and practice of human rights was much circumscribed in that human rights applied only to free men -- not women, slaves and foreigners-in a very similar manner to the way the rights were circumscribed in Greece. Further progress in the conception of human rights was made by Christian philosophers in the middle Ages who argued that man possessed innate human dignity because he was God's **creation**. Laws by earthly rulers could not negate human dignity. The language of human rights was used in the revolutions against feudalism in the 17th and 18th centuries. The rising middle classes argued through their philosophers such as John Locke that, in the formation of a government, men entered into '**a social contract**' by which some individual rights were surrendered for the establishment of the community. However, some basic rights -- particularly those of life, liberty and properties -- were retained by the individual. Any Government, which did not respect such basic rights, it was argued, could be resisted since it had failed to fulfil part of its '**social contract**'.

Human rights are an extremely important concern of human society since the beginning of civilisation. As a result of Adolf Hitler's fascist and dictatorial rule in Nazi Germany and Benito Mussolini's Italy, individual rights and freedoms were mercilessly trampled underfoot and naked terror unleashed on individuals and entire populations. States and governments, whose primary purpose is that of protecting individuals and enabling them to realise themselves, turned against them. After Hitler and Mussolini were defeated in the Second World War, the United States and European governments

systematically introduced the notion of a catalogue of the individuals and group's inalienable rights and freedoms which states and governments were forbidden to derogate from. Thus one of the post-second world- war concerns of the League of Nations, and later of the United Nations (UN), was to come up with a list of basic rights and freedoms of the individuals. These rights which were alluded to in the UN Charter were enshrined and confirmed in the Universal Declaration of Human Rights (1948). The fundamental rights and freedoms of the countries which became decolonised after the Second World War were modelled on the Universal Declaration of Human Rights, a tradition of which Kenya is part.

In today's world, human rights is characteristically imagined as a movement involving international law and institutions as well as a movement involving the spread of liberal constitutions among states. Internal developments in many states have been much influenced by international law as well as by pressure from other states trying to enforce international law. Internal or comparative approaches to human rights law and the truly international aspects of human rights are now rarely **'split'**. Rather, they are completely intertwined and reciprocally influential with respect to the growth of human rights norms, the causes and effects of their violations, the reactions and sanction of intergovernmental bodies or other states, and the transformation of internal orders.

1.1 The Research Problem

Violations of human rights fuel and exacerbate the impact of violent conflicts while, on the other hand, the latter undermines progress in the realisation of the former. The UN has put in place human rights guidelines that the international community is required to abide by. In addition to the

UN guidelines, several regional bodies have put in place human rights guidelines that member states are expected to observe.

Kenya, for instance, is a member of both the UN and the African Union (AU, formerly OAU). Both UN and AU have guidelines on human rights observance. These guidelines, however, need to be looked into for assessment of their observation.

That Kenya experienced ethnic clashes therefore raise the question as to why this happened and what role the state, despite its constitutionally-sanctioned administrative machinery, could have played in them. The clashes, no doubt, contributed to massive violation of individual human rights. It is therefore important to investigate the adequacy or, otherwise, the nature and the scope of measures that the government of Kenya has put in place for implementing respect for human rights. The basic question, therefore, is: Has Kenya, as a nation state, discharged its obligations effectively in a bid to ensure observance and respect for human rights?

This research focuses on conflict and human rights based on the UN and the AU documents on human rights' observance. Specifically, the researcher will look at the rights as observed or protected, and also as violated, by the state, through its varied agents. The right to movement and association, including political association; the right to own and protect one's property; the right to life and security; the right of everyone to enjoy the highest level of attainable standard of economic development, etc. The researcher will put particular emphasis on understanding how conflicts affect the practice of human rights' observance and the role of the law of the land, as a general principle, and also seek to establish the role/influence that the judiciary plays on human rights issues under such circumstances.

1.2 Literature review

Liberalism's theoretical paradigm is one of the most enduring in international relations, experiencing a new resonance in the post-Cold War era. Scholars of the liberal persuasion have argued that the extension of economic interests entail political order, and improvement in international cooperation. Francis Fukuyama in his discourse of the past decade on the end of history (Fukuyama 1989, 1992, 1999), has maintained that consumer capitalism and liberal democracy have resolved the main issues of contention over which human rights have fought since time immemorial. Following the collapse of most Communist – oriented regimes, and the increasing globalisation of capital, the liberal perspective in international relations and international law has achieved an unprecedented level of acknowledgement, but not without areas of contention.

The liberal tradition looks to individual rights and individual welfare as the normative basis for international institutions and global exchange (Keohane 1990).

Although much of liberalism is drawn from the realm of economic, the political realm is increasingly represented as fundamental to its ethos.

Michael Doyle, in his description of liberal regimes, notes four definitional Characteristics. These are the presence of private market –based economies, the existence of external sovereignty, a citizenship with juridical rights, and republican representative governments (Doyle 1995). In the field of international relations, liberalism occupies a central explanatory space in outlining how peaceful competition and peaceful common marketisation can lead to peace. Liberals also make the argument that the democratic ethos can be used to explain the limit or absence of war, particularly in the post-cold war period. Liberalism makes a powerful argument concerning the necessity for an open exchange of goods and services. This exchange,

liberals argue, along with international rules and institutions, leads to the promotion of both international peace and economic prosperity. Francis Fukuyama (1989) draws from Hegelian thought which traces the evolution of self-awareness and self-esteem to the point of perfection, which he argues has been achieved in the modern liberal democratic society. He contends further that political democratisation and consumer capitalism have resolved the main contradictions over which, throughout history, human beings have been prepared to fight. With the fall of communist bloc, he further argues that all rival forms of political identity have been eliminated in the sense that they have failed to satisfy either the desire for wealth or the desire for freedom.

Fukuyama's argument has important implications for international relation theory. First, it implies that peace will be accessible to all nation-states willing to undertake liberal democratic reform. Indeed, this civil peace brought about by liberalism, it is argued, should logically have its counterpart in relations among nation- states. The **'theory'** of a democratic peace has been the outgrowth of this proposition, positing that democracies rarely fight each other, and instead tend to fight undemocratic or illiberal regimes.

From an international law perspective liberalism, democratic ethos and freedom of the individual are best protected and fulfilled only when individuals are able to enjoy their human rights as recognised under international human rights documents. Political and civil rights are ordinarily found in the constitutions of market oriented or free-enterprise countries. Such rights are perceived as principally granting citizen's freedom from government so that the 'citizens' enterprise can unhinderedly be employed in productive work. Socialist countries as well as some writers on

human rights believe that the most important type of human rights is the economic, social and cultural rights, since the enjoyment of these rights, it is argued, is conducive to the immediate raising of the standard of living of the citizen.

It is true that a state could theoretically guarantee political and civil rights without spending a coin. However, for economic, social and cultural rights (and some group rights) to be enjoyed, the state has to commit funds before their enjoyment can be possible. However, it is generally accepted that political and civil rights and economic, social and cultural rights are complementary, they go hand in hand. The right to life is endangered where the citizen cannot afford food or health care. Protection from deprivation of property is meaningless to the majority of a country's citizen if they have no property. Freedom of movement is circumscribed where citizens cannot afford to travel. The right to secure protection of the law is undermined if citizens cannot afford legal fees. Similarly, even if a high standard of living and culture has been achieved in a country, the citizens may yearn for political and civil rights as events have demonstrated in South Korea and the former Soviet Union. The ideal state then exists where the three types of fundamental rights- and thus human rights in their entirety- are recognised and enjoyed equally and at the same time.

Under the United Nations Charter, member countries are enjoined to respect human rights and fundamental freedoms, because, when individual governments trample on human rights, peace and security are threatened, for all and not only for the individual country. As a result of this, member countries are expected to make provisions of this requirement within their constitutions and other laws. The government and the individuals in any country must therefore be bound by human rights provisions.

Excessive government and governance are not only materially costly, but also do not create the right atmosphere to enable individuals develop their enterprise and their countries to the maximum. A good human rights record can only exist where there is enlightened and good governance as well as an aware citizenry. Therefore human rights awareness and observance become a co-operative enterprise between the government and the citizens.

Enforcement of human rights may very well be the most crucial aspects of provision and enjoyment of human rights. However impressive the way of human rights a constitution or international instruments grants, the rights may not mean much where an individual cannot enforce them. It is therefore necessary that enforcement of these rights to be real so as to ensure that individual's rights are vindicated genuinely. Liberalism argues that it is only democratic and liberal regimes, which will be able to provide a proper environment for the full enjoyment of human rights.

Liberalism, proponents so-argue, will be able to provide freedom for everybody, to maximise their talent to the maximum possible they can, ensure that peoples welfare is taken care of, moral principles and greatest good for the greatest number. Under these conditions, it is argued that individual human rights would be maximised and war would not be possible

Internal conflict is today a worldwide phenomenon. It not only stagnate development, but also results into massive human rights abuses. A vast majority of wars today are internal. In Africa alone more than thirty wars were fought between 1970 and 1997, most being internal in origin. In 1996, fourteen of the fifty three countries of Africa were afflicted by armed conflicts, accounting for more than half of war- related deaths worldwide

and resulting in more than eight million refugees, returnees and displaced persons. The consequences of those conflicts have seriously undermined Africa's efforts to achieve long-term stability, prosperity and peace for its people. Management of internal conflicts by states, at times further exacerbates human rights abuses. The army, police and other state agents have been known to use terror for social control and counter –insurgency campaigns targeted at civilian populations. Some states resort to the use of extreme violence in an effort to wipe out indigenous communities. Millions of indigenous people have been displaced and killed as a result. In addition, internal conflicts, has become a threat to world peace given the fact that domestic affairs usually develop international characteristics. The need to address the problems of internal conflict therefore cannot be overemphasised; nor can the relationship between conflict and human rights. In his report on the “causes of conflict and promotion of durable peace and sustainable development in Africa”, the U.N. Secretary General Koffi Annan said:

Conflict in Africa poses a major challenge to United Nations efforts designed to ensure global peace, prosperity and human rights for all. Although the U.N. was intended to deal with inter- state warfare, it is being required more and more often to respond to intra-state instability and conflict. In those conflicts the main aim, increasingly, is the destruction not just of armies but also of civilians and entire ethnic groups. Preventing such wars is no longer a matter of defending states or protecting allies. It is a matter of defending humanity itself.

The Secretary General goes further to state that human rights and the rule of law are good components of any efforts to make peace durable. They are cornerstones of good governance. By signalling its commitment to respecting human rights, a government can demonstrate its commitments to building a society in which all can live freely.

Mwagiru writing on “conflict and peace management in the **“Horn of Africa”** (1996) discusses the issue of internationalisation of conflict and

concludes that internal conflict becomes endowed with many international characteristics, which render it no longer purely internal. As example, he cites the loss of life (including genocide) and violations of human rights, which occur in internal conflicts such as those of Somalia, Rwanda and Burundi, which give rise to international concern since human rights are now considered to be an international and even universal concern. Hence their abuse and violation can no longer be justified on **“internal affairs”** grounds alone. Similarly, where ethnic communities straddle the territorial borders of two states, a conflict on one side of the border will necessarily affect the kith and kin on the other, and this in itself immediately internationalises the conflicts. This argument while depicting a true position does not state the role of the state as a protector of its citizens. Zartman in his work **‘mediation in ethnic conflicts’** (2004) states that perceived collective need that is denied is the basic condition for conflict. According to him this can refer to a broad range of grievances, from relief from political repression to redress for economic deprivation. These needs can be codified as rights. However, he admits that due to its subjectivity and universality, need alone is not the source of conflict. Quoting Aristotle who noted that **“inferiors become revolutionaries in order to be equals, and equals in order to be superior,”** with the cycle continuing to run, Zartman argues that conflicts find their roots in differentially distributed need. He argues that the jump from inequality to inequity, or unjust inequality leading to conflict comes when needs appear to be met differentially for unacceptable reasons. When people no longer see themselves as poor or deprived because that is the way things are or because it’s God’s will, for example, or because of something that they have done as an infraction of accepted rules, but because they are targeted for deprivation, then the situation becomes explosive. Need-based conflict is reduced by meeting need in absolute terms and by meeting fairly, according to whatever

meaning of fairness is currently acceptable in society. Conflict management in this situation means meeting grievances or meeting need. Like Mwangiru, Zartman does not discuss the positive role of the state as an independent organ charged with a role of protector of all in such a situation.

Zartman argues that people feel targeted because of their political beliefs or their social position or their inscriptive membership, or variations on these themes but whatever the cause of the discrimination, it is in itself the coin for the conflicting party and becomes a source of solidarity among the revolvers. Rupesinghe writing on **“mediation in internal conflict, lessons from Sri-Lanka”** (1996) notes that these conflicts often involve a notion of identity, a concept of security and a feeling of well-being. He points out that conflicts that involve a core sense of identity tend to be intractable largely because of any rational assessment of benefits in perpetuating the conflicts. Azar (1986) has pointed out that intractable conflicts which sometimes stem from a single grievance, escalate **“to dominate and absorb most of the energies and resources of all sides, ultimately involving every aspect of inter-communal relations”** in these instances, conflict resolution can be seen as a means of changing the conditions of intractability. Rupesinghe has pointed out some of the characteristic of internal war which include the fragmentations of societies, communication breakdowns between segments of society, the militarising of the conflict, increased flows of refugees and the internally displaced, the stereotyping and / or dermonization of others, internationalisation of the conflict (but rarely of attempts at mitigation or resolution), and massive violations of human rights and severe breaches of humanitarian law, particularly against civilians. In addition, partly because of the multifaceted and complex nature of most protracted social or

communal conflicts and the societal fragmentation they engender, attempts at peacemaking are often sporadic and uncoordinated.

In conflict situation marked by fragmentation and miscommunication and / or disinformation, linear, elite-level approaches to conflict resolution rarely bring lasting results and apparently must be supplemented by other approaches. At one level, this necessitates looking at conflicts within political frameworks that take into account social, economic and historical factors. It also implies recognition that in specific conflict situations many actors and institutions need to be involved in the transformation process, and that each phase in conflict may necessitate a different type of intervention by different actors or combination of actors.

In terms of fragmentation of society, perhaps the most critical aspect of internal conflicts is the disempowerment of local communities. According to Rupesinghe, in these internal situations, armed protagonists readily target civilians. Humanitarian agencies working in difficult circumstances created by conflict begin to negotiate with the armed protagonists and the civilian population becomes increasingly passive. Meanwhile, attempts are made at external mediation.

Ho-Won Jeong, in his book ^{her} **“Peace and Conflict Studies- An Introduction”**, posits that Human rights have become major concern of modern society, with violent oppression being used as a form of social control to prevent democratic participation. He further notes that root causes of human rights violations originate from deteriorating economic and social conditions. He points that expression or organisation of Political opposition in China, Turkey, Kenya, Pakistan and other countries under authoritarian government leads to imprisonment. Political intolerance, he states, often

goes hand in hand with social discrimination against certain categories of people . Victims of communal violence often include indigenous populations, refugees, children and minority groups.

In analysing the connection between human rights and peace Hon-Won Jeong states that the elimination of structural violence against the marginalized has its own intrinsic importance- inequality and unfair treatment at personal and group levels stem from ethnocentrism, racism, sexism, colonialism and authoritarian political rule. Economic justice and fair treatment of people he argues are important not only in their own right, but simultaneously it can also be said that they are essential component of positive peace. Discrimination against ethnic and linguistic minorities builds up anger and frustration, while lack of freedom and economic inequity create conditions for political and social unrest -sometimes civil war. According to him sustainable peace cannot be obtained without the existence of a civil society that guarantees human rights. Ho-Won- Jeong also argues that permanent collective rights and special status for minorities are essential elements in creating a desirable process to build stable communal relations.

Balancing competing claims between minorities and majorities is crucial for building a pluralistic society where various separate nationalities exist side by side with a single citizenship. The concerns of minority groups can be addressed by a variety of means that allow more control over and autonomy for their life. These include the creation of new territorial boundaries, greater access to decision-making, distributive economic policies in favour of disadvantaged groups and acceptance of cultural pluralism. Where as this argument is basically sound, it fails to consider the fact that without an enabling legal framework and enforcement institutions, it may not be possible to fully address the concern of this minority group. An ethnic

group refers to a nation, race or tribe that has a common cultural tradition. The aspiration to become a mono-ethnic state with exclusive right to territory is an unattainable dream, in that very few states have ethnic homogeneity. Conflict is endemic and systemic in many countries (states) divided by class ethnicity, religion and language. Severe violence has been experienced in multi ethnic states of former Yugoslavia, Rwanda, Sri-lanka, India and other places. However, reasons as to why ethnic conflicts occur within states could differ from place to place. Generally speaking, political and social stability does not exist in a society that has intolerance towards other ethnic and racial groups. Many violent conflicts reflect the instability or deligitimisation of a nation-state system.

Political elites in many authoritarian states lack political accountabilities. State institutions in places such as Turkey, Iraq (before collapse) and Iran have been used as tools to repress minority ethnic groups as well as the majority population. Human Rights violations occur within a state, rather than the high seas or in outer space outside the jurisdiction of any one state. Ultimately effective protection must come from within the state. The international system does not typically place delinquent states in political bankruptcy and through some form of receivership take over the administration of a country in order to assure the enjoyment of Human Rights, rather the international system seeks to persuade or pressure states to fulfil their obligations through one or another method either observing national law (constitution or statutory) that is consistent with the international norms or making the international norms themselves part of the national legal and political order.

The international community has, over the years since the end of the Second World War, tried to establish certain minimum standards of behaviour that

all countries should comply with. These standards have been progressively given voice in different Human Rights instruments that world governments are expected to adopt. Among these instruments are:- the Universal declaration of human rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the covenant against the Crime of Genocide, etc.

Alongside the growth of such human rights instruments, there have grown different non-governmental organizations whose mandate is advocacy for greater respect for international human rights. The work done by these NGO's has led to a situation where it is very difficult for the government to violate human rights without other countries getting to know of it. The result has been that human rights concerns have thus become part of the terms under which countries relate. Gangster nations can expect to be criticised by other members of the international community. Governments that violate human rights will be condemned. Censure can be a powerful diplomatic weapon, especially if it is fortified with some concrete action, such as economic sanctions. In Kenya suspension of foreign aid to the country was a major catalysing factor in the transition to political pluralism.

Kenya has not ratified the international Covenant on Economic, Social and Cultural Rights 1966; however, the country has ratified the covenant on Political and Civil Rights 1966, and is accordingly bound by it. More important, is the fact that international human rights standards, according to international law apply to all countries irrespective of whether a particular country has ratified or officially agreed to be bound by the international agreement. Because of this legal position, International human rights Standards become very important in the domestic arena as far as securing and safeguarding of human rights is concerned. Accordingly, apart from the

domestic constitution, there are international instruments which also impose observance of human rights.

Chapter five of the Constitution of Kenya (sec. 70-82) provides for the protection of human rights of the individual citizen. These include freedom of movement (Sec. 81), right to reside in any part of Kenya, subject only to certain legal limitations, section 70 of the same Constitution lists as a fundamental right, i.e. the protection of privacy of one's home and other property and protection from deprivation of property without compensation. Section 75 specifically protects this property and lists the ground upon which compulsory acquisition by Government may be effected.

The Statute that regulates land ownership and title on the other hand, and specifically the registered Land Act (cap.300) were intended to create strong, absolute and indivisible title to land, with appropriatory character that is indicative of one's interest in a piece of land and evidence of such ownership. A strong and absolute title was also in turn supposed to enable the proprietor to freely transfer land in the market, the person whose name appears therein, being deemed to be the rightful owner, to the exclusion of all others, and the title is in turn guaranteed by the state.

The state, through police force, is constitutionally mandated and obliged to be in charge of the maintenance of law and order. Section 14 of the Police Act (Cap. 84) spells out the mandate of the Kenya Police force as:- the preservation of peace, the protection of life and property, prevention and detection of crime, apprehension of offenders and enforcement of all laws and regulations with which it is charged. It is important to note that in addition to the Police force, the state has at its disposal the Army, Air Force and Navy, which even though are meant for taking charge of aggression

from outside, can easily be mobilised if it is felt that a situation exists domestically that is beyond the capability of the regular police force.

Kenya too is a multi- ethnic state and has had its fair share of ethnic conflicts. It must be pointed out that not all internal conflicts in Kenya or elsewhere are ethnic in nature. However, this study will focus on internal conflicts, which are ethnic and also violent in nature.

In its report to the Minister for Justice and Constitutional Affairs, the task force on the establishment of a truth, justice and reconciliation commission stated:

Throughout the 1990's, the Moi government instigated and at times directed the ignition and execution of ethnic clashes against communities that were deemed to be in opposition to it. Directed at the so-called opposition communities and zones, these clashes exploited the volatile question of land as their pretext.

If the above observation by the task force is true then one immediately is justified to conclude that the Moi government was openly abdicating its responsibility as a protector of international human rights. The report also observes that in both the Rift Valley and Coast provinces, in particular, Kenyans from certain communities were termed "**foreigners**" and either killed outright, their lands forcibly taken, their property and livestock confiscated or destroyed, women and girls from their communities raped and beaten, and their lives irreparably ruined. Any of these "**foreigners**" were forcibly exiled from the provinces and dared to return. Thousands were killed and hundreds of thousands internally displaced in these clashes. The role of the state as a protector of its people, in such situation calls for investigation. This work is targeted at exactly that.

The republic of Kenya has an internationally binding obligation to protect all human rights, that is, civil and political rights, and economic, social and cultural rights because it is a signatory to both the international covenant on civil and political rights and the international covenant on economic, social and cultural rights. Economic crimes lead to the violations of the entire gamut of human rights, and in particular of economic, social and cultural rights. It is a well established fact that human rights- including economic-social and cultural rights- are indivisible, interdependent, and interrelated. Land, for example is an economic asset, and the killing or forcible eviction of the lawful owners from their lands constitutes both economic crime and human right violations. The role of the state in such glaring violations calls for investigation. Furthermore having become a signatory to the covenants for protection against such violations, the need to examine state preparedness for the fulfilment of the protection goals calls for examination. The impact of the violations and the future of human rights in the country also call for a study.

Nyong'o, in his article **"The lies about tribalism in Kenya,"** (1991) has correctly observed that like most "isms, tribalism is an ideology. It is an ideology for political oppression; it is an ideology of divide and rule. The fact that a Mkamba speaks Kikamba with fellow Mkamba is not tribalism; language is a form of communication with cultural, ethical and emotional import. People speaking different languages can live in the same political system without making language a bone of contention in politics. But when a Mkamba is refused the chance to speak Kikamba and is compelled politically to use another language then language becomes a political issue. Also when people who speak one language are favoured in employment, then language will rear its ugly head as a bone of contention in politics. From Nyong'o's observation, it is quite clear that discrimination (read human

rights abuse) is what makes ethnicity become a problem. In a nation state the custodian of human rights can only be the state and its agents, consequently in studying ethnic conflict, the role of the state and its agents in this regards is put on spotlight.

Like the task force on truth and reconciliation Nyong'o seem to hold the view that it was the Moi regime that 'promoted the ethnic clashes – that occurred in Kenya (1991-1997). That the government in power is responsible for the overall maintenance of law and order is not an issue in dispute, and to that extent the Moi regime (KANU) is justifiably to blame for these clashes. However, how does one explain the fact that the NARC govt; in which Nyong'o is now a minister, has failed to address the problem of victims. To date many people evicted from their legally owned land have neither been resettled elsewhere nor been assisted to go back to their land parcels. This is despite the fact that parliament has already approved legislation requiring the government to do so. Two years of NARC rule has not given any hope to these victims. Moreover, recent ethnic clashes in Likia region of the Rift Valley cannot vindicate the argument.. It therefore goes beyond Moi and KANU.

To the then President Moi, **“the clashes were caused by democratic changes”** this he said at a luncheon in Vienna, Austria, on 17th March 1992. Moi all along accused the opposition parties of instigating the violence. However, one fails to understand why his government could not take action against the people he accused of instigating the violence. The only logical conclusion was that Moi was being too mean with the truth. For example in April 1992, the President accused Raila Odinga, then one of his greatest critics in opposition politics, of instigating the attacks in Western province areas of Bungoma. Interestingly, at that time Raila was out of the country.

As correctly observed by Aloo Ochola (NLM NO. 43 JUNE 1992), it defeats all logic that the President, being in full control of the state machinery, should, with fanfare, tell his country folk to see just how multi-party democracy is destroying them. One would have expected the President to have had the vandals arraigned in a court of law in order to have witnesses testify against them.

Kiraitu Murungi, then working for the American civil liberties union in Washington D.C. and one of the then leading opposition lawyers, in his article titled **“Kenya’s dirty war against multiparty democracy”** wrote: -

As the euphoria for multiparty democracy grips the majority of Kenyans and the world, little attention is being paid to the gross violations of human rights being perpetrated by the government against innocent people and their children. In an attempt to complicate and sabotage the transition to multi-party democracy, the government of president Moi is aggravating ethnic tensions in the country.

Murungi, then in exile and actively opposed to the Moi regime, -- and now minister for justice and constitutional affairs in the NARC government -- was expressing a view then held by many back home, who could not openly talk about it, probably for fear of victimization by state agents. On 30th April 1992 the Catholic bishops of Kenya met President Moi over the problem of insecurity in the country and told him what amounted to the view held by Murungi in his article quoted above. The cumulative effect of the clergy’s message was that Kenyans had lost confidence in Moi’s leadership, considering the manner in which he had been running the revered office, and matters of public interest (NLM. NO. 43. JUN 1992. As seen earlier Moi did not seem to bother. Later when it appeared that what they discussed had been leaked to the press, his reaction was only to condemn the churchmen for revealing to the public the substance of discussion with him

stating that it was **“in confidence.”** In reaction to the president’s accusations, the churchmen met again in Nairobi on 22nd May 1992 and reiterated their stand by stating:-

What the bishops said to the president remain true, even though it was regrettable that there was a breach of protocol, but we stand by and are willing to repeat every word we spoke. We earnestly request the president to consider very drastic changes to meet a truly tragic situation, because it threatens the whole future.

What is clear both from Murungi’s view and the bishop’s is the reluctance of the state, symbolized by the presidency, to act against violence. According to Murungi the violence in Western Kenya bore a striking similarity to the right – wing or so called black- to black violence in South Africa, where security agents had not only funded, but also actively participated in the alleged tribal wars, though they denied any involvement.

Going by a view held by lawyer Maina Kiai (1996), the situation obtaining in Kenya at the time of these clashes was similar to that in Rwanda just before the genocide. He supports the report by the London-based Human Rights group, “African Rights” released in September, 1994, which extensively analysed the situation in Rwanda. According to the seven hundred page report, “Rwanda; death, despair and defiance”, the war in Rwanda was not a “tribal conflict”, rather “political manipulation of ethnicity (was) the main culprit for (the) ethnic problem. The report goes on to state that the genocide was a political strategy adopted by a clique of powerful people at the centre of the government in Rwanda. Their plan, the report concludes was to “hold to power at all costs.”

Kiai added that Kenya, like Rwanda, had expressive legal and administrative structure, unbridled corruption, lust for total and unchallenged power, radio

propaganda, lack of dialogue and the unwillingness to compromise. He concluded that the clashes had reached a level which, if left unchecked, had the potential of turning into genocide.

Prominent lawyer Gibson Kamau Kuria (1996) added a voice to the debate when he said that the clashes were the result of a clamour for an ethnic based federal system (majimboism) championed by senior politicians opposed to political reforms for fear of losing power. Kuria cited politician Kipkalia Kones, then a Minister of State in the President's Office, as one advocate of majimboism who even proposed that a motion be moved in Parliament to change the constitution to pave way for majimboism. Such an amendment, Kuria argued, would be an illegality which could plunge the country into turmoil. Though Kuria argues that constitutional amendments should involve the citizens, he lays claim that Moi's KANU government did not take to Parliament such a bill as proposed by majimbo advocates. Instead, around October 1991, some form of majimboism had been introduced unconstitutionally through ethnic cleansing. He points out that Dr. Misoi, then an Assistant Minister in Moi's government, and one of the advocates of majimboism, had actually stated in public: "Once we introduce majimboism in the Rift Valley, all outsiders will have to move and leave the same to our children". Kuria also cited a statement by legislator Francis Lotodo, then Moi's Cabinet Minister, who on November 27, 1993 said that the reason for his demand that Kikuyus leave the Pokot district, Rift Valley Province, was the Kikuyu demand that Moi vacates the presidency. In addition, Kuria claimed majimbo had, since September 1991, been seen as a device for ensuring that the political power did not shift its regional location. The other object was the redistribution of land, since its advocates such as politician William ole Ntimama considered market and constitutional protection of property as unstable institutions for Kenya.

Finally, Kuria argues that the August, 1992 constitutional amendment requiring a Presidential candidate to garner at least 25% of votes in at least five provinces was seen by the KANU leaders as a threat of political domination by the big tribes (read Kikuyu, Luos). They had therefore to be confined to their "Ancestral Lands" for voting purposes.

He concluded his article by an advice to the political establishment of the day:-

The political and constitutional advisers of the sole party have big and urgent task. The first one is to advice that the (civil) war declared by the advocates of majimboism and practitioners of ethnic cleansing be ended ... they must also tell them that they must swallow their pride and start recognising the rights of others.

1.3 General Objectives of the Study.

The objectives of the study are to:

- (i) Investigate how observance /lack of observance of human rights lead to internal conflicts.
- (ii) Establish the way in which human rights and conflicts affect each other and
- (iii) Draw correlates that help in pointing to explanations.

Specific Objective of the Study.

To critically examine the human rights situation in Kenya prior to the outbreak of, and during, the clashes of the eight-year period, 1991-1997.

1.4 Justification of the Study.

With seven hundred and seventy nine persons killed, fifty four thousand people displaced and property valued at over a billion Kenya shillings destroyed within the first year of the outbreak of the clashes (1991-1992), the need for a valid response to the problem, especially highlighting its possible causal factors, cannot be over- emphasised.

The findings of this study will provide the government with necessary information on how to handle future situations of domestic conflict. The study will also create some awareness on issues of human rights and governance. Besides, it will provide the general public with additional knowledge, especially by showing the linkage between internal conflicts and state protection of human rights.

1.5 Hypotheses

This study will be guided by three hypotheses, namely:

- (i) Observance of international human rights facilitates management of internal conflicts.
- (ii) Lack of observance of international human rights inhibits management of internal conflicts.
- (iii) There is no correlation between observance of international human rights and internal conflict and its management.

1.6 Theoretical Framework

Theory is set of interrelated concepts that explain a phenomenon. It is a simplification of reality. Theories help us explain and predict phenomena of interest and, in consequence, to make intelligent practical decisions. Explanation is possible since theory is able to specify what variables are related to what other variables and how related they are, thus enabling the researcher to predict from certain variables to certain other variables. The very nature of theory lies in its explanation of observed phenomena.

According to Coplin (1971) theory is a set or sets of propositions and /or hypotheses that are logically related to each other. Coplin further states that theory brings organisation and the capacity to accumulate knowledge to a field and it enables scholars to tie together the proposition they have

developed at different level Hoffman (1960) sees theory as a set of inter-related questions capable of guiding research both of the empirical and normative variety.

One of the most influential Greek concepts adopted by the Romans was the idea of Natural Law, a theory which constituted a body of universal relevance. Such rules were believed to be rational and logical because they were rooted in human intelligence (reason). They could not be restricted to any nation or any group but were of worldwide relevance. This element of universality is basic to modern doctrines of international law, as well as being an indispensable precursor to contemporary concern with human rights.

The natural law concept begins with an assumption that there are natural laws which confer certain particular rights upon individual human beings; that such rights exist as a result of a higher law than positive (or man-made) law. Such a higher law constitutes a universal and absolute set of principles governing all human beings in time and space. The proponents of this approach, like John Locke, founded the existence of such inalienable rights - - as the right to life, liberty and property --upon a social contract, marking the end of the difficult condition of the state of nature by enabling recourse to a superior type of law. This approach, therefore, provided a powerful method of restraining arbitrary power to such an extent that its immense value has led to the establishment of universal principles of human rights within the international community.

Positivism, as a legal theory, emphasised the authority of the state and as such left little space for rights in the legal framework other than the specific rights emanating from the constitutional structure of that system. In political science jurisprudence --particularly in the study of international relations --

natural law and positive law theories can be equated to realism and liberalism, respectively. In international relations we do not have one theory. What we have are many theories, which would be better called approaches. Realism and liberalism are probably the most talked of theories of international relations. Others include the dependency and the general systems theories.

As far as the study of human rights issues and conflict management is concerned, realism and liberalisms, no doubt, provide the most relevant explanation. Realism sees the state as the main actor in the international system and sees conflict as a must, and also persistent since to them, in international relations, nation states do not engage to integrate with one another. Liberalism, on the other hand is based on the assumption that all needed to avert war and bring peace are strong institutions. Liberals argued that human beings are generally good and that with strong institutions they would live in peace. This is in direct contrast to the realist view, which depicts man as naturally bad. A concentrated state power as advocated by the realist poses danger to the full enjoyment of human rights and may actually result in abuse of the same. Liberalism would most likely achieve the opposite.

In 1989 the Soviet Union, which was a champion of state power, voluntarily retreated from power and realism thereafter acquired very poor explanatory value. With democracy which came after the cold war, universal declaration of human rights, amongst other factors, there seem to be a consensus that human beings can be morally upright if they can be reminded of certain rules they have contracted into (social contract). With the demise of cold war we also see various other actors such as international NGOs all of which play an important role in international relations including matters of human rights.

Realism also assumed that the major aim to be pursued at the international level is power and that this was to be acquired through military strength. In the post-cold war era, militarism has gone down. People are now concerned with disarmament and peace. Realism also rejected everything that went with liberalism (democracy etc). With the demise of cold war there is more and more emphasis on basic freedoms, human rights, and issues of self determination in terms of individuals having a right to determine where they live, how they are governed and by whom and so on. Today we even have an international court of justice where individuals can complain. The new African union (A.U) even has a provision for a Pan African court of justice where individuals can seek justice bypassing their national courts, if not satisfied (article5(d)).

Though it is true that states still compete for power in the post cold war era, that we still do not have a conflict free world and that wars are still being fought all over, even with the economic cooperation's being formed; of interest to the writer is liberalism's explanation of ethnic clashes, its prescription for management and how this relate to human rights issues.

1.7 METHODOLOGY

The study is based on library research – texts, journals, newspapers and magazines, seminar papers and Internet materials, government reports, reports of NGO bodies involved in human rights and conflict issues.

1.8 CHAPTER OUTLINE

The study comprises five(5) chapters and chapter one is the introduction. Chapter two(2) provides the evolution of international human rights and its current place in international politics. Chapter three(3) deals with ethnic conflict in Kenya in the period under review. Chapter four deals with an overview of the relationship between human rights observance and conflict outbreak and management. A case study of Kenya has been used as basis of analysis. Chapter five(5) is the summary, conclusion and recommendations. The chapter also spells out research issues.

CHAPTER TWO

2.0 EVOLUTION OF INTERNATIONAL HUMAN RIGHTS

INTRODUCTION

As has been stated in chapter one, human rights are violated within individual states, not in outer space or on high seas, one might therefore argue that the study of human rights should concentrate on different states – say human rights in Nigeria, Kenya, Pakistan, Peru and so on. Talk of international human rights would therefore not arise. What then do we mean by international human rights? Before answering this question, it is probably necessary to first understand what human rights are, after which it might become clearer what is meant by international human rights.

According to the Oxford advanced learners dictionary a “right” is a moral or legal claim to have or get something or to behave in a particular way. In proper legal jurisprudence, a right however, must be that which one is able to enforce against others. Human rights refer to those rights that are natural to human kind or human beings and accrue to them merely by virtue of being human. These rights are not accorded by government or state or economics or religion or whatever. They are rights recognized for all peoples whatever their politics or ideology or social economic status. These rights can be said to be rooted in moral values of the highest degree. It is in the nature of these rights that they are endowed by the creator and that they are inalienable and can only be derogated from in very special circumstances.

From the above definition of human rights, one thing that comes out clearly is their universal nature. It is therefore not surprising that one of the distinctive aspects of human rights movement of the last half century has been its invention and creation on the international level. Hence the stress on the international

human rights system as well as on the vital relationship between the system and states internal orders.

Another meaning of international human rights is brought out clearly by the fact that often individual countries find it difficult to adhere to the human rights standards laid down in the countries laws. It has therefore become necessary to further safeguard human rights through international law. Countries are therefore expected to observe and respect human rights defined both by the domestic law and human rights defined by international law.

The concept of "right" developed in Rome which became the first Western society to recognize private rights and insist that it be protected. For the Roman jurists, right and law were things one could not separate and the term "jus" was used to refer to both of them even though Roman law (*jus civile*) applied only to Roman citizens. Later *jus gentium* was developed to provide simplified rules to govern the relations between foreigners, and between foreigners and citizens.

The progressive rules of the *jus gentium* gradually overrode the narrow *jus civile* until the latter ceased to exist. Thus, *jus gentium* became the common law of the Roman empire and was deemed to be of universal application. Earlier around the third century B.C., Greek stoic philosophers had formulated the concept of natural laws and their theory was that it constituted a body of rules of universal relevance. The Romans also borrowed this Greek idea of natural law, whose element of universality became vital to the contemporary concern of human rights. Demands for more humane treatment of fellow human beings can also be found in the holy scripts of Hinduism, Buddhism, Confucianism, Judaism, Christianity and Islam. Ideas of similar kind also found their way into several charters and social contracts solidified in Europe in the middle ages, such as the Justinian's basic law for Roman law, *Magna Carta Libertatum* of 1215 in

England, Erick Klippings' *Hand Faestning* of 1282 in Denmark and the *Joyerse Entrée* of 1356 in Brussels.

The freedoms and rights enumerated in the documents (above), however, often conferred them only to certain groups or classes in society based on sex, rank and status. Likewise, the rights enumerated could often be claimed only under certain circumstances. Large segments of society and foreigners were often not seen as beneficiaries of these rights.

Advocates of the natural law school played a preparatory role in setting out the basis of rights and the recognition of the right of all human beings to freedom and dignity. The father of modern international law, Hugo Grotius (1583 – 1645), based his work on the notion that above positive law existed another source of law, the law of nature. This natural law, with its roots in human reason, could be discovered without any knowledge of positive law. From this law of reason, Grotius started to build a secular modern international law or laws of nations.

Other prominent philosophers and jurists who around this time in history developed schemes of natural rights were Samuel Von Pundorf (1632 – 1694) and John Locke (1632- 1704). Jean Jacques Rousseau (1712- 1778) depicted in his work that also the sovereigns derived their powers from this source and therefore they were also to obey or respect this law of nature. It is also from this doctrine that Charles de Montesquieu (1689 – 1755) developed his famous concept of separation of powers as a way of guarding against abuse of power. The principle of equal dignity and worth of every human being has today become a cornerstone of good governance all over the world.

Before acquiring its universal nature, the development of the human rights has gone through a milestone. The declaration of rights in the United States in 1776 is recorded as the first declaration of human rights ever to be adopted in the constitution of a freely elected government. In 1789, human rights entered into the European constitutional history when the National Assembly of France proclaimed the rights of man and the citizen. In December 1948, the UN took a giant step towards true universality -- extending beyond the boundaries of Western culture – when it adopted the Universal Declaration of Human Rights (UDHR)

Whereas each country will define its own human rights through its own laws, however, those guaranteed within a country are usually less than those guaranteed internationally. Consequently, international human rights will apply to all countries and there is always pressure from the international community for countries to adopt international human rights standards. Once again one sees the rationale for use of the term “international human rights”

International human rights law has continued to be applied primarily to states only – with one, rather limited qualification and one more important exception. In principle, if an agent of a state party to an international human rights treaty, in particular, the International Covenant on Civil and Political Rights (ICCPR) or the European Convention on Human Rights (ECHR) – violates any of the rights granted to an individual by the instrument in question, it is the state that is responsible for the violation, and not the individual. The state may be required to take action against the perpetrator of the act; if it fails to do so, that may show, or emphasize, the states culpability. Conversely, if the state did take all reasonable measures to prevent the abuse and/or to punish the perpetrator, it will generally be absolved of its international legal responsibility. But in either case the focus is on the actions or omissions of the state, rather than the

actions/omissions of the individual; or if the focus is on the latter, it is because he is acting for the state and because his action can be attributed to the state.

Actions between private persons (not acting in official capacity) are largely outside the scope of international human rights instruments; however, sometimes states can be held responsible for actions of and between, private individuals, if it is found that by their failure to regulate such behavior they have deprived one of the individual (or particular categories of individuals) of an essential aspect of a right which they are obliged to secure or ensure.

The growth of international human rights

Before the nineteenth century, the doctrines of state sovereignty and domestic jurisdiction reigned supreme. Issues of common international concern were seen by states as either non-existent or a threat to their sovereignty. States did not expect to be questioned by other states on matters, which were purely within their territories. Virtually all matters that today would be classified as human rights issues were at that stage universally regarded as within the internal sphere of national jurisdiction; the only major exceptions being piracy and slavery. Concerning slavery, a number of treaties were entered into to abolish it. As early as 1864 there were already concerns being raised on the treatment of the sick and wounded soldiers and also of the prisoners of war and states were being required to observe certain minimum standards in the treatment of aliens.

In addition certain agreements of general welfare were beginning to be adopted by the turn of the century. The right of humanitarian intervention, although within a vague range and extent, also appeared to gain acceptance in the 19th century.

During and after the First World War, the clamour for an international organization that could help avert future wars gained great momentum. The League of Nations (LN) was finally created on 10/11/1920 resulting to an important change as far as the growth and development of international human rights was concerned. The scheme for a LN adopted at Paris was in ideological terms, an expression on the international level of nineteenth century liberalism. This meant, first of all, that the LN was intimately related to the assumptions and values of democratic theory. The then United States President, Woodrow Wilson, -- one of the greatest champions for the formation of the LN -- made it clear that he believed and intended that the organization should be one of free peoples, enjoying the right of democratic self-government in their homelands. President Wilson asserted: -

Only the free peoples of the world can join the League of Nations. No nation is admitted to the League of Nations that cannot show that it had the institutions, which we call free. No autocratic government can come to its membership, no government which is not controlled by the will and vote of its peoples

The establishment and work of the LN also included attempts to associate the general peace settlement and the machinery of the organization with obligations in regard to the protection of minorities.

Article 22 of the covenant of the LN set up the mandate system for the people's in the ex-enemy colonies 'not yet able to stand by themselves in the strenuous conditions of the modern world' with an obligation to guarantee freedom of conscience and religion and a permanent mandates commission was also created to examine the reports the mandatory authorities had undertaken to take. Article 23 provided for just treatment of the native populations of the territories in question, while the 1919 peace agreements with Eastern Europe and Balkan states included provisions relating to the protection of minorities (equality of treatment and opportunities for

collective activity). These provisions were supervised by the LN to whom there was a right of petition. Part XIII of the treaty of Versailles (the one that created the LN on 10/1/1920) provided for the creation of the International Labour Organization (ILO), among whose purposes were the promotion of better standards of working conditions and support for the right of association. Though created in 1919, under the treaty of Versailles as an autonomous institution associated with the LN, an agreement establishing its relationship with the United Nations (UN) was approved on 14/12/1946, making it the first specialized agency associated with the UN.

The aims of the ILO included the promotion of social justice for working people everywhere. It was also charged with the responsibility of formulating international policies and programmes to help improve working and living conditions and creation of international labour standards to serve as guidelines for national authorities. ILO is unique among world organizations in that under its guidelines both workers' and employees' representatives have an equal voice with those of government in formulating its policies -- international labour standards; for example, freedom of association, wages, hours and conditions of work, workmen compensation, social insurance, vocation with pay and so on.

The LN in its articles had thus set the stage for the internationalisation/universalisation of human rights by insisting on standards applicable to all member states. The strategy of guaranteeing human rights internationally gained momentum after the second world war. The impact of the war upon the development of human rights was immense as the horrors of the war and the need for an adequate international system to maintain international peace became apparent to all. The excesses which characterized Nazi Germany and Mussolini Italy convinced European

powers that basic standards regarding the rights of man must be established and individual countries would have to be held to these standards. There was therefore need to create an organization that would work to "save" succeeding generations from the scourge of war, "reaffirming faith in fundamental human rights," "establish conditions under which justice... can be maintained and promote social progress and better standards of life in larger freedom." This is how the United Nations became responsive to the degradation of basic human values.

But even before the UN and LN came into the scene, the need for international arrangements in order to resolve conflicts related to protecting the rights of minorities had been felt. One of the first arrangements is found in the treaty of Berlin of 1878; where religious freedom was promised to Bulgaria, Montenegro, Serbia, Romania, and Turkey. Also in international law, some elements of human rights gradually began to emerge. Provisions for the purpose of ensuring certain rights to minorities were included in peace treaties following armed conflict arising out of the reformation: The treaties of Munster and Osnabruck at the close of thirty years war in central Europe in 1648 are cases in point. At the congress of Vienna in 1815, the participating powers agreed to condemn slave trade. Several treaties were subsequently elaborated for the purpose of ensuring international cooperation in combating slave traffic.

The 1926 anti-slavery convention -- which aimed to suppress and eradicate slavery in all its forms -- was marked by negotiations under the auspices of the LN. The Berne convention of 1906 aimed at protecting women from being subjected to night timework. In diplomatic conferences in Paris (1856), St. Petersburg (1868), Brussels (1874), the Hague (1899) and (1907), provisions regulating state conduct during armed conflict and

granting special protection to the wounded and sick in wartime were adopted.

2.1 International human rights at the global Level.

Although human rights had already found international expression in the League of Nations, it is the United Nations charter, which spells out the concept of human rights and fundamental freedoms in the manner that we know it today. Reference to human rights and fundamental freedoms appear in the united Nations charter repeatedly as can be seen in the following articles: - the preamble, article 1(3) article 13(1)(b), article 55(c) article 62(2), article 68 and article 76 (c).

Amongst the objectives for which the UN was set up include; to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people and to take other appropriate measures to strengthen universal peace. The other object is to achieve international co-operation in solving international problems of an economic, social, cultural and humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. These two purposes of the UN puts the organization at the centre stage of issues of international human rights and as to such the signing of the charter was a significant step in bringing human rights more firmly within the sphere of international law.

The UN has played, and continues to play, a crucial role in the promotion of human rights issues and today human rights form an important part of positive law, at both national and international levels. The norms of human rights have, through hard work and long lasting negotiations at international

meetings, been agreed upon in international documents and treaties. They have thereby been transformed from ethical or moral postulates into a number of specific and detailed directives of international law. Today concern for the promotion and protection of human rights is woven throughout the UN charter beginning with the preamble which: -

Reaffirms faith in the fundamental human rights, the dignity and worth of the human person, the equal rights of men and women and of nations small and large. Article 55 calls on the UN to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex language or religion. In article 56, "all members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purpose set forth in article 55.

When the UN charter was being drawn up in 1945, it did not come up with an international bill of rights however the charter made a provision for the establishment of a commission on human rights whose mandate included the drafting of an international bill of rights. In 1947, the above commission drafted the international bill of rights (in three parts), culminating in the first part (declaration) being adopted by the UN on 10/12/1948. This is the famous universal declaration of human rights, which was one of the major achievements of the UN in the field of international human rights promotion. The assembly proclaimed the declaration as:

Common standard of achievement for all peoples and nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and educating to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the people of member states themselves and among the peoples of territories under their jurisdiction.

The declaration sets forth the human rights and fundamental freedoms to which all men and women, everywhere in the world are entitled without any discrimination. Article 1, which lays down the philosophy upon which the declaration is based, reads: -

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood," Article 2, which sets out the basic principle of equality and non-discrimination as regards the enjoyment of human Rights and fundamental freedoms, forbids distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3, the first cornerstone of the declaration, proclaims the right of life, liberty and security of person – a right essential to the enjoyment of all other rights. This article introduces article 4 to 21, in which other civil and political rights are set out, including: - freedom from slavery and servitude, freedom from torture or cruel, inhuman or degrading treatment or punishment; the right to recognition everywhere as a person before the law; the right to effective judicial remedy; freedom from arbitrary arrest, detention or exile, the right to a fair and public hearing by an independent and impartial tribunal; the right to be presumed innocent until proved guilty; freedom from arbitrary interference with privacy, family, home or correspondence, freedom of movement and residence; the right of asylum; the right to nationality, the right to marry and found a family, freedom of thought conscience and religion, freedom of opinion and expression; the right to peaceful assembly and association, the right to take part in the government of one's country and equal access to public service in one's country.

Article 22, which is the second cornerstone of the declaration, introduces article 23 – 27, in which economic, social and cultural rights – rights to which everyone is entitled “as a member of society” – are set out. The rights recognized under these articles include the right to social security, the right to work, the right to rest and leisure, the right to a standard of living adequate for health and well being, the right to education, and the right to participate in the cultural life of the community.

The concluding article 28 – 30, recognizes that everyone is entitled to a social and international order in which the human rights and fundamental freedoms set forth in the declaration may be fully realized, and stresses the duties and responsibilities which each individual owes to his community. Article 30 warns that no state, group or person may claim the right, under the declaration, “to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth in the declaration”.

After adopting the declaration, things did not move first as was expected as it was realized that the remaining two parts (convention and measures of implementation) proved contentions between the socialists and free-enterprise countries. As a result the UN Commission on Human Rights (UNCHR) only managed to get the UN body approve the promulgation in two separate covenants; that is, the international covenant on economic, social and cultural rights and International covenant on civil and political rights, both of which came into force in 1976.

In 1965, the UN Convention on Elimination of all forms of Racial Discrimination (C.E.R.D.) was adopted; and followed by the 1966 International Convention on Civil and Political Rights (C.C.P.R.) and the International Covenant on Economic Social and Cultural rights (C.E.S.C.R.).

Since then several covenants on human rights protection have been adopted by the UN.

The primary purpose of human rights is to govern the relationship between the individual and the state, the idea originating from a perceived need to protect the individual against a tyrannical use of power. The purpose of internationally agreed norms of human rights is that they shall be implemented in a national context. The main duties arising out of the norm of human rights, therefore, fall on governments and public authorities of the state. They are the ones to be held accountable in case of failure and non-performance.

The norms of human rights thus primarily serve as a guide for national legislation and policies in areas which often earlier on were regarded as areas of domestic jurisdiction and competence. By adhering to human rights treaties and commitments, states have voluntarily agreed to govern in a manner consistent with these obligations. Human rights, as described in the charter of universal declaration, are for the more part characterized by: -

- a. Being inherent in all human beings by virtue of their humanity alone.
- b. Being inalienable, within qualified legal boundaries.
- c. Being equally applicable.”

Additionally, as has been pointed in chapter one, international human rights (IHR) standards, according to international law, apply to all countries irrespective of whether a particular country has ratified or officially agreed to be bound by the international agreement creating them.

Many human rights instruments create international organs and procedures to monitor compliance by the state within the prescribed norms. The

Convention on Civil and Political Rights(C.C.P.R), for example, establishes an eighteen member human rights committee consisting of independent experts and elected by the state parties. The committee's mandate includes supervision of state compliance with the treaty; by reviewing and commenting on periodic reports that must be filed by the state parties, by administering an optional inter-state complaint mechanism provided for in the CCPR and by considering individual petitions submitted pursuant to the CCPR's first protocol which enables those claiming to be victims of violation of the covenant to file communications with the human rights committee against a state party to the covenant and protocol.

The covenant against torture and other cruel, inhuman and degrading treatment also provides for optional interstate and individual complaints, patterned after the civil and political covenant and the optional protocol. The Covenant on the Elimination of Racial Discrimination (C.E.R.D) provides for an optional individual complaint procedure, but a mandatory interstate complaint process. The Covenant on Economic, Social, and Cultural Rights (C.E.S.C.R), in contrast, contains progressive or pragmatic obligations that are monitored via examination of periodic state reports. Even more restrained, the genocide convention creates no permanent institution to monitor compliance, but instead leaves the punishment of offenders to national courts and to the law of state responsibility.

It can be said that virtually all UN organs deal with human rights matters. However, the work of the UNHRC is especially to be noted, particularly its special procedures in handling serious human rights violations. Resolutions 1235(XLII) of 6th July 1967 and 1503(XLIII) of 29th May 1970 allow the commission to consider information relevant to gross violations of human rights. According to resolution 1235, the commission may undertake a

thorough study and report its findings to the economic and social council where there is found to be a consistent pattern of such violations. It is on the basis of this authority that the commission has appointed working groups and special rapporteurs to report on large scale violations in specific countries throughout the world.

Resolution 1503 establishes a limited petition system for the sub-commission on prevention of discrimination and protection of minorities to consider non-state communications that “appear to reveal a consistent pattern of gross and reliably attested violations. The sub-commission may forward the information to the commission which may either undertake a thorough study by an ad-hoc committee according to the provisions, or take no action. The procedure, however, is not designed to afford individualized remedies to victims.

The UNCHR has also developed “thematic” procedures to address specific human rights problems on global basis. The first of such thematic procedure was the working group on enforced or voluntary disappearances, which were created in 1980 in response to the phenomenon of disappearances in Latin America. This became a precedent for the creation in 1982 of the special rapporteur on summary or arbitrary executions.

In their work, the working groups seek information from governments on cases, propose urgent action, make country visits and finally report to the commission. In some cases, the thematic procedure can accept petitions and raise the issue of redress for victims of violations. None of the UN permanent treaty or internal bodies has legal competence to order compensation or other remedies. The human rights committee and other UN bodies may make recommendations or express views to the state concerned.

The recommendations sometimes call on the state to pay compensation or afford other remedies but they do not specify amounts that may be due or other forms of redress.

2.2 International human rights at regional levels.

Before and for a long time, regionalism in the matter of human rights was not popular at the United Nations. There was often a tendency to regard the move as an expression of a breakway movement calling the universality of human rights into question. However, the regional postponement of work on the IHR covenants led the UN to rehabilitate, and to be less suspicious (less jealous, some would say) towards regionalism in human rights especially after the adoption by resolution of the covenants in 1966.

By resolution 2200c(XXI) of 19th Dec. 1966, the General Assembly requested the UN commission on human rights to study, inter alia, the question of the setting up of appropriate regional institutions for the purpose of discharging certain functions relating to observance of the covenants in human rights. Consequently, the CHR resolution 6(XXIII) of 1967 set up an ad hoc group to study the possibility of establishing regional human rights commissions within the framework of the UN.

Earlier on, the organization of American states had set up an inter-american commission on human rights in 1959, followed by a supporting framework in the form of American convention on human rights in 1969 and which entered into force on 18th July 1978. In Europe the Europe convention on the human rights was signed at Rome in 1950 and came into force in 1953.

In a series of resolutions between 1977 and 1979, the General Assembly appealed "to states in areas where regional arrangements in the field of human rights did not yet exist, to consider agreements with a view to establishing suitable regional machinery -- within their respective regions -- for the promotion and protection of human rights. In 1979 a subsequent UN regional seminar on the establishment of regional commissions on human rights with special reference to Africa was held in Monrovia in September and adopted the "Monrovia proposal for the setting up of an African commission on human rights" which contains a possible model for such commissions. Finally, the African charter on human and peoples rights was adopted in Nairobi, Kenya, in June 1981 and came into effect in 1986.

In relation to other regions, it may be noted that the August 1979 conference of the Law Association of Asia and the Western Pacific (LAWASA) recommended that the council of LAWASA establish a permanent standing committee on human rights with a view to establishing a centre or centers for human rights in the region and the working towards the creation of an Asian Commission and or court of human rights. In the Arab world, the league of Arab states did set up in 1968 a permanent Arab commission on human rights. Finally, although not strictly a regional initiative, mention may also be made of the fact that in 1979, the heads of state and government of commonwealth nations invited the commonwealth secretary general to appoint a working group to examine a proposal, put forward by the Gambia, to establish a commonwealth human rights commissions. Consequently, in October 1981 the Commonwealth heads of state and government agreed in principle to establish a special unit within the commonwealth secretariat for the promotion of human rights.

Signs of the regionalization of human rights are therefore now to be seen in every continent, although still in a very embryonic form in Asia. This movement, which was first launched, chronologically on the European continent, now mean that apart from international human rights laws which seek to regulate the whole international community, there are human rights regimes which are limited only to certain regions, consisting mainly of a group of countries which might have political or historical or geographical connections. These human rights regimes (e.g. European convention for the protection of Human rights and fundamental freedoms, the American convention on human rights, the African charter on human and people s rights etc) aim at ensuring protection of human rights at the relevant regional levels.

2.3

Enforcement and monitoring of human rights and fundamental freedoms.

For human rights to be realistically enjoyed by the individual, there has to be effective machinery for vindication. Today there are close to a hundred human rights treaties adopted globally and regionally. Nearly all states are party to some of them and several human rights norms have become part of customary international law. Yet like all law, human rights law is violated, has not ended governmental oppression and by itself cannot prevent or remedy all human rights abuses. Many violations are linked to long – standing political, economic and social problems that require more than law alone to repair. Education and other broad social efforts are required to combat the cause of human rights abuses: prejudice, ignorance, disease, poverty, greed and corruption. Human rights law does have an impact, however, on the behaviour of persons inside and outside of government.

Although the primary responsibility for the implementation of human rights rests with governments in regard to the people under their respective jurisdictions, one cannot but conclude that the basic concept of international human rights is at least partially contrary to the principle of non-interference with internal affairs as mirrored in article 2(7) of the United Nations charter¹⁶.

However, this provision which is a consequence of equality and sovereignty of states, has been subject to a process of reinterpretation in the human rights field; so that states may no longer plead this rule as a bar to international concern and consideration of internal human rights situations. For example, in the *Nottebohm* case (I.C.J. reports 1955) the court remarked that while a state may formulate such rules as it wishes regarding the acquisition of nationality, the exercise of diplomatic protection upon the basis of nationality was within the preview of international law and that no state may plead its municipal law as a justification for the breach of an obligation of international law, of which human rights have now been accepted as forming part of.

Moreover, the experience of the Second World War made the international community re-evaluate its responsibility for individuals regardless of national borders within which they live. Thus, how a state treats its own subjects has become a legitimate concern for the international community and an important part of international law. Secondly, the national standards and the actual conduct of sovereign states in a number of domestic areas can and should be assessed and evaluated against the international standards of human rights which are applicable in the particular state.

International concern for human rights is not entirely a new subject. The law of state responsibility has long held that when a citizen of one state is mistreated by an act or omission attributed to another state, the claim of the injured citizen who has exhausted local remedies in the mistreating state can be, and often is espoused by the state of nationality, which itself is deemed to be injured under international law (Ireland vrs U.K. 1978).

Such claims generally have been settled by negotiation or by submission of the matter to an international claims commission or arbitral tribunal. In contrast a state's treatment of its own nationals escaped international scrutiny with limited exceptions, until the latter half of this century. Within the framework of the United Nations, Article 64 of the charter empowers the economic and social council to make arrangements with UN members and specialized agencies to obtain reports on steps taken to give effect to its recommendations and to recommendations on matters falling within its competence made by the general assembly. This authority has enabled the council, on numerous occasions to call upon member states to report the actions taken to implement resolutions and decisions concerning human rights and to forward the reports received to the assembly with proposals for any necessary further action.

In addition, a number of human rights conventions of the UN require states parties to communicate to the Secretary General information as to the laws and regulations they have adopted in order to ensure the application of the provisions of the convention. Occasionally, states parties to a human rights convention have been requested by the council to submit reports on the application of the convention, even though the convention does not oblige them to do so.

Special bodies have also been established to supervise the application of certain human rights conventions. For example, the Committee on Elimination of Racial Discrimination (CERD) was established to consider reports by states on the legislative, judicial, administrative or other measures they have adopted which give effect to the convention. The other one is the human rights committee set up under article 28 of the international covenant on civil and political rights. Under article 14 of the convention on elimination of racial discrimination, a state party may at any time make a declaration to the effect that it recognizes the competence of the committee to receive and consider communications from individuals or groups of individuals, within its jurisdiction claiming to be victims of a violation by that state, of any of the rights set forth in the convention. Furthermore, under article 41 of the ICCPR, a state party may declare that it recognizes the competence of the human rights committee to receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under the covenant. Under article 16 of the convention on economic social and cultural rights, states parties commit themselves to submit reports on the measures they have adopted and the progress they have made in achieving the observance of the rights set out in the covenant. These reports are received annually and in 1976 a sessional working group on this was established to assist in the task.

Today state parties to human rights covenants are required to present a report on what they are doing to promote these rights within their territories. The first report to be presented within one-to-two years after membership. It is really not a complaint, but the report is placed publicly before a committee, which reviews it. This procedure applies to all

covenants granting rights, for example, both conventions on the rights of women and rights of the child have provisions for the reporting procedure. First after two years, thereafter, after every five years. This is an international obligation, which a country must discharge.

In addition to states espousing their citizen's cases, individuals can also now sue directly before the civil and political rights tribunal (I.C.J tribunals for Rwanda and Yugoslavia) provided one is able to convince the tribunal that the case is a genuine one of violation of human rights, not subject to another court proceedings and that *local remedies* have been exhausted. However, if there are no *local remedies*, to be exhausted, either because of non-existence or ineffectiveness of such *local remedies* then this last condition will be dispensed with (Lawless Case). The rising caseload of the European and inter-American courts attests to the willingness and ability of victims to bring their own complaints against states that fail to comply with their international obligations. Unfortunately the human rights committee cannot authoritatively pronounce on the complaint once and for all in the manner in which domestic courts grant damages to the individual where appropriate.

Appropriate remedies can have dissuasive effect on those who would commit violations, as well as serving to redress the wrongs done to victims. Remedies are thus a significant aspect of ensuring the rule of law. The right to remedy when rights are violated is itself a right expressly guaranteed by global and regional human rights instruments.

Enforcement and monitoring of rights at the regional level

Regional, human rights bodies have the power to designate remedies that the state must afford to victims of violations and this just like the UN declaration on human rights, has had a great deal of influence on domestic legislations dealing with human rights protection. In Europe, for example, the European Convention on human rights has had a significant influence on British law and practice, the government having been held in violation of its terms over twenty times and having introduced legislation on rulings of the European court on human rights.

Under the O.A.U (now AU) charter on human and people's rights, a commission is established whose function is to promote human and people's rights and to ensure their protection. The commission has powers to entertain complaint of human rights violations from both states and individuals and make its report, which is then considered by the assembly of heads of state and governments. This enforcement machinery relies heavily on fear of adverse publicity, which may attach to culpable state party.

In conclusion it can be said that the rights guaranteed in the international covenant on economic social and cultural rights have their enforcement rather weak, since it relies heavily on the goodwill of member countries. The United Nations and its agencies cannot easily enforce these rights where the state party is not collaborating in the reporting system that applies to it. Moral censure thus remains the major means of enforcing this species of rights. When it comes to the international covenant on civil and political rights the enforcement machinery (though by reporting) appears to be more substantial. Under this covenant a human

rights committee is established which receives reports from states parties to the covenant through the Secretary General, and which reports indicate the extent to which a country is guaranteeing the rights in the covenant. The reports are circulated to state parties, and the fear of moral censure then becomes a powerful tool to prod states into positive action. Under this covenant, a state party can accept the competence of the human rights committee to receive and consider communications under the covenants. The covenant also has an optional protocol and which is very crucial as it is the one that gives an individual the right to seek direct remedy to the human rights committee as has been stated above.

It must be pointed out that international law does not avail sufficient protection to the individual when human rights are violated, since it generally seek resolution of conflicts in amicable fashion to the extent that where a state decides to be uncooperative, international law has no "hard teeth" to deal with the state. Finally although every state has undertaken human rights obligations on the basis of United Nations treaties, today's challenge remains to enhance the effectiveness of procedure and institutions established to promote the accountability of government under the treaties. The treaty bodies that monitor and evaluate state policies and practices, play a vital role but the whole system has been stretched almost to breaking point. It is underfunded, many governments fail to report or do so very late or superficially, there is a growing backlog of individual complaints, broad reservations have been lodged by many states, while at the same time the committee members expertise continues to be questioned.

2.5 **Enforcing human rights at the domestic level.**

States in voluntarily accepting human rights conventions undertake to put into effect; domestic laws regulations and administrative provisions, or to take the judicial measures, necessary to give effect to the provisions of these conventions. In some cases, they also undertake to repeal or abolish the domestic legislation, regulations, administrative provisions which contravene the purposes of the convention. In others they undertake to prevent and burnish acts contrary to the purposes of the convention, that is, all the machinery of the state is used to apply the international standards which the convention establishes and seeks to protect.

Nearly every state in the world today has provisions, in its constitution or basic law, for the protection of rights and fundamental freedoms. The first amendment to the United States (US) constitution, for example states:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Constitutional protection of rights is particularly true of countries, which adopted their basic legal texts after the proclamation of the universal declaration of human rights in 1948. In some cases, certain or all of the provisions of the declaration were incorporated in those texts. Citizens of such states who feel that they have been denied a right of freedom set out in the constitution or basic law may take their complaint to the local or national administrative or judicial officials and seek a remedy of the wrong allegedly done to them.

International human rights bodies sometimes prepare two instruments relating to a single subject; a convention which is legally binding upon states

which accept it, and a declaration or recommendation which establishes principles and standards applicable to all states. Therefore even without the domestication being done a country is bound, since international human rights law has developed into “*jus cogens*” meaning that human rights standards will apply to all countries irrespective of whether a particular country has ratified or agreed to be bound by any agreement.

However, before human rights protection in a country can be assured, there is need for awareness on the part of the citizenry, since without knowing his or her right a citizen will not seek redress no matter the magnitude of violation. Another important factor is the willingness by individuals to pursue their human rights claims in courts of law. The state and its officials, too, have to know human rights and respect them. Lawyers and the legal profession generally should contribute towards public awareness of the law; while at the same time courts must be ready to resolve human rights issues according to the law. The executive on its part must not pressurize courts to make decisions that favour it. This means that the independence of the judiciary must be guaranteed.

Even before the birth of the UN, the clamour for human rights observance had forced certain countries to put in place domestic mechanisms for the enjoyment of human rights by citizens. The American declaration of independence of 4th July 1776 and the 1781 bill of rights of the American constitution are predicated on the conviction that all human beings have equal status and that everyone is the bearer of certain inalienable rights. The same ideology is found in the French declaration *des droits de l'homme et du citoyen* of 1789. Many constitutions drafted around this time contained provisions, relating to the “classic” and “economic” rights and individuals well-being in a broader sense.

The state occupies a central position in ensuring the protection and respect for human rights at the domestic level. It must not only ensure that there exists a law that promote human rights enjoyment, but also make sure that its enormous power is not used to derogate human dignity and freedom. The state must also make sure that an individual citizen or a group of citizen does/do not abuse the fundamental rights of other citizens. Generally speaking the state must ensure the provision of an enabling environment for the enjoyment of human rights; not only by laying down appropriate laws, but also ensuring that both individual and government itself obey the law.

International human rights law only applies in full during times of peace. The relevant treaties expressly allow for derogations from most of their requirements “in times of war or other public emergencies, threatening the life of the nation” (war being included here in the concept of public emergency). The derogation provisions undoubtedly apply to both international and non-international armed conflicts. The phrase also covers serious internal disturbances. However, states may *only* invoke the derogation clause in human rights treaties if the internal disturbances are so serious so as to “threaten the life of the nation.” The clauses may not be invoked to justify arbitrary killings, slavery or torture, cruel inhuman or degrading treatment or punishment (states must continue to protect these rights even in times of armed conflict). This position has been held so by the International Commission for Jurists (ICJ) when it aptly explained in the legality of the threat or use of nuclear weapon decision that: -

...the protection of the international covenant of civil and political rights does not cease in times of war, except by operation of article 4 of the covenant whereby certain provisions may be derogated from in time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life

applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely which is designed to regulate the conduct of hostilities.

Wanton destruction of civilian property, in violation of the Geneva conventions, would undoubtedly also be considered as a measure which exceeds the exigencies of the situation (war, emergency). Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial, the passing of sentence and the carrying out of execution without previous judgment pronounced by a regularly constituted court, convicting people in manifestly unfair trials, would constitute violations of international human rights law, even if the trials is held in times of war or other emergency.

Like international humanitarian law, international human rights law is also addressed to states. The main compliance with the treaties in question rests with the state National courts play a vital role in resolving human rights controversies and developing human rights norms. It therefore means that the individual should be able to access a court of law where a violation has occurred, is taking place or is likely to occur.

In case of a detained person, there should be provision to enable another person to vindicate his rights. Upon a human rights case being filed in court, the court should be able to hear and determine the application and make such an order, issue such writs and give directions as it considers appropriate for the purpose of enforcing or securing the enforcement of any of the provisions on fundamental rights and freedom.

Most cases on human rights violations, are against governments. When state agents, in their conduct of duties do so unlawfully and thereby violate

human rights, the aggrieved individual can proceed against the state as the principal employer. However, in such a situation, both the agent responsible and the government are jointly sued since the government could only have acted through individuals. Where governments are authoritarians and repressive, where violations are serious, systematic and brutal, courts are least relevant. Relative to western democracies, the judiciary's competence to review executive or legislative action, particularly in the developing world, may be sharply reduced or eliminated, its jurisdiction limited, its decrees ignored, its judges subjected to threats or worse. In such states, courts will be at best marginal actors on human rights issues.

Increased vigilance and awareness creation by various bodies at the municipal level has, however, put national governments on their toes as far as enforcement of human rights at the domestic level is concerned; as has been noted by the UN Secretary General:

Across the world, NGOs, parliamentarians, the media and the public at large alert the international community to imminent or unfolding human rights treaties. In many cases this watchdog capacity has proven the key to mobilization of opposition to the perpetrators of abuses and support to their victims. Our partnerships with NGOs in the field are particularly important to the success of our work in support of human rights. The information and expertise of the specialized NGOs reinforce promotional and educational programmes and promote a culture of human rights as part of wider efforts to foster democratic and peaceful change in countries throughout the world.

CHAPTER THREE

ETHNIC CONFLICT IN KENYA; 1991-1997.

3.0 Introduction:

Rose stagner defines conflict as “a situation in which two or more human beings desire goals which they perceive as being obtainable by one or the other, but not both” (Stagner 1981). Goldstein says “conflict is a difference in preferred outcomes in bargaining situations”(Goldstein 2001). According to Mwagiru conflict simply “arises when two or more parties have incompatible goals about something (Mwagin 2000). It is therefore clear, that in a conflict situation, there must be at least two parties with each party mobilizing energy to obtain a goal, a desired object or situation, and each party perceives the other as a barrier or threat to the other.

Ethnic conflict refers to a conflict situation between two or more ethnic groups/tribes. Today ethnic conflicts are the most prevalent forms of intra-state conflicts on the African continent. Violent ethnic conflict, at its worst, can cause costly civil wars especially when the state apparatus fails to mediate successfully between the conflicting parties. Intra-state conflicts may even occur within a well organized state system with a legally constituted state apparatus for the mediation and arbitration of conflicts. However, it is expected that the state should be able to bring to an end such conflicts, more so if they are of the ethnic nature where to a large extent there is use of mere crude weapons. This is so because within the state system there is a government endowed with the monopoly of the legitimate

means of violence; – the police and the military, together with a judiciary which permits the system to regulate competition within it

Furthermore, the state is endowed with resources for allocation among conflicting interest groups. Through the manipulation of power and allocation of resources among conflicting interest groups, the state system should be able to produce consensus which is necessary for the maintenance of peaceful co-existence. Unfortunately, the truth of the matter has been that many multi-ethnic states turn out to be breeding ground for ethnic “nationalism” and therefore ethnic clashes. In Kenya there are well over forty two (42) distinct ethnic groups/tribes with different socio, cultural ways of life. Before independence, the British colonial masters used tribe against tribe as a way of ensuring control over the natives. This was the infamous “divide and rule” policy introduced by colonial governor Fredrick Lugard more than seventy years ago. Furthermore, in an ethnically heterogeneous country like Kenya, the official national culture of the state does not always adequately represent the way of every person’s life. The nation state system therefore contains seeds of disintegration. Ethnic conflicts in many countries have been instigated by an awareness of national (read ethnic) boundaries and a perception of incompatible group interests.

3.1 Background to the ethnic clashes in Kenya:

Kenya became independent on December 12 1963, after nearly seventy years of British Colonial rule. The independence constitution was a complicated federal one which locally was referred to as Majimbo constitution and which conceded a great deal of autonomy to the regions.’ This constitution also had a multiparty setup on which the pre-independence election of May 1963 was contested by the then three leading political parties namely the Kenya African National Union ,the Kenya African Democratic Union and the African peoples party. This state of affairs did

not last long for on the first anniversary of Kenya's independence in 1964, the Majimbo constitution was replaced by one that converted Kenya into a republic with a central government.

The same year also saw the "voluntary" absorption of KADU and APP by KANU which had formed the government under Kenyatta first, as Prime Minister and later, as President. The de-facto one party state that this amounted to was to last till 1966, when then vice president Jaramogi Oginga Odinga resigned from his position as second in command in the country and formed an opposition party the Kenya peoples union. This was short lived as in August 1969, following the Kisumu disturbances during a visit by the then President, the late Mzee Jomo Kenyatta, KPU was proscribed. A de-facto one party status was to exist again till June 1982 when parliament enacted section 2A of the Constitution which read as follows: -

"There shall be in Kenya only one Political party, the Kenya African National Union"

The country was now a de jure one party state. It is important to note that due to the colonial policy of "divide and rule" which rested on using tribe against tribe, a lot of suspicion or fear of being "dominated" by other tribes was already ripe at the time of independence. The smaller ethnic groups saw KANU as a party dominated by the big tribes of Kikuyu and Luo. This they countered by joining KADU, which from its inception pursued a political philosophy of regionalism (majimboism) which would allow the regions to have substantial say over many matters affecting them.

In order to forestall any possible domination of one ethnic group by another, the architects of "majimbo" ensured that the provincial boundaries were

drawn along ethnic lines. The district boundaries were equally drawn along the same ethnic lines. To this extent the whole of central province was Kikuyu, while Nyanza province was Luo except for Kisii District which was itself entirely Kisii. Rift valley was basically Kalenjin, Maasai and "related tribes" land. Western province became purely Luhya land.

From the time of independence, it has been clear that political parties in Kenya rely on ethnic support for their survival. It is through a political party that an individual could be elected to parliament. Ethnic loyalty, not ideology, determined voter allegiance in the hope that the party would be a partial distributor of the national wealth. KANU was basically a kikuyu/Luo party up to 1966 when the Luos left it to team up with one of their own in KPU. KADU was for a group of tribes which had identified themselves under the banner of "small" tribes fearing Kikuyu/Luo domination.

The president, the party or Member of Parliament became the best agent as a patron of the tribe, feeling obligated to dispense favours for his or her own tribe. Kenyatta, for sure, favored his kikuyu tribesmen and their Meru cousins (under the banner of gikuyu embu and meru association). Moi's period witnessed an upsurge of the Kalenjin in high positions. With Moi at the helm and with the passing of section 2(A), KANU literally became a Kalenjin party and Moi the chief custodian of the Kalenjin interest. He became an agent to access and allocate national values to his tribesmen. This institutionalization of ethnicity led to such suspicion within and between ethnic groups leading to the division of citizens along regional, ethnic and linguistic lines.

The collapse of the Soviet Union in 1989 and the clamour for more democratic space all over the world also caught up with Kenyans who were

increasingly getting tired with president Moi's dictatorship. Religious leaders, politicians and scholars started the clamour for multipatism and good governance. There was a more than willing support from the diplomatic community, particularly those envoys representing the western world, which stood for liberal democracies. The donor community, including the World Bank and the International Monetary Fund, too were not left behind in this clamour.

During a new year's sermon at the St. Andrews church in Nairobi on 1st January 1990, the Rev. Dr. Timothy Njoya urged an end to the one party system in Kenya in view of what was happening in Eastern Europe. Njoya had argued that in view of the crumbling of monolithic systems in eastern and central Europe, KANU had the obligation of revising its stand on multipatism. In April of that year Bishop Henry Okullu of the Maseno South diocese called for a constitutional change and suggested a two five year term limit for future presidents in Kenya. Soon thereafter, messrs Charles W. Rubia and Kenneth Matiba who had fallen out with the government called for a national referendum to decide the country's political future. Like the Njoya and Okullu proposals, Matiba and Rubia received heavy criticisms and counter attack from KANU leaders and members of parliament (which was KANU dominated). As pressure continued to mount for the liberalization of political space, the KANU National Governing Council established a KANU review committee led by then Vice president Hon. George Saitoti, to hear the citizens' view on the country's political future. KANU found itself besieged from left, right and centre by many critics who pressurized it to drop its dictatorial tendencies and adopt a more democratic stance. At the height of this debate, there occurred nationwide riots which lasted for three days during the Saba Saba riots, in which many Kenyans were killed.

In July 1990 Rubia and Matiba were detained just before the planned "Saba Saba riots of 7th July 1990 which left over 20 people dead and over 60 injured within and around Nairobi alone. On 23rd November 1990 Mr. Oginga Odinga announced his intentions to launch a new political party the National Development Party, which however could not be registered in view of the existing constitutional provisions. In August 1991 the late Oginga Odinga, Martin Shikuku, the late Masinde Muliro, George Nthenge, Philip Gachoka, and Ahmed Bamahriz announced the formation of the forum for restoration of democracy as a pressure group.

The years 1990/1991, as has been detailed above, witnessed the inexorable struggle for a westernized democratic form of government. The government (read KANU leaders) which was openly opposed to multipatism, was therefore under great pressure and on 8th and 21st September 1991 respectively, a number of Rift Valley leaders at two rallies at Kapsabet and Kapkatet vehemently attacked advocates of multipartism and proposed Majimboism as an alternative. There followed other rallies in Narok on 28th September, Machakos on 7th October and Mombasa on 17th October 1991, which even though appeared to have softened in tone, bore the same message as the first two meetings⁸. These rallies otherwise called "majimbo rallies" were preceded by a statement by Hon. Dr. J.K Misoi then MP for Eldoret south at a press conference in Eldoret, declaring that he had drafted a "majimbo" constitution which would be tabled before the house if proponents of multipartism continued their crusade. The Kapsabet meeting which was chaired by Hon. Henry Kosgey, then a minister and KANU chairman for Nandi Branch resolved to, take action against FORD (read multiparty advocates) using all means at their disposal so as to protect the

government and KANU. The meeting also banned Mr. P. Muite (an Advocate of multipatism) from setting foot in the Rift Valley.

The Kapsabet meeting was also chaired by a cabinet minister – Hon. Timothy Mibei. This meeting also banned advocates of multipatism from setting foot in the Rift Valley province and also ordered the late Masinde Muliro, a founder member of FORD to move out of Trans Nzoia (his home district) Hon. Biwott said at the rally that FORD members would be crushed and that KANU youth wingers and wanainchi were ready to fight to the last person to protect the government of President Moi. He added that the Kalenjins were not cowards and were ready to counter attempts to relegate them from leadership (presidency)

Between them, the two meetings were attended by what one would call the “face of government from the Rift Valley province”. These included Hon. Biwott, Hon. Kipkalia Kones, Hon. John Cheruiyot, Hon. Francis Mutuol, John Terer, Willy Kamuren, Lawi Kiplagat, Christopher Lomada, Peter Nangole, Robert Kipkorir, Samson ole Tuya, Paul Chepkok, Ezekiel Bargatuny and 34 councilors from Kericho, Nandi and Bomet.

Other “majimbo” rallies in other parts of the country were also attended and addressed by the senior most party and government leaders. These rallies alarmed Kenyans especially the non-Kalenjin living in the Rift Valley. The leaders continued to make utterances that clearly indicated their inclination towards the zoning off of their areas and ethnic communities so as to spare them from the perceived bad influence of others. This would no doubt be inferred as sufficient warning for the other ethnic groups to tread carefully. For example, on 20th February 1992, Hon. William ole Ntimama, then a minister at a public rally made blatantly inciting utterances , by stating that

the non-Maasai living in Maasai land should respect the Maasai and further warned that the title deeds owned and cherished by such non-Maasai were mere papers that could be disregarded at any time (Daily Nation 21.2.1992).

Even with the Majimbo rallies continuing, dissatisfaction and demands for reforms in the country continued. Internally, political parties, civil society groups and other pressure groups evolved a united front unseen before, perhaps a kin to the nationalist movements in the struggle for independence in a number of African countries. On the other hand, the international community specifically the principal multilateral and bilateral sources of financial assistance played a central role in mounting pressure on the government to open up political space.

On 16th October 1991 the FORD attempted to hold a meeting at Kamkunji grounds in Nairobi which was, however dispersed by the police as it was not licensed. On 19th October 1991, parliament passed a motion condemning the involvement of the United States Ambassador to Kenya, Mr. Smith Hemstone, in the organization of an illegal meeting (*Saba Saba*) and demanded his recall. On 3rd December 1991 a KANU Special Delegates conference recommended repeal of section 2A. This led to the amendment of the constitution of Kenya by the constitution of Kenya (amendment) [No.2] Act, 1991, which entered into force on 20th December 1991 and which repealed section 2A of the constitution reverting Kenya to a multiparty state.

Subsequently, the constitution was also amended by the constitution of Kenya (amendment) Act 1992 which entered into force on 29th August 1992. This act provided inter alia, that a successful presidential candidate should in

addition to obtaining the majority of votes cast also obtain not less than twenty five percent of the votes cast in the country:

“The candidate for president who is elected as member of National Assembly and who receives a greater number of valid votes cast in the Presidential election than any other candidate for president, and who in addition, receives a minimum of twenty five percent of the valid votes cast in at least five of the eight provinces shall be declared to be elected as president”

Because of the past practice where parties rely on tribe for support, the repeal of section 2A of the constitution and the then imminent multiparty parliamentary and presidential elections saw the emergence of opposition political parties based on tribal allegiances. For example FORD Kenya was to a large extent Luo party till Odinga’s death when it became a Luhya party following the late Wamalwa’s being made chairman of the party. The Luos thereafter acquired National Development Party under Raila Odinga. The Democratic Party was basically a kikuyu party as was FORD ASILI. Kalenjins remained with KANU.

This state of affairs was also exemplified by the tribal pattern of the results of the democratic parliamentary and presidential elections held in 1992 and 1997. In this respect the ordinary mwnainchi has always regarded himself firstly as a member of his tribe and only secondly, as a national of the country.

3.2 Nature and extent of the 1991 – 1997 clashes:

Prior to the commencement of the ethnic clashes, the Kenyan political environment had been progressively stirred up and was highly charged. A

determined crusade for a return to multipatism which had crystallized in the formation of the pressure group FORD, the counter crusade, characterized by the highly parochial utterances through the "majimbo" rallies and finally the repeal of section 2A of the Constitution opening the way for multipartism had prepared the ground. The re-introduction of multipartism tended to magnify and fuel tribal loyalties and to complicate the resolutions of inter-tribal border conflicts. The tribes that were involved in the clashes according to the particular areas affected may be presented as shown in table I below.

Table I

TRIBES INVOLVED IN TRIBAL CLASHES BY PROVINCE/DISTRICT
AND AREA.

RIFT VALLEY

DISTRICT	AREA	TRIBES
NAKURU	Molo	Kipsigis, Ogiek – vs – Kikuyu and Kisii
	Njoro	Kipsigis, Ogiek – vs – Kikuyu
	Olenguruone	Kipsigis, Ogiek – vs – Kikuyu and Kisii
KERICHO	Londiani	Kipsigis, – vs – Kikuyu, Kisii, Luo, Kamba & Luhya.
	Fort tenan	Kipsigis, – vs – Kikuyu, Kisii, Luo, Kamba & Luhya.
	Kipkelion	Kipsigis, – vs – Kikuyu, Kisii, Luo, Kamba & Luhya
	Thessalia	Kipsigis, – vs – Luo.
	Kunyak	Kipsigis, – vs – Luo.
	Sondu	Kipsigis, – vs – Luo.
	NAROK	Enoosupukia
LAIKIPIA	Ol Moran	Sambjuru, Turkana & Pokot –vs- Kikuyu
NANDI	Miteitei	Nandi-vsKikuyu,Luhya and Kisii.
	Kamasai	Nandi –vs- Luhya
	Owiro	Nandi –vs- Luo
	Songhor	Nandi –vs- Luo
	UASIN	Burnt Forest

GISHU TRANS NZOIA TRANS MARA	Turbo	Nandi –vs- Kikuyu
	Sabaoti	Nandi – Bukusu
	Nyangusu	Saboat –vs- Luhya Kisii – vs- Maasai.

NYANZA PROVINCE

DISTRICT	AREA	TRIBES
KISUMU	Sondu	Kipsigis –vs- Luo
KISII	Ochodororo	Kisii –vs- Luo
	Nyangusu	Kisii –vs- Maasai

WESTERN PROVINCE

DISTRICT	AREA	TRIBES
BUNGOMA	Mr. Elgon	Sabaot –vs- Bukusu & Teso

COAST PROVINCE

DISTRICT	AREA	TRIBES
MOMBASA TANA RIVER	Likoni	Digo – vs- Luo, Kikuyu & Other up country people
	Mutuga	Digo – vs- Luo, Kikuyu & Other up country people
	Bangale	Digo – vs- Luo, Kikuyu & Other up country people
	Garsen	Degodia – vs- Orma
	Hola-Garsen	Orma –vs- Galjael.

	Saka	Wardey –vs- Pokomo
	Nanighi	Ogaden -vs- Munyoyaya
	Boka	Degodia – vs- Orma
		Degodia – vs- Ogaden

NORTHERN EAST PROVINCE

DISTRICT	AREA	TRIBES
GARISAA	Benane	Ogaden -vs- Borana
	Saka	Ogaden -vs- Munyoyaya
	Masalani	Ogaden -vs- Pokomo
WAJIR	Griftu	Degodia –vs- Ajuran
	Hadado	Degodia –vs- Ajuran
	Bute	Degodia –vs- Ajuran
	Bute	Ajuran –vs- Garre
	Habaswein	Degodia –vs- Ogaden
MANDERA	Bugalla	Degodia –vs- Ogaden & Gabra
	Kotulo	Garre –vs- Degodia
	Korofa hare	Garre –vs- Degodia
	Mansa	Garre –vs- Degodia

EASTERN PROVINCE

DISTRICT	AREA	TRIBES
ISILOLO	Garbatulla	Borana –vs- Degodia
	Benane	Borana –vs- Ogaden
MOYALE	Budhudha	Borana –vs- Degodia
	Moyale town	Borana –vs- Degodia
MARSABIT	Arches post	Borana –vs- Degodia

[source: report of the judicial commission appointed to inquire into tribal clashes in Kenya, 1999]

The 1991 – 1997 clashes in Kenya occurred in six out of the eight provinces in the country, Nairobi and Central provinces being the exception. The timing and magnitude of these clashes differ from one place to the other. However, much of the clashes and the highest degree of loss/damage occurred in the Rift Valley province, which was also the first to experience the same. It should be noted that even prior to 1991 the country had experienced some form of ethnic clashes in different parts and between different communities. For example in 1964, a joint border meeting between the local district leaders from both Narok and Kisii led by the regional presidents of Nyanza and Rift Valley provinces, Johnson Karagori and Daniel Arap Moi was held to promote peace after the two communities had clashed, inter-alia, because of the unwise utterances by politicians. Stock thefts, border conflicts and conflicts over the right to water animals have all along been common factors. However, unlike the 1991 – 1997 clashes, the previous ones were not only minor in terms of damage caused, but were easily contained at the instance of governmental intervention. The 1991 – 1997 clashes were different in several ways. First they involved not only traditional weapons, but even modern ones like guns and at times even

imported arrows. These clashes were also sporadic in many parts of the country and appeared to be organized along modern warfare. Finally, the failure of the state machinery to stop them immediately was quite significant. The attention, concern, both within and outside the country was such that the government had to respond by appointing two different commissions to investigate them. First was the Parliamentary Select Committee appointed by parliament on the 13th May 1992 with the mandate to investigate “ethnic clashes in western and other parts of Kenya.” This committee was chaired by Hon. Kennedy Kiliku MP, and trade unionist. The other committee was the Judicial Commission of Inquiry appointed by the President and whose terms were much broader than the Kiliku committee. The Judicial Commission which was appointed vide gazette notice no. 3312 of 1st July 1998 was chaired by Hon. Justice Akilano Akiwimi of the Court of Appeal. The chronology and extent of the clashes as they occurred may best be understood by conducting an analysis province by province.

3.2.1. The Rift valley province

Rift Valley province is the largest of Kenya’s eight provinces and runs along the Great Rift Valley from Kenya – Ethiopia border in the North to the Kenya – Tanzania border in the south. Before colonialism it was home mainly to pastoral communities among them, the Kalenjin tribes, Maasai, Samburu, Pokot, and Turkana. Most of its areas where clashes took place were part of the colonial settlers “white highlands”

On the advent of independence in 1963, many indigenous Kenyans moved into the Rift Valley to acquire farms left by the departing European settlers through cooperative societies or outright purchase by individuals. However, a big proportion of the land was purchased by the government under the

agricultural development cooperation and latter used to settle landless and other needy Kenyans. The results is that places such as Molo in Nakuru, Olenguruone, Trans Nzoia in Western Province, Nairage Ngare in Narok and other places in the Rift Valley became cosmopolitan. The Kikuyu, Abagusii, Luo, Kambas, Luhyia, and good representation of other tribes found their homes in the Rift Valley. Even the colonial government also settled some “outside” tribes in the rift valley so as to give room for the “white highlands.” For example, in 1941, the government “purchased” thirty four thousand seven hundred (34,700) acres in Olenguruone to settle over four thousand (4000) Kikuyu squatters originally replaced by White settlers in central province. Later the kikuyu spread to other places such as Melili and Nairage Ngare in Narok North. The Independence government on its part continued this process even in the late 1980’s. In the 1970’s for example the government settled the Kalenjin, Kikuyu, and the Dorobo living in Ndoinet Forest in Olenguruone (Akiwumi repor).

In the Rift Valley the clashes were witnessed in the districts of Nakuru, Kericho, Narok, Laikipia, Nandi, Uasin Gshu, Trans Nzoia, and Trans Mara. Meteitei Farm in Tinderet Division of Nandi District, Rift valley province, is the acknowledged origin of the 1991-1997 ethnic clashes. They sparked off here on the night of October 29th 1991, and spread out to the rest of Tinderet division, lasting till may 1992. The clashes then spilled over to other spots in this belt as follows – Koru and its victims, November 04 to May 1992; Chegaiya settlement scheme and its environs on November 06 to march 1992; Londiani and its environs on November 18 to July 1992; Tarbo and Kamasai and environs on December 17 to may 1992; Sondu and its environs in march 1992 (Kiliku report).

At Miteitei farm the burning of houses belonging to non – Kalenjin begun on the night of October 29, 1991. The immediate contention was the ownership of the farm. A group of three hundred and ten (310) comprising mostly of Kalenjin claimed to be the bona fide members of Miteitei Farmers Company and demanded that the other group of about two hundred and seventy nine (279), which comprised mainly Abaghusii, Kikuyu, Abaluhya, and other non Kalenjins should evacuate from the farm. Attempts by the provincial administration to resolve the dispute failed, when just before the out break of the clashes, the then District Officer 1 for Nandi, Mr. Mwashu had his Baraza boycotted by the Kalenjin group. The Kalenjin group later held their own meeting under chief Philip Karoney of Miteitei location and Kipyegon Metolong Korir a KANU chairman for the sub-location and also leader of the team of 310. The claim by the group of 310 to be the bona fide owners of the farm is alleged to have had the support of Ezekiel Bargetuny, then a powerful MP, and even the D.O. whose meeting they boycotted. When the D.O failed to have his planned meeting, he left, but the group of 310 continued with their meeting and finally seem to have decided on creating a situation to evacuate the other group of 279. The first house to be burnt belonged to Ms. Kamene (Akamba).

The Nandi spread their mayhem to Owiro farm in Songor location, where the damage effected was so excruciating that by July 06 1992, there was evidently no single person in sight. Owiro farm with an acreage of about 2610 had been the home of about 4000 Luos since 1970. The wanton destruction and looting meted at Owiro farm had similarly been carried out at Kotnalel farm. Evidence of several witnesses appearing before the Parliamentary Select Committee, indicated that the Kalenjin “warriors” who caused such havoc in Tinderet division and neighboring Belgut and Muhoroni divisions in Kericho and Kisumu districts respectively received

transportation and powerful spotlights to identify no-Kalenjin houses from Hon. Ezekiel K. Bargetuny MP. Evidence was also received that the warriors were each paid between one thousand and two thousand Kenya shillings per person killed or burning grass thatched house, ten thousand for a permanent house and five hundred shillings for safe return from the front; from funds allegedly supplied by Hon K.N.K Biwott, Hon. Reuben Chesire, Hon. Exekiel Bargetuny and Hon. Wilson Leitich MP.

Of all "ethnic clashes" areas in the country, Nakuru district comprised the largest single area with Molo and Olenguruone division bearing the heaviest brunt. These two divisions are cosmopolitan, the majority of the population being Kikuyu, Kalenjin and Abagusii, with a fair representation of most other Kenyan communities. The time span of clashes in these two divisions covered the period from mid February to August 1992. However, tension and suspicion had increased amongst the communities since the initial clashes started in Meteitei farm in Nandi District. The first incidence of house burning was reported on 15th March in Ngurubi farm. The clashes then spread to Olenguruone from Kamwaura. In these areas the clashes pitted the Kalenjin on the one hand against non-Kalenjin (mainly Kikuyu, Abagusii, Luo and others). Before the burning of houses started in Molo area, there were claims by the Kalenjin that the Kikuyu had burnt houses belonging to Kalenjins on 15th February 1992. The Kikuyu on the other hand alleged that they had found anonymous leaflets which were telling non-Kalenjins to leave, as Molo was a "Kalenjin area".

After the first house burned (15.4.1992), mayhem broke out and the burning of houses and the killing and destruction of property took a swift form. The Kalenjins used bows, arrows and spears, while Kikuyus used pangas and rungas. During the entire period of the clashes, the non-Kalenjins claimed

that the Kalenjins were getting support from the provincial administration. The clashes stopped with the visit of the R. Valley Provincial Commissioner. Mr. Yusuf Haji on 29th April 1992, by which time the non-Kalenjin population had virtually left Olenguruone. By mid 1993 the clashes had spread to Enosupukia, Naivasha, and parts of Narok and Transmara districts which together then formed the greater Narok before Transmara district was hived out of it, and to Gucha district in Nyanza province. In these areas the Kipsigis and Maasai were pitted against the Kikuyu, the Kisii, the Kamba and Luhya amongst other tribes. In 1998, the clashes revived in Laikipia and Njoro pitted the Samburu and Pokot against the Kikuyu in Laikipia and the Kalenjin mainly against the Kikuyu in Njoro.

In each clash area non – Kalenjin or non-Maasai, as the case may be, were suddenly attacked, their houses set on fire, their properties looted and in certain instances, some were either killed or severely injured with traditional weapons like bows and arrows, spears, panga, swords and clubs. The raiders were well organized and co-ordinated and generally attacked at night and, where attacks were in broad day light, the raiders would smear their faces with clay to conceal their identities. Their target was mainly the kikuyu, Kisii, Luhya, Luo and other non – Kalenjins and non – Maasai communities.

The attacks were barbaric, callous and calculated to drive out the targeted groups from their farms, to cripple them economically and to psychologically traumatize them. Many victims were forced to camp in schools, church compounds and shopping centers, where they lived in makeshift structures of polythene sheets, cardboards and similar materials. They had little food and belongings with them and lived in poor sanitary conditions with their children who could no longer go to school.

According to the findings of the Kiliku Parliamentary Committee the causes of clashes in Molo/Olenguruone area were: - the “majimbo” rallies of September 1991, which were held in Nandi and Kericho districts and which propagated the theory that Rift Valley was for the Kalenjins and those espousing political parties other than KANU must leave the province. Second cause was the utterances by leaders as shown by Hon. Leitich and councilor Maiyo at Kuresoi where they spoke openly against opposition parties. Thirdly was the re-introduction of multipartism without the proper education of wanainchi leading the Kalenjin to misinterpret it as a direct attack on the presidency. To a lesser extent rivalry over land ownership was also a cause.

3.2.2. **Western province.**

In this province clashes occurred in the old Bungoma district and to a very small extent in the old district of Kakamega along the boundary between Kakamega and Nandi districts. Like the Rift Valley, part of this province also experienced white colonial settlement. In Trans Nzoia much of the land was alienated early nineteenth century to pave way for European settlement. The Sabaots who claim to be the original inhabitants were confined to the upper moorlands of Mt. Elgon.¹⁷ Since 1962, the Sabaots have expressed their wish to be administered from Tran Nzoia and to be included in Rift Valley with fellow Kalenjins, a request which the colonial government rejected. Bukusu leaders on their part insisted that Trans Nzoia should be included in Western province. Upon independence, the government declared certain former European farms in the area as settlement schemes for settling the landless. These schemes were then ceded to Western province, but the Sabaots never acquired any and have since continued to grumble over what they consider to be their lost land. This together with issues of

cattle raids and boundary disputes that had been there before meant that there already existed a fertile ground for ethnic fights.

In the Sabaoti and Kwanza of Trans Nzoia regions, leaflets threatening non-Sabaots started circulating in December 1991, and by 25th December 1991 fighting had intensified, spreading quickly around Mt. Elgon sub-district. In the Mt. Elgon region it was the Sabaot fighting Bukusu and Tesos and these clashes spread to Bungoma regions. By April 1992, the clashes had spread over a wide area into Cheptais, Sirisia as well as Kimilili divisions. The aggressors, who were the Sabaots, were armed with arrows, spears and at times guns. They wore red t-shirts and red shorts or black t-shirts and shorts – their target being non – Sabaots. The cause of the clashes in Trans Nzoia and Bungoma districts were; firstly the perennial demand by the Sabaot to have their own district, comprising parts of Kwanza and Sabaoti Divisions of Trans – Nzoia district and Mt. Elgon sub-district of Bungoma district. There was also the desire by the Sabaots who felt neglected by the government, to be considered for settlement schemes like other communities. Utterances by politicians and administrative leaders also incited people. Rivalry over distribution of administrative posts, introduction of multipartism amongst others were also a contributory factor.

3.3.2 Nyanza province.

In Nyanza province clashes were experienced mainly along what may be referred to as the Kisii – Narok – Nyamira, Bomet Belt, which runs along the provincial administrative boundary of Nyanza and Rift valley provinces. This area includes the common border between Kisii and Nyamira districts in Nyanza province and Narok and Bomet districts in Rift Valley province. The southern end of this belt is the Naymaiya market on the Kisii – Narok

common border and the Northern most is at Sondu market on the Kisii and Bomet common border.

Clashes also occurred along the Migori – Gucha district boundary pitting the Kisii against the Luo while at the same time the Luos and Kuria were also engaged in clashes along Kuria - Migori districts boundary.

Kisii and Nyamira districts have all along been considered to be the ancestral home of the Abagusii as has been Kericho and Bomet for the Kalenjin and Narok for the Maasai. These regions also bore the brunt of colonial “re-arrangement” of settlement, thus were also part of the white owned farms. Like elsewhere in independence Kenya, the former white farms were bought by the government, which in turn vested them into Agricultural Development Corporation for purposes of settling squatters, landless persons and interested purchasers. The Abagusii have always had a higher population density, thus their large numbers outside Kisii and Nyamira districts. This is also why at the creation of the above settlement schemes, most of the settlers turned out to be the Abagusii. In addition, all has not been smooth between these three ethnic groups mainly due to continued stock thefts. This situation was made worse by the multi-party and Majimbo crusades which ended up creating animosity between ethnic groups.

Along the Gucha - Migori boundary, ethnic clashes seem to be a perennial affair, but intensified between the period of October 1991 and July 1992, extending again in 1997. Since time immemorial, there had been rustling of Luo cattle by the Kisii through organized militia groups, “chinkororo,” leading to constant inter-tribal fighting – along the border. At the same time due to land shortages in Kisii, some of the Abagusii purchased land in Migori district and have settled there. Upon re-introduction of multipartism,

these inter-tribal conflicts took a different dimension. The Luo mainly supported FORD while the Kisii remained, to a large extent in KANU. This political difference was exploited to the maximum by each of the groups to rid their area of those who did not support their party so that during the 1992 and 1997 elections each would be able to vote as a bloc for their political party.

As for the Kuria/Luo clashes, it must be pointed out that prior to the creation of Kuria and Migori districts, both Luo and Kuria lived in harmony in Migori. The only problem that existed was stock theft and cattle rustling by the Kuria community. From 1993 when Kuria district was hived from Migori district., a new problem emerged. The boundary of the two districts was fixed at river Migori. Unfortunately the river kept on meandering and changing course and this resulted in certain families occasionally finding their homes in the other district. This problem led to clashes which at its peak in 1997 affected the villagers of Remo, Wasweta, Agor and Alara in Migori district. However, the fact that these clashes occurred in 1992 and 1997 which were election years, is clear evidence that politics played a part in them.

3.2.4 Coast province

The indigenous people of the Coast province can be divided into two broad communities of the Mijikenda and non-Mijikenda. The non-Mijikenda comprises of the Taita and Taveta of Taita Taveta district, the Orma, Pokomo, Munyoyaya and Malakote of Tana River district, the Bajun of Lamu (who are also residents of various urban centers along the coast line) and Swahili, and peoples of Arab decent who are mainly to be found in the towns. The Mijikenda comprise of groups which are culturally and linguistically inter-related and are; the Rabai, Ribe, Chonyi, Giriama,

Mjibana, Kauma and Kombe of Kilifi and Malindi districts, the Digo and Duruma of Kwale district. The remaining residents who are upcountry people are largely Kamba, Luo, Kikuyu and Luhya.

The Kamba, some of whose forebears had settled at the coast even before colonial period are farmers in the Shimba hills of Kwale District. Many have moved to Ukunda to work in holiday beach hotels. The Kikuyu who are to a large extent businessmen are more scattered with some owning land in Ukunda, Kwale town, Mkongani and Likoni. The Luo are concentrated in granites and stone-cutting industries, while some of them are also employed in Mombasa island. A few are in the fishing industry. Over time, many of the upcountry people became long – term migrant settlers at the Likoni – Kwale area, though many still owned land in their places of origin as is demonstrated during burials.

The areas most affected by clashes in coast province were the Likoni Division of Mombasa and adjacent Kwale district. Much of the population of Likoni is unemployed and about 80% are Digo and Duruma tribes, with the Digo being the majority. The rest are the upcountry people as has been stated above. Even though the Likoni – Kwale area is heterogeneous in terms of ethnic composition it can also be described as dichotomous in terms of the regional and religious background of its inhabitants, who are split between the predominantly Muslim coastal majority and the predominantly Christian upcountry minority. Because of their comparative illiteracy, the Muslim coastal majority constitute most of the unemployed, while the Christian upcountry minority form the more economically developed inhabitants and who in turn, prefer to employ their own ethnic compatriots rather than the coastal people whom they regard as lazy and undisciplined.

The Digo youth for example, were on the whole unemployed, idle and hungry. This scenario constituted a fertile ground, waiting to be exploited to wreak vengeance upon the perceived upcountry oppressors. Other factors that contributed to the hatred between upcountry people and the indigenous coastal tribes include the fact that most small and large scale businesses have always been in the hands of the non – coastal people; and that most of the wealth generated by the lucrative tourist industry in the area is not used to uplift the social and economic standing and activities of the local people. These factors had led to the desire for majimboism, the desire for the Digo, to have a greater control in their region, over their own social, economic and political destiny.

The introduction of multi-party politics in 1991, gave the coastal people a chance to express themselves. Unfortunately politics had by then become polarized along tribal lines. Inevitable under such circumstances, between 1993 and 1995, the police reported seven sporadic incidents of tribal clashes. In Mombasa division two incidents were reported in which three upcountry persons were seriously injured and seventeen houses of upcountry people burnt. Three incidents took place in Kwale division where Digo youths stabbed one kikuyu to death, injured four upcountry people and burnt thirty one houses belonging to the upcountry people. In Kilifi there were two incidents in which Mijikenda youths killed seven and injured fifteen upcountry people and burnt thirty four houses belonging to upcountry people.

On the night of 13th August 1997, a traumatic and well-organized type of clashes was witnessed at the coast when about twenty Digo youths attacked the Likoni Police station, ransacking it and burning everything to the ground. During this raid, the raiders released prisoners held at the station, stole one

VHF radio set and pocket phones, forty three G3 rifles, one revolver, one thousand four hundred and seventy five(1475) 7.62.mm and 9 mm rounds of ammunition were also stolen. Private property including 43 houses, 520 kiosks, 15 shops, 17 bars and restaurants, 10 butcheries and several vehicles were badly damaged. Two churches were also damaged, five regular police officers were killed in the raid and an inspector of the General Service Unit, who was leading a mission to re-take the ferry back from the raiders, was shot dead. Also ten civilians were killed, twelve police officers injured and many civilians injured too.

On 14th August the raiders descended on one Mr. Kamani Prathans farm where they stole livestock and looted his house and in the process killed one person, a Kamba from upcountry. As a result of these killings and destructions of property (including houses) 3500 people took refuge within the sacred precinct of the Catholic Church at Likoni. However, this did not deter the Digo youths who, on the night of 19th August 1997, attacked the church. On the 22/8/1997 the church was again attacked and this time two of the refugees were shot dead. Thereafter, the police started engaging the raiders in combat till calm was attained.

3.2.5 North Eastern and Easter provinces.

These provinces neighbour one another and the tribes that have engaged in ethnic clashes are to a large extent the same ones and at times solicit for help from either of the regions, depending on where trouble is. Geographically, economically and socially, the two provinces have not enjoyed the same attention from the government, as have the other provinces. The main economic activity in these regions is pastoralism, however due to constant draught and high levels of banditry livestock is becoming less dependable. Miraa trade is increasingly becoming a main economic activity. Cattle

rustling, it must be pointed out, has been a cultural activity in the region since time immemorial. An increasing arms influx into the region from neighbouring Ethiopia and Somali has since the late 1980's revolutionized banditry, making the inhabitants more trigger happy and far from peaceful.

Tribal clashes in the totality of this region involved in almost all cases the use of firearms and was between the Somali clans and the Borana tribe and their cousins e.g. The Orma, Burji and the Garre. In a number of cases, support is enlisted by the tribes or clans in Kenya from their kith and kin in either Somalia or Ethiopia. During the period in question clashes over water and grazing areas pitted the following tribes/clans:-In Isolo district, the Borana versus the Degordia, in Wajir district, the Degordia versus Ajuran in Mandera and Wajir districts, the Garre versus the Degordia, in the Mayole district, the Burana versus the Degordia, in Tana River, the Degordia versus the Orma, the Orgaden versus the Munyoyaya, Pokomo and Malakole and Galjad versus the Orma and Sanye.

In most cases the method of handling clashes in these areas has been through mediation by the provincial administration. In general, the clashes took the form of war-like activities between the tribes in which sophisticated as well as primitive weapons were used. The cost of the clashes to individuals, families and the country is enormous. The results were deaths and the affliction of barbaric injuries on men, women and children; the displacement of thousands from their land and slaughter and maiming of several valuable and precious livestock, the burning of thousands of rural homes and the looting and destruction of billions of shillings worth of property. Those displaced became internal refugees under conditions with little or no food; no medicine, while at the same time children lost the chance to go to school.

According to the Kiliku commission findings, the clashes caused seven hundred and seventy nine deaths, fifty four thousand displacements within the first one year. Property destroyed together with livestock lost or stolen was valued at two hundred and nine million shillings, while the total units of houses destroyed was nine thousand and four hundred.²⁶ The details of loss and destruction may be presented as shown in table II below:

Table II

Districts	Deaths	Injured	Arrested	Charged	Finalised	Displaced
Trans-Nzoia	200	39	296	178	171	12,000
Bungoma	113	70	244	17	1	14,000
Kakamega	19	23	36	20	20	*
Uasin Gishu	159	138	53	50	6	4,000
Nandi	25	*	79	24	*	7,000
Bomet/Kericho	50	262	110	21	6	10,000
Kisumu	17	*	92	92	33	*
Kisii	25	*	6	6	4	*
Nyamira	8	*	5	5	*	*
Narok	48	22	20	18	2	2,000
Nakuru	114	100	290	*	*	13,000
TOTAL	779	654	1236	248	243	54,000

* Figures unavailable

Source: Report of the Parliamentary Select Committee to investigate Ethnic Clashes in Western and other parts of Kenya, 1992.

Incitements from political leaders and failure on the part of security agencies to act decisively on perpetrators of violence, contributed a great deal to the outbreak and delay in bringing the conflicts to a quick end. Ignorance on the part of some communities also led them to the misconception that other ethnic groups could be chased away and their land confiscated.

The response of government agents did not seem to be seriously directed at stopping the clashes and, at times ended up fuelling the whole problem. The clashes were politically motivated and resulted into massive human rights violations.

CHAPTER FOUR

AN OVERVIEW OF THE RELATIONSHIP BETWEEN OBSERVANCE/ NON OBSERVANCE OF INTERNATIONAL HUMAN RIGHTS AND CONFLICTS IN KENYA: 1991-1997, A CASE STUDY

4.0 INTRODUCTION

In the preceding chapters, we surveyed the origin and historical development of human rights. We also looked at how international human rights evolved, and what the international community has put in place to protect the individual from any form of violations. Finally, we considered the nature of the conflict that occurred in Kenya in the period under review (1991-1997). In this chapter, we shall look at the relationship, if any, between the human rights observance/non observance and conflicts and whether the one impacts on the other, as was postulated in this study. Internal strife, including civil wars, are still largely outside the parameters of war crimes and the grave breaches of the Geneva Convention, international human rights and international criminal law are inextricably linked. The same harm forms many international crimes and fundamental human rights violations. Once an international right-based duty binds a person, its violations may be pursued in multiple venues; such as international criminal law, international humanitarian law and international human rights law.

International human rights covenants, as has been pointed out in earlier chapters, target states' responsibility, and even where an individual is the target, that becomes so because the individual is acting as an agent of the state or the state has failed to take action against that particular individual. Thus, even though human rights violations can be committed by other bodies apart from the state, the state still remains the sole custodian of law,

especially by ensuring that individuals and groups within its jurisdiction have their inalienable rights protected.

As Tunkin rightly put it, the principle of respect for human rights in international law may be expressed in the following three propositions:

- 1) All states have a duty to respect fundamental rights and freedom of all persons within their territories.
- 2) States have a duty not to permit discrimination by reason of sex, race, religion or language.
- 3) States have a duty to promote universal respect for human rights and cooperate with each other to achieve this objectives (Turkins 1974).

Following on Tunkin's argument, it is worth noting that the state has three major obligations as pertains to human rights, and to which we shall pay closer attention in this chapter. The first one is the obligation to respect, which requires that the state abstain from interference with individual freedoms. Second obligation is that of fulfillment, which requires the state to take necessary measures to ensure that individuals satisfy their needs which can not be secured by personal efforts. The third and final obligation of the state that we shall look into is the obligation to protect, which expects the state to prevent other individuals from interference with the rights of others. Three different species of rights will form the basis of our evaluation as to the degree of compliance by the state. These are, Political and Civil Rights, Economic, Social and Cultural; Rights and Third Generation Rights. Political and Civil Rights curtail abuse of power by the state and ensure that it "keeps off" from the individual. These rights assure "limited government" and envisage the antithesis of "too much government" in the lives of the people. Economic, Social and Cultural Rights aim directly at enhancing the standards of living of citizens, so much so that governments need to spend money in

ensuring their availability. For example, the right to work, the right to education, the right to health, access to communication and so on. The third generation rights are recent in origin. They are broader in scope than the first two species mentioned above and apply generally to groups. They concern themselves with self-determination and development and are mainly sought by third world countries.

Under international law, human rights violation amount to crimes against humanity, which have been defined in the charter creating the Nuremberg military tribunal as: - those acts directed principally, but not exclusively, against civilian population, before or during war, and include offences such as extermination, murder, enslavement, or political or religious persecutions (article 6(C)). Also included in the definition are "any other inhuman acts committed against any civilian population. The April 1961 trial of Nazi henchman Adolf Eichman in Israel was based on the principle of human rights violations as defined in the Nuremberg Charter. As head of the Gestapo department for Jews affairs during the Nazi atrocities, Eichman was indicted on fifteen (15) counts and was sentenced to death for crimes against the Jewish people. That verdict was reached because there was enough evidence to prove that Eichman had used his position to persecute, exterminate, deport and murder millions of Jews, as well as enslave and torture other Jews in Nazi concentration camps.

Although Eichman was indicted under the 1950 Act, the substances of the alleged crimes were founded principally under international law. Other charters under which human rights violations have been classified as crimes against humanity include, the charter creating the International Criminal Court, the Charter for the establishment of the International Criminal

Tribunal for the former Yugoslavia and the statute of the International Tribunal for Rwanda.

Although guaranteed rights and freedoms are viewed as fundamental and inalienable, they are also subject to derogation. This means that on some occasions human rights will not be observed by the state. The state in such occasions will be allowed by law to disregard human rights. Two of such situations are when the country is at war and when an emergency situation exists. The emergency must be a real one, which threatens the very existence of the country, such as when there is a natural catastrophe of great magnitude which creates a lot of havoc – thereby disorganizing the country. Such calamities would include an earthquake, a great fire, which for example, destroys most of a city, flash flood and so on.

Derogation from the rights must be allowed only in exceptional circumstances, otherwise such may constitute substantive and far reaching negation of the rights themselves. Under the constitution of the republic of Kenya, for instance, even in cases of emergency, only certain rights can be taken away from the individual. Such rights include: right to liberty, right to protection against arbitrary search or entry, freedom of expression, freedom of assembly and association, freedom of movement and protection from discrimination. All the other rights remain protected and the individual must continue to enjoy them even as the emergency continues. These “emergency immune” rights are: right of life, protection from deprivation of property, protection against inhuman treatment, protection against slavery and forced labour, freedom of conscience and the right to secure protection of law. Furthermore, Kenyan law also provides that, even for the rights that can be negated during war or other serious emergency, an act of parliament must be passed to give such authority...

In addition, before a civil society can exist in which individuals feel free to pursue their economic, social and other interests; an abundance of civil and political rights is necessary. This is why both at the international and national levels, laws abound that aim at the protection of fundamental rights and freedoms. Hence, governments lay down law so that it can be followed by all to ensure the existence of order in society. Kenya has signed and ratified the Covenant on Civil and Political Rights and therefore, it is expected she will introduce the rights guaranteed under the covenant into the constitution and other domestic legal instruments. Consequently, Chapter five (5) of the constitution of the republic of Kenya lists these rights and undertakes their protection . As for the other two species of rights, they are yet to find room in the constitution of Kenya. However, even before Kenya ratifies any international rights instrument, she is still bound by them. This is because under international law, even where individual countries do not accept international obligations, such obligations are still law.

In the Kenyan context therefore, both the Covenant on Economic, Social and Cultural Rights together with the third generation rights are applicable even without their express acceptance by the government. Furthermore, the various species of rights are inter-linked; the enjoyment of one depending on the other. Human rights provisions must therefore bind the government and the individual in any country. If the government violated human rights, it would be sending the message that citizens, could, if they so wished, break the country's laws.

Enforcement of human rights, both at the domestic and international levels, remains a major problem to date. In Kenya, for example, anybody who claims a human rights violation under the law has direct access to the high

court. A state violation of citizens' rights is a matter of fact, and even though the process of monitoring the violations may be inhibited by the state machinery, an analysis of the circumstantial factors would still unveil state misconduct against its people. A case in point is the 1991-1997 clashes in Kenya in which the state had appointed two committees/tribunals to investigate the causes and make necessary recommendations to avoid similar situations in the future.. In this chapter, the researcher will apply samples of certain rights guaranteed by the three generations of human rights to evaluate the level of observance/non observance of fundamental human rights and freedoms in Kenya in the period prior to, during and after the 1991-1997 conflicts. Finally, we will evaluate the role of the judiciary in upholding respect for human rights in Kenya during the same period. A total of eleven (11) rights recognized by international and national legal instruments have been used in the study (see table 3 below).

Table III
International and national legal instruments, and rights and freedom recognized/ protected under them.

	Rights	Instruments of recognition
1	Life	▪ D3,C6,AC4,CK71,CE15,RC6
2	Personal liberty/inhuman treatment	▪ D3,D5,C7,C9,AC5,AC6,CK72,CK73
3	Assembly and association.	▪ D20, C21, C22, AC11, CK80.
4	Movement and residence.	▪ D13, C12, AC12, CK81.
5	Property.	▪ D17, AC14, CK75.
6	Work.	▪ D23, E6, E7, AC15.
7	Education.	▪ D26, E13, E14, AC17.
8	Health.	▪ D25, E12, AC16.
9	Peace.	▪ AC23.
10	Economic Development.	▪ AC22.
11	Legal protection/Role of Judiciary	▪ D8,D9,D10,C2,C9,C14,C15,C26 AC7, CK77.
		▪

Source: L'etwal International (a foundation for law and policy for contemporary problems) April 2001.

KEY

D= Universal Declaration of Human Rights.

C=International Covenant on Civil and Political Rights.

AC=African Charter on Human and Peoples Rights.

CK= Constitution of Kenya.

RC=Convention on the Rights of the Child.

CRD=International Convention on the Elimination of All Forms of Racial Discrimination.

3, 6, 71...=Articles

4.1 Civil and Political Rights

These are also referred to as first generation rights; they are referred to as political because they limit what the government can do to its citizen in exercise of its power. Moreover, the rights are civil in the sense that in their absence, civil or human society can not exist. Compliance with international law and Civil and Political Rights takes place within a state and depends on its legal systems, on its courts and on its official bodies. The Convention on the Civil and Political Rights came into being in 1966

and Kenya signed and ratified it in 1972 thereby, pledging to ensure that all relevant provisions were reduced to municipal law. The Kenyan constitution provides for Civil and Political Rights, just like the covenant, even though the latter covers more human rights ground than Kenya's constitution and other relevant laws. Some of the civil and political rights include:

4.1.1 The Right to Life.

International guidelines on the right to life stipulates that:

- Everyone has a right to life, liberty and security of person (article 3 of the universal declaration of human rights).
- Article 6 paragraphs 1 of the International Covenant on Civil and Political Rights states more specifically, "every human being has the inherent right to life. This right shall be protected by law; no one shall be arbitrarily deprived of his life."

In the Kenya context, the constitution adopts a positive approach and provides for the protection of individual life in the same manner as the international instruments cited above.

Section 71(1) of the Kenyan constitution states:

- No person shall be deprived of his life intentionally, save in the execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.

Section 71(2) goes on to spell out other circumstances under which death would not be construed to be a contravention of the law as:

- When resulting from force used for the defence of any person from violence or for defense of property.
- When resulting from force exerted during a lawful arrest.
- When resulting during a suppression of a riot, insurrection or mutiny.

- When resulting as from efforts to prevent the victim from committing a criminal offence, or as a result of lawful war.”

The right to life, it can be argued, is the most fundamental among all the rights, because an individual must have life before he can enjoy any of the other rights. Furthermore, before we can evaluate the quality of a person's life, he must have the life itself. The United Nations General Assembly recognized this position when -- at its 1983 sessions and after considering an agenda entitled: 'human rights and scientific and technological developments' -- it expressed similar views that: 'for no people in the world today is there a more important question than of the preservation of peace and ensuring the cardinal right of every human being, namely, the right of life.' Thus, UN bodies have endeavored to promote the realization of the right to life in such practical ways as :preparing international conventions which make the taking of life in certain circumstances a crime under international law; promoting the abolition of capital punishment especially in political offences; calling upon governments to end summary or arbitrary executions; appealing to them for help in dealing with the problem of enforced or involuntary disappearances of persons; and formulating measures to prevent and punish acts of international terrorism and taking of hostages. To foster the right to life, criminal law prohibits murder or any other acts calculated to negate or jeopardized the right to life. Therefore, one of the objects of criminal law is to ensure that the individual who unlawfully abridges any person's right to life will be dully punished .In Kenya, the punishment is death penalty for murder and life imprisonment for manslaughter. The magnitude of loss of life that was caused by the 1991-1997 conflicts, no doubt, amounts to violation of the right to life; seven hundred and seventy nine (779) persons having been recorded to have lost their lives within the first year of the outbreak of the skirmishes!

4.1.2 Rights to Personal Liberty and Protection against Inhuman

Treatment

These are rights and freedoms aimed at safeguarding individual dignity enabling a person to maintain his autonomy and personality. International protection for right to liberty and inhuman treatment is provided in articles 3, 4 and 5 of the Universal Declaration of Human Rights. Article 3 provides that: “every one has the right to life, liberty and security of person” while article 5 states: “no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.” Other international instruments that provide protection for these rights are: articles 7, 8 and 9 of the International Covenant on Civil and Political Rights; and articles 5 and 6 of the African Charter on Human and Peoples’ Rights.

Under Kenyan law, protection is provided in the Constitution: Section 72(1) protects the rights to personal liberty, subject only to legal limitation. Also, Section 74(1) states “no person shall be subject to torture or to inhuman or degrading punishment or other treatments.” Personal liberty ensures that the individual is physically unrestrained and therefore, free to do those things he likes and chooses to do. If for example, one is arrested or imprisoned, detained without trial or confined in a particular area, his liberty is curtailed. The constitution therefore attempts to ensure that the state does not arbitrarily curtail the citizen’s right to personal liberty. The right to liberty can arguably be said to be next to the right to life in that, the latter without the former borders on meaninglessness.

In addition, torture or inhuman treatment need not be physical; but can also be psychological. The right against inhuman treatment must therefore be observed even when a person is in lawful custody, and not merely when he is free. The constitution of Kenya and other laws keep to a bare minimum

instance when the right to liberty can be derogated from. Section 71(1) of the constitution of Kenya provides ten (10) instances in which individual liberty may be taken away. These include an order issued by a court of law relating to imprisonment, persons with infectious or contagious diseases or who are insane. Perhaps the most important exception is the one under the public security act (cap.57) which provides for detention of any person who is a danger to the security of the state. However, any law which provides for the imprisonment of a person without trial ought to be examined with extreme care -- most importantly, the reasons behind such law.

The detention law in Kenya confers to the minister of home affairs powers quite similar to those exercised by the British secretary of state under emergency regulations during the Second World War. In a famous case on the Home Secretary's powers-*Liversidge Vrs Anderson (1924).A.C.pg.244*, Lord Atkin (dissenting) said:

In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute. In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment of his liberty by the executive, alert to see that any action is justified in law.

Though the judgment was a dissenting one, it is nevertheless, one of the most powerful ever delivered in defence of the liberty of the subject. It is in the same breath that the law in Kenya provides that for non-capital offences, an accused person shall be brought before a court of law within twenty four (24) hours. For capital offences the period is fourteen (14) days. The detention of Rubia and Matiba (already dealt with in previous

chapter), was a serious violations on the right to personal liberty. Demanding political pluralism (for which they were detained) is itself a right protected, by both international and municipal laws (*Art.21 U.D.H.R,Art.25 I.C.C.P.R,Art.13,A.C.P.H.R,Sec 43 C.O.K*) .The arrest of Mbuthi Gathenji,an advocate of the High Court who had instituted a private prosecution against a cabinet minister (Hon.Ntimama) for inciting the clashes in the Rift Valley ,and his subsequent detention for five(5) days without being taken to court, is another example of violation of the right to liberty. Evictions were carried out in a brutal manner and without the benefit of the requisite court orders. There is no doubt those evicted from their homes, and who had to camp in the churches, trading centers were subjected to inhuman and degrading conditions.

4.1.3 Freedom of Assembly and Association

Freedom of Assembly, refers to the right to come together for brief moment particularly in meetings, whereas Freedom of Association refers to long term interactions, for example within political parties, trade union and so on. Article 20 of the universal declaration of human rights proclaims that: “everyone has a right to freedom of peaceful assembly and association,” and that “no one may be compelled to belong to an association.” Similar principles are elaborated in the International Covenant on Economic, Social and Cultural Rights and also in the International Covenant on Civil and Political Rights. “Earlier on, the International Labour Office(*I.L.O.*) had assumed major responsibility of promoting and protecting freedom of association including trade union rights.

Under the constitution of the republic of Kenya, section 80(1) provides: ‘except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to

assemble freely and associate with other person and, in particular, to form or belong to a trade union or other association for the protection of his interests. The qualifications to these rights are those which are necessary in the “public interest”

Thus, the freedom to associate does not only give citizens the right to assemble and associate as they wish, but also the right not to associate or assemble at all. For this reason, it is unconstitutional for anybody to force citizens to belong to any group, including a political party. According to both the Akiwumi and Kiliku reports, the immediate cause of ethnic clashes in Kenya during the period under review was the ruling party’s (K.A.N.U) opposition to the introduction of multi-party politics in the country. This view has been shared by many others including the Catholic Church and the Law society of Kenya. This is also the position advanced in this study.

The bill of rights enshrined in the constitution of Kenya provides every individual Kenyan with the freedom of movement, association, assembly, thought and conscience. It is therefore a breach of the constitution and a violation of this right when anybody purports to deny others the freedom to join or form other parties of their own choice. Finally, the right to participate in the political affairs of a nation (art.21 U.D.H.R) is only possible via political parties.

4.1.4 Freedom of Movement and Residence

International guidelines on freedom of movement, provided in article 13(2) of the Universal Declaration on Human Rights, states: “every one has the right to leave his county including his own and return to his country.” Article 12(2) of the International Covenant on Civil and Political Rights provides that “everyone shall be free to leave any country including his

own,” while paragraph 4 of that article reads: “no one shall be arbitrarily deprived of the right to enter his own country” Article 15(4) of the Convention on the Elimination of All Forms of Discrimination Against Women provides that “states parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.”

The Kenyan position on freedom of movement and residence is found in section 81(1) of the constitution which states that: “no citizen of Kenya shall be deprived of his freedom of movement that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter, the right to leave Kenya and immunity from expulsion from Kenya.” Exception to this freedom includes lawful detention, public security, public morality and public health grounds. Other restrictions may be allowed on grounds of a court order resulting from criminal proceedings or any other lawful order. Finally, law can be passed by parliament imposing restrictions on the acquisition or use of land or other property by any person in Kenya without them infringing on freedom of movement. The land control act, for example, lays down some conditions which a prospective buyer of a piece of land must fulfill before a board can give consent for the purchase.

The majimbo rallies and the K.A.N.U zone phenomena/culture that it bred shows Kenyan being evicted from areas where they had settled or were doing business. Up country people were chased away from the coast (Likoni), while in the Rift Valley ,the Kikuyu and other non Kalenjin/Masaai tribes were evicted The right to movement and residence became severely curtailed. Statements from political elite purporting to ban others from entering certain zones of the country ran counter to section 81 of the Constitution of Kenya which guarantees freedom of movement ,yet no action was taken

4.1.5 Right to property

International guidelines on right to property are:

- Article 17 of the Universal Declaration of Human Rights which proclaims: “everyone has the right to own property alone as well as in association with others; no one shall be arbitrarily deprived of his property.”
- State parties to the International Convention on the Elimination of All Forms of Racial Discrimination undertake, under article 5, to guarantee the right of everyone to equality before the law in the enjoyment of a number of rights, including “the right to own property alone as well as in association with others” and the “right to inherit.”
- The Declaration on the Elimination of Discrimination Against Women provides, in article 6, for measures to be taken to ensure to women, married or unmarried, equal rights in the field of civil law, and in particular the right to acquire, administer, enjoy, dispose of and inherit property, including property acquired during marriage.

Under Kenyan law, the right to property is guaranteed in the constitution, even though in a negative way. The constitution does not guarantee every citizen the right to have property, but rather, after a citizen has acquired property, the law steps in to guarantee that the property cannot be taken away without compensation. Section 75 of the constitution provides that; “No property of any descriptions shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except on certain prescribed grounds that can be described as in the interest of the state. Valuable safeguard provisions are made requiring prompt payment of full compensation and direct access to the high court in case of any dispute.

This ensures that property cannot be arbitrarily and compulsorily acquired or taken possession of. The right to property is supposed to give substance and meaning to the right to life. Lawfully acquired property must be protected since such property enables sustenance of life.

Apart from loss of life, the value of property lost during the clashes is no doubt the greatest. Billions worth of property was stolen, destroyed, burnt or simply left to the vagaries of weather. Houses both permanent and semi-permanent were burnt down, livestock stolen or killed, household destroyed or stolen, farm produce burnt or stolen and businesses destroyed.

4.2 Social, Economic and Cultural Rights.

These rights are also referred to as second generation rights, and are derived from the growth of socialist ideals in the 19th and 20th centuries and the rise of the labour movements in Europe. They contrast with the first generation civil and political rights associated with 18th century declarations on rights of man and third generation rights that encompass the rights of peoples or groups. International Covenant on Economic, Social and Cultural Rights (I.C.E.S.C.R.) entered into force on 3rd Jan. 1976, following the deposit of the 35th instrument of ratification. However, it was not until 1986, upon the creation of the United Nations Committee on Economic, Social and Cultural Rights that the covenant got a meaningful system of generating a wider understanding of its terms. The Universal Declaration of Human Rights in article 22 had earlier referred to Economic, Social and Cultural Rights as: 'indispensable for one's dignity and free development of one's personality and the right to social security which entitles everyone access to welfare state provisions'. Other articles go on to declare the right to work (article 23), rest and leisure (article 24), adequate standard of living (article 25), education

(article 26), and free participation in the cultural life of the community (article 27).

Kenya, like most countries in the free enterprise world, has not ratified the Covenant on Economic, Social and Cultural Rights. This is mainly due to the fact that for most of these rights, governments would have to incur considerable expenditure for their realization. However, this does not strictly mean that these countries are not bound by the rights under the convention. As has been stated, under international law, countries are bound by human rights treaties irrespective of whether they have ratified them. Human rights instruments are considered so important to world peace and development that countries are not allowed the options of picking and choosing which instrument will bind them.

It must, however, be pointed out that when a country willingly accepts to be bound by a human rights treaty, it would be expected that enforcement of the treaty's provision would be easier than where a country refused to ratify the treaty. Since international law rests largely on the willingness of the parties involved, enforcement of human rights stands on a surer foot where a country has ratified an international human rights instrument. Some of the second generation rights are:

4.2.1 Right to work

The right to work is guaranteed by article 23 of the Universal Declaration of Human Rights which proclaims: "everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment ..." Under article 6 of the Covenant on Economic, Social and Cultural Rights: "state parties recognize these rights and undertake to achieve their realization ..." Article 11 of the International

Convention on the Elimination of All Forms of Discrimination Against Women also guarantees the right to work .Finally, the African Charter on Human and Peoples' Rights also makes provision for the right to work.

Crucial to the right to work is the right of everyone to be availed the opportunity to gain a living by work freely chosen. Situations of insecurity -- as was witnessed during the ethnic conflicts in Kenya -- no doubt compromise the enforcement of this right. Normally to earn a living, a person must work, and all human communities depend -- for their sustenance -- on the work done by their members. The right to work also supplements the right to property, which can provide more income commensurate with an adequate standard of living.

Scores of those who were displaced during the clashes lost the right to work, both in the formal and informal sectors. At the coast province, the raiders make it clear that they wanted the upcountry people out because they had "robbed" the of their work opportunities. Businesses closed down due to the insecurity caused by the clashes, thereby denying people the right to work.

4.2.2 The Right to Education

International guarantee for the right to education is provided under article 26 of the Universal Declaration of Human Rights which claims that: "Everyone has the right to education" and sets out the number of principles to be applied in order to achieve this goal. Under article 13 and 14 of the International Covenant on Economic, Social and Cultural Rights, state parties should undertake necessary measures to achieve the full realization of this right, and in particular, to work out and adopt a detailed plan of action, of the principle of compulsory education free of charge for all .Under article 5 of the International Covenant on the Elimination of all Forms of Racial Discrimination, state parties undertake to prohibit and eliminate racial

discrimination in respect of this right. Under article 10 of the Convention on the Elimination of all Forms of Discrimination Against Women, state parties should undertake to take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education. Article 28 of the Convention on the rights of the child require states parties to recognize the right of the child to education and takes appropriate measures to promote it.

Under the right to education, not only is primary education compulsory, and to be made available to all, but also shall secondary school be made generally available and accessible to all. Furthermore, fundamental education or “adult literacy” shall be encouraged or intensified for those who have not received or completed the whole cycle of primary education. The clashes forced several schools to close. In certain places, schools became refuge centers for displaced persons. Such was the case in Thessalia primary school in the Rift Valley. Teachers ran away, while at the same time, pupils whose parents were victims could not attend classes. Some pupils lost their parents and could not therefore continue with studies in the normal manner.

4.2.3 Right to Health

This right is guaranteed under several international covenants. Article 25(1) of Universal Declaration of Human Rights proclaims: “everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing and housing and medical care...” Under article 12 of the International Convention on the Economic, Social and Cultural Rights: “state parties recognize the right of everyone to the highest attainable standard of physical and mental health and agree to take steps to achieve the full realization of this right...”

Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides that state parties shall take all appropriate measures to eliminate discrimination against women in the field of healthcare..."Article 19 of the 1969 Declaration on Social Progress and Development calls for, "the provision of free health services to the whole population of adequate preventive and curative facilities and welfare medical services accessible to all.

The right to health is also protected under article 2 of the 1971 Declaration on the Mentally Retarded Persons and article 6 of the 1975 Declaration on the Rights of Disabled Persons. In addition to treatment and control of diseases, the right to health also requires that conditions exist that would assure medical services and medical attention to all, in the event of sickness. This requirement is clearly laid down in the preamble of the constitution of the World Health Organization (WHO) where it recognizes: the highest attainable standard of health as a fundamental right of everyone, and defines health as a state of complete physical, mental and social well-being and not merely the absence of disease and infirmity.

States parties are to make efforts to institute rural health sub-centres and to motivate health personnel to open up practices in rural areas. Healthcare should also be affordable for the economically underprivileged while at the same time be of good quality. Access to clean and safe water and the provision of adequate sanitary facilities, environmental hygiene and health education are also to be promoted by the state. As already stated, the clashes displaced and rendered homeless several people, who later settled either in schools, churches or market centers. Those displaced could not access clean and safe water at the centers where they took refuge. Environmental hygiene was seriously compromised, while at the same time, certain health centers had

to close down due to insecurity. This meant that, those in need of health services could no longer access it.

4.3 **Third generation rights.**

These ones shed light on group well-being realized by collective rights. They are the most recent to be recognized and are based on the rationale that the rights and interests of certain groups of people can be better met by their self-identification as members of a collective entity. Third generation rights take a more holistic approach embracing a brotherhood and sisterhood of mankind and their inseparable solidarity. The emergence of these species of rights was influenced by a non-Western movement to end colonialism and racism in the mid twentieth century. These rights were sought by groups with common identity and experience in the struggle to achieve self-determination of racial and ethnic groups. This was reflected in the adoption of international standards condemning genocide and apartheid.

Even though the 1991-1997 clashes in Kenya can not be seen as an attempt to self determination, it is important to note that to a large extent, distinct groups were targeted for eviction. This has been pointed by the Akiwumi Commission report where it observes that; 'in each area of the clashes in the Rift Valley Province, non-Kalenjin or non-Maasai, as the case may be, were suddenly attacked, their houses set on fire, their properties looted and in certain circumstances, some were either killed or injured.

Similarly, in its report on the clashes that occurred in the Coast Province, the commission states; '...the clashes were purely a one way affair where the Digo youths attacked, killed and destroyed the property of upcountry people.

In North Eastern and Eastern Provinces, the clashes once again, involved distinct groups. It can also be argued that the clamour for 'majimbo' was an attempt to self determination. However, whatever position one takes, it can

not be disputed that 'majimbo' was a movement against certain ethnic communities as 'groups'. It is in this light that this study finds it necessary to also evaluate some of the third generation rights: the right to economic development and the right to peace and security are hereby discussed below.

4.3.1 The right to peace

The close link between human rights, peace and development has been recognized by the UN organs on many occasions. For example, at its 1983 session, the General Assembly (GA) emphasized that international peace and security were essential elements for the full realization of human rights, including the right to development. As early as 1947, the GA linked the enjoyment of human rights with maintenance of international peace and security in resolution which, while recalling that all member states had pledged themselves to take joint and separate action to promote universal respect for, and observance of fundamental freedom, including freedom of expression, condemned "all forms of propaganda ...designed or likely to provoke or encourage any threat to the peace, breach of peace..." Two years later, in resolution entitled "essential of peace" the assembly called upon every nation to "refrain from any threat or act, direct or indirect aimed at impairing the freedom, independence or integrity of any state or fomenting any civil strife and subverting the will of the people in any state." Also, in 1976 the commission on human rights expressed, its convictions that unqualified and promotion of human rights and fundamental freedoms required the existence of international peace and security. At the same time, it pointed out that flagrant and massive violations of human rights could lead the world into armed conflicts. In the same resolution, it emphasized (a)... against racial discrimination and other forms of flagrant and massive violation of human rights and (b)...the need for all states to create, both by their own effort and with international assistance and co-operation, the most favorable

conditions and promotion of human rights and fundamental freedoms, including the right to life and security of persons.

More recently, the GA in 1982 adopted and proclaimed declaration on the participation of women in promoting international peace and co-operation, in which the link between peace and enjoyment of human right is clearly recognized in article 1, which reads: “women and men have an equal and vital interest in contributing to international peace and co-operation”. To this end, women participate in economic, social, cultural and political affairs of the society on the equal footing with men.

The atmosphere surrounding the areas where clashes occurred was one of total insecurity. The death and destruction witnessed is a good indicator that peace was absent. In North Eastern/Eastern provinces, security has remained one of the worst in the country, with a seemingly unstoppable influx of firearms and ammunition into the region from neighboring Ethiopia and Somalia. Majimbo rallies and incitement created an atmosphere of uncertainty and fear among the people. Timothy Mibei, then a minister, while addressing such rally at Kapkatet on 21st September 1991:-“Instructed wananchi in the Rift Valley province to visit beer halls and crush any government critics and later make reports to the police that they had finished them (*Daily Nation 22nd September 1991*).Such threats amounted to acts of incitement that would attract penalty in the area of criminal law, yet no action was taken despite the fact that the rallies were always attended by senior police officers and members of the Provincial Administration.

In the Coast Province, evidence was given to the Akiwumi Commission to the effect that chiefs and their assistants were aware of plans by Digo youths to attack the Likoni police station, but no action was taken. This is the same

attitude that the Police Commissioner took when he got similar report from the Director of intelligence. The same happened at Miteitei farm and everywhere else. The right to security was so compromised so much such that even victims who had taken refuge within the Catholic Church in Likoni found themselves being attacked by raiders. During this incident, a suspect – Mwalimu Masudi Mwahima a councilor from whose house the raiders had short into the church compound was arrested, but mysteriously released from the port police the following day. Those arrested with him were equally released. The P.P.O was later to tell the Akiwumi Commission that the released were on the orders of the Police Commissioner (Wachira) following pressure from Shariff Nassir, then a powerful K.A.N.U operative and Minister of the Government. Finally, there were no efforts to assist the displaced persons to settle back on their farms and appropriate security arrangements made for their peaceful stay thereon. Todate this issue has not been settled.

4.3.2 The right to economic development.

In a resolution adopted by the international conference on human right held, at Teheran in Iran in 1968, it was pointed out that “the enjoyment of economic and social rights is inherently linked with any meaningful enjoyment of civil and political rights and that “there is profound interconnection between the legislation of human right and economic development.” It recognized that the universal enjoyment of human rights and fundamental freedoms would remain a pious hope unless the international community succeeds in narrowing the ever-widening gap between the living standards in the economically developed and developing countries. It further recognized the “collective responsibility of the international community to ensure the attainment of the minimum standards of living necessary for the enjoyment of human rights and fundamental freedoms by the persons throughout the world.”

One year later, the commission on human rights affirmed “that the universal enjoyment of economic, social and cultural rights set forth in Universal Declaration of Human Rights depends to a large degree on the rapid economic and social development of the developing countries which are inhabited by more than one half of the world’s population, whose lot continues to deteriorate as a result of tendencies which characterized international economic relations.”

The right to development calls for the reduction and elimination of poverty and a fair distribution of the benefits of development, employment creation, provision of universal education on the broadest possible scale, attainment of level of health that would promote living of a socially and economically productive life, and the provision of basic shelter and infrastructures for all people, in rural as well as in urban areas.

The government at all times has a duty to ensure that citizens are not denied their rights. This calls for an even spread of development. The whole country must move forward, not leaving some areas lagging behind because of their remoteness or because of who lives there. In North Eastern and parts of Eastern Provinces, the government to a large extent neglected these areas as far as development is concerned. There have been hardly any roads, only a few schools, ill equipped hospitals and very little economic activities going on. The same regions suffer acute water problems, which lead to undue competition for scarce water during prolonged droughts. In several other areas, the government has since independence made efforts to provide water, roads, hospitals, schools and a meaningful communication system, which has resulted not only in improved security but also general economic development of those regions. This is a biased development policy (discrimination) on the part of the government. Disagreement over such limited resources, such as

water, was one of the causes for the ethnic clashes/conflict in these regions, while poor communication network made it difficult to bring to an end the clashes early enough.

4.4 The Right to secure protection of the law and the role of the Judiciary.

“There can be no peace without justice, no justice without law and no meaningful law without a court to decide what is just and lawful under any given circumstances”

The right to secure protection of the law is one of the species of rights guaranteed under the International Covenant on Civil and Political Rights. Due the unique role played by courts of law in the realization of human rights, it has been evaluated from the point of view of the role of the courts in the dispensation of justice. As already pointed out in previous chapters, human rights can only be enjoyed if there is effective machinery for vindication. No other instrument can be more important in this area than the judiciary. The right to secure the protection of the law is guaranteed under several international instruments. Articles 7 and 10 of the Universal Declaration of Human Rights articles 14 and 26 of the International Covenant on Civil and Political Rights and article 3 of the African Charter on Human and People’s Rights are some of the international and regional instruments that guaranteed secure protection of the law. The United Nations has repeatedly expressed its concern for the principle of equality in the administration of justice. Article 10 of the Universal Declaration of human rights; for example, provide that “every one is entitled in full equality to a fair and public hearing by an independent and impartial

tribunal, in the determination of his rights and obligations and of any criminal charge against him. Under Kenyan law, provision is made for fair trial of any persons charged with a criminal offence: - the presumption of innocence, legal representation of one's choice etc. Section 77(1) of the constitution provides; "if a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The right to secure protection of the law can be said to be a cluster of rights available to an arrested and accused person in the cause of an on going criminal trial. Even the right to protection against discrimination, as far as it ensures that laws serve all citizens equally, generally falls under the right to secure protection of the law. Other rights that are also provided for here are: the right to clear description of the offence alleged, provision of adequate time and facilities to prepare defence by the accused, right to legal representation and cross examination, right to an interpreter, right to be present at one's own trial and so on.

The right to secure protection of the law is therefore aimed at ensuring that criminal proceedings are conducted according to the law and that the spirit of the law is observed so that justice is arrived at. Neither the accused nor the government should be favoured. In *Ogola vs. Republic* (1973) E.A. 277, the applicant's advocate asked for an adjournment of the hearing date so that the advocate chosen by the applicant could conduct his defence. The trial magistrate refused to adjourn the hearing date. On appeal, the High court held the applicant's constitutional right to have a legal representative of his own choice had been infringed; a fresh trial was ordered.

It is essential that courts must be seen by the people to be independent and impartial. This is only possible if judicial decisions are reached without pressure from any quarter, be it the executive or the litigating parties. The question of independence of courts in Kenya was probably debated most in the 1990s during the period that clamour for political pluralism also reached its apex in the country. No judiciary can be perceived to be independent as long as there are issues that put that independence into question. One issue that has been of great concern as far as independence of the judiciary in Kenya is concerned is the retention and continued appointments of expatriates' judges. The London-based human rights group-African Watch; in its report of July 1991 had this to say on the matter: "political manipulation of the judiciary is at the heart of the Kenyan human rights crisis. Lawyers and judges are subjected to an array of pressures to undermined the independence of the judiciary; which has been facilitated by the recruitment of the British expatriate judges."

Dr. Eugene Cotran, himself a former expatriate judge in Kenya, has similarly criticised the performance of his former colleagues and accused them of delivering judgments in favour of the state for fear of losing their jobs. Cotran argued that expatriate judges in Kenya have nice jobs which they could not get back at home (England), and that expatriate judges are required only in countries where there is a shortage of legal personnel. He denies that this was the case in Kenya.

Another human rights body-USA based Robert Kennedy memorial centre for human rights did also accuse the government of Kenya of "criminalizing political dissent especially in the use of treason, sedition and pre-trial detention as a means to this end. In a report entitled "Justices enjoined-the state of the judiciary in Kenya" it cited the following cases as example of

attempts by the government to contain political opposition through the judiciary: Aaron Ringera vs. Paul Muite and others, civil suits No.133 of 1991; Reverend Lawford Imunde vs. Republic H.C.Misc.application No.180 of 1990; Koigi Wa Wamwere and others vs. Republic H.C.Misc application No.574 of 1990 [unpublished].

In the Aaron Ringera vs. P.K.Muite case, Muite, an advocate of the High court and one of the crusaders of the multiparty politics in the country, had just been elected as chairman of the Law Society of Kenya [LSK]. In his inaugural speech, he called upon the government to register Oginga Odinga's National Development Party (NDP). In reaction to this, a number of Kenyan advocates known for their pro-government leaning, filed an injunction against Muite and the LSK council, arguing that it was ultra-vires the objective of the LSK for its chairman to issue political statements. The case was first heard by justice Dugdale (ex-parte) and later by the late justice Mango (inter-parte), both of whom granted the applicants their prayers thereby barring Muite and the council from conducting the affairs of the LSK "in a political manner".

Muite and the council later issued a statement wherein they called for the removal of various judges from the Kenyan bench on grounds of judicial ineptitude. The four plaintiffs, Aaron Ringera, Nancy Baraza, Nesbit Ojwang and Philip Kandie then made an application for the council's committal to jail for contempt. On 23rd October 1991, the High Court sitting in Nairobi [justice Mwera] found the LSK council members in contempt of Court on grounds of having "talked politics" and fined each of them ten thousands Kenyan shillings. It is this kind of judgment that exposes the judiciary as an institution under manipulation by the executive. One wonders what judges Dugdale and Mango understood politics to be. Furthermore, the core function of the LSK is to promote the dispensation and administration of justice in the country; and

comment made on judicial officer's performance ought to be seen in that context.

Another expatriate judge, Justice Shields on his part, had this to say: "the government takes a keener interest in the judiciary than is normal in a democratic society. The government does not show evidence that it believes that a judge should be independent minded and decide matters on law and evidence". The judge added that "some powers were interfering with the judicial process. Justice in Kenya will only be dispensed with independently when these powers stop interfering with the judiciary ... the independence of the judiciary remained a far cry so long as such interference went on"(Standard Newspaper Dec. 1994).

Other concerns on the independence of the Kenyan Judiciary have been expressed, for example, by the LSK when it petitioned then British Secretary of State for Foreign Affairs, Hon Douglas Hurd for assistance to have the then Chief Justice A.R.W Hancox and Justice Dugdale, removed from the bench due to the fact that they were an obstacle to the people of Kenya in their struggle to return the country to democracy and the rule of law. The LSK based their argument out of concern that most of the suits lodged in court for the enforcement of fundamental rights usually fell foul of the nebulous section 84 of the constitution. The easy way for the courts was to adopt a line of decisions that essentially held that the section was inoperative in the absence of rules made by the Chief Justice under the section. This is the barrier that the application challenging Mr. Kenneth Matiba's detention in 1984 experienced. Section 84 (6) of the constitution of Kenya states:

"The Chief Justice may make rules with respect to the practice and procedure of the high court in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the

time within which applications may be brought and references shall be made to the high court)". No Chief Justice has ever since independence, complied with this part of the constitution and it is the same section that the pro-establishment judges have used to deny citizen's their rights.

Justice Dugdale, for example while making a ruling in the *Gitobu Imanyara vs. Attorney General* case, where the question for consideration was: whether section 2A of the Kenya constitution (which made Kenya a one party (KANU) state was inconsistent with the freedom of association under section 80 of the constitution had this to say: "when the applicant referred in paragraph of his affidavit that he believed that there are millions of Kenyans who are by choice non-members of KANU, the contents are irrelevant because he is the only applicant". Justice Dugdale went on to dismiss the application by stating that the statement was made for propaganda purpose and to stir up and excite the public. He also stated: **in addition, one can understand an individual seeking redress for infringement of constitutional right but here we have an individual who seeks to alter or amend the constitution for his own benefit.**" Dugdale's argument in the above-mentioned case therefore fails to recognize the right to individual human rights protection and gives the wrong impression that human rights should only be protected when millions of people are affected and not just an individual. Even more worrisome was Justice Dugdale's decision in another case – *Joseph Maina Mbacha and others vs. Attorney General* in which the judge declared that the entire section 84 of the constitution of Kenya was in operative (NLM 1991).

The said section 84 of the constitution provides for enforcement protectives of rights as provided for in chapter 5 of the very constitution (Kenya Bill of Rights). Relying on a previous judgment by a former chief justice, Cecil

Miller, (himself an expatriate) , Justice Dugdale stated as follows:” this court has had the benefits of reading the judgment of the honorable Chief Justice Miller, EGH, EBS in the high court Misc. cc. 551 of 1988 (Nairobi) G.K. Kuria vs. AG. in the course of which he set out the principles involved in the construing statutes and observed that the jurisdiction conferred by section 84 is subject to sub-section (6) of the said section 84 and there being yet no operative rules regulating the practice and procedure of the high court in such as the instant matter, there is a void in search for certainty which is an important aspect of jurisdiction whatever as to the entire section 84”. The judge then concluded that there was no merit in the application and proceeded to dismiss it.

The application by Mbacha and group was to the effect that having been arrested and put in custody without bail on charges which they believed were politically motivated, they moved to the high court under section 84 and 60 of the constitution seeking an order of prohibition against the resident magistrate’s court set to hear their case. This decision has no legal basis at all since it is common knowledge that in law, where rights are guaranteed, there must be machinery for their vindication, otherwise guaranteeing of unenforceable rights would amount to a fraud on citizens. Moreover, in the past, the Kenya High Court had vindicated fundamental rights and freedoms. This showed that the High Court had jurisdiction over such cases. In the Mbacha case, Judge Dugdale did not determine whether the High Court was right to hear all other human rights cases before the Mbacha case. Above all, the provision that instructs the Chief Justice to make rules for the establishment and procedure of human rights court is not mandatory. Section 84(6), provides “the Chief Justice may make rules...” Before the rules are made, then the High Court can entertain human rights cases by virtue of its original jurisdiction in all cases arising in Kenya and also by

virtue of the dictates of Section 84(2) which gives the High Court original jurisdiction in human rights cases.

Besides the “expatriate judges” factor in our judiciary, it appeared that the independence of the judiciary in Kenya had further been compromised by the powers of the executive over the Judiciary. Such powers included, and still do include, the President’s power to appoint the Chief Justice and judges of the High Court and Court of Appeal. The president had, and still has, powers over the appointment of members of the Judicial Service Commission, which in turn, appoints, transfers and fires other members of the judiciary. Those appointed are likely to owe allegiance to the appointing authority, -- the very government (President) they are supposed to keep in check. The situation was made worse when the same president also doubled as the leader of the then ruling political party, KANU, whose top brass took an active role in opposing the re-introduction of multi-party, including by inciting ethnic animosity amongst citizens.

Furthermore, even though the police and the AG are responsible for criminal investigations in the country, their professional work have in the past been tampered with – much to the chagrin of sound judicial practice in the country. For instance it raised eyebrows when Swaleh Bin Alfani, the oath giver, was released on bail, in spite of the obvious atrocities that his conduct led to, despite the fact that he had been charged with non-bailable offences. For the same reason, one is justified to question such judicial acquittals, allegedly on grounds of lack of evidence, especially in cases that had to do with the clashes. It was later revealed to the Akiwumi Commission that Bin Alfani was released due to pressure from politicians.

Another contentious issue in the state of our Judiciary then, was the mode of allocation of cases. The Chief Justice was vested with powers to decide which judge hears what cases. Justice Hancox, the then Chief Justice, delegated the assignment of cases to two quasi permanent judges – Dugdale and Porter, well known at the time for their impatience with government critics. That way, Hancox did ensure that only judges known to rule in favour of the state heard politically sensitive cases. Dugdale, for example, reserved for himself all politically sensitive cases such as the civil suit filed by NDP challenging refusal for registration by the registrar general. He decided to hear this case alone, while the practice was, and still is, that three judges hear such an important constitutional case. As expected he ruled in favour of the state and noted “the open hostility expressed in the documentation against the government and against KANU” as the basis for throwing out the application. One wonders whether by that statement Justice Dugdale was playing KANU politics or he was still playing the role of an impartial judge.

Indeed even before the case started, the advocate representing the NDP had earlier expressed his fears by asking the judge to disqualify himself when he said: “in view of the cases that have come before you affecting constitutional matters, most of which touch on rights and freedom of individuals as stipulated in Sections 70 and 80 of the Constitution and which you have always ruled in favour of the state, the applicant in this matter feels you should disqualify yourself from this case.” A private prosecution, against Hon. Ntimama by Mbuthi Gathenji for instigating tribal clashes in the Rift Valley was terminated by the A.G. by way of nolle Prosequere and shortly afterwards, it was Gathenji who found himself being charged with being in possession of seditious documents.

In September 1996, the Police Commissioner, Duncan Wachira, received a report from the Director of intelligence on impending clashes at the coast, but did nothing. Instead he was more concerned with providing cover to Karisa Maitha (deceased), at the time a KANU activist, and who had been charged before the Mombasa Chief Magistrate with offences relating to tribal clashes at the coast. He actually instructed John Namai, (then P.C.I.O.) to make sure the accused was released on bail.

Conclusion

Though we live in a period when human rights have received recognition world wide, abuse of individual rights is still rampant. States continue to act in total disregard of both International and municipal requirements. Furthermore, in the case of Economic, Social and Cultural Rights, it is likely that states will take along time to give them the same status and impact as the Civil and Political Rights. States will still continue to fear the financial commitments of guaranteeing such species of rights.

CHAPTER FIVE

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

5.0 SUMMARY

This study's objective was to investigate how human rights relate to internal conflict in Kenya. The assumption was that non-observance of human rights fuels the out break, spread and exacerbates internal conflicts. It was further assumed that internal conflicts undermine progress in the realization of human rights. Drawing from both the natural law concept and that of liberalism, the study looked at all the three species of rights; Civil and Political, Social Economic and Cultural rights and the third generation rights, which it emerged, have developed into part and parcel of international law norms (*jus cogens*). Liberalism theory helps in explaining the broadening and universality of human rights throughout the world.

In the introduction we discussed the history of human rights and how it became an issue of international concern. In the methodology, we stated that the study would rely on secondary data.

In chapter II, we looked at the evolution and development of human rights from the Roman time to the time the UN stepped in, to give it an international character. The main purpose of the chapter was to trace how issues of human rights was first articulated, its developments and current status as an issue that cuts across national boundaries. In this chapter we also looked at enforcement and monitoring of rights and freedoms and the responsibility that international law lays on states as far as this is concerned.

In chapter III, we looked at the ethnic conflict in Kenya during the period under review. We have specifically addressed ourself to the background,

nature and extent of the conflict; and how certain underlying factors provided fertile grounds for human rights violations.

This chapter also addressed the role played by various actors before and during the conflict period. Politicians and church leaders, private individuals, government officials as well as community leaders; all played some role in one way or the other in fueling the conflict; as has been documented in this chapter. The chapter also discussed the regions where ethnic clashes occurred and the actual communities which were involved. Finally, we have also looked at the kind of loss and destruction that occurred during the conflict.

It is this factor which led us to chapter IV where we looked at the relationship between respect for human rights and conflict. Here we identified eleven different rights recognized by international instruments and used them to mould our case study. In this chapter we also looked at the nature of international human rights, particularly, its focus on state responsibility in the protection of individual rights. The three responsibilities of the state in this regard (respect, fulfilment, protection) were looked at in this chapter. Furthermore, we did address our self to the specific concern of the three different species of rights: specifically, how they aim at controlling respect for individual rights.

In the second part of chapter IV, we addressed ourselves to how the international community has in the past addressed human rights violations committed within national boundaries; and in the process also looked at the relationship between human rights and crimes against humanity. In the final part of chapter IV we discussed circumstances under which derogation from human rights may be allowed and which specific rights may be derogated.

5.1 CONCLUSIONS

It is the expectation of every citizen that those charged with state authority (running the government); will invariably engage in good governance. Citizens expect the state to be able to maintain law and order, bring about economic growth, and promote freedom (e.g. of speech, association etc), promote the welfare of the less fortunate in society; promote transparency and accountability in the management of national resources, amongst other things. For good governance to be achieved, certain universally accepted principles that are linked to it must obtain. These include above all, respect for the constitution (rule of law) including increased popular political participation and the respect for human rights. Poor governance can easily result into conflict (violent or structural), while at the same time conflict situations will also be a hindrance to good governance.

The Kenyan constitution is the supreme law of the land. Any law that contradicts it is void to the extent of that contradiction. The constitution lays down the power of the government. It tells us the limit of those powers. It tells the government how, when and by whom those powers are to be exercised. The constitution also tells the people what rights they have. It tells them how, when and by whom those rights can be taken away. Some of the rights in the constitution make it possible for the citizen to influence the behavior of government. Other rights enable the citizen to change the government altogether. But some rights are absolute. The government has no power, even in emergency, to take them away (e.g. right to life), except under legal exceptions as has been stated under the rules to derogation. The constitution recognizes that if such rights are violated, then our essential humanness will be violated.

There are right and wrong ways of enforcing the law. For example, government is not allowed to break the law so as to apprehend criminals. It is not allowed to punish people for doing something, which is not prohibited by the law. It is not allowed to punish people for doing something, which was not an offence at the time when it was done. This moral side of law is what lawyers call constitutionalism or rule of law. The concept of the rule of law, which was first laid down by Albert Venn Dicey in his book "Law of the Constitution" in 1895, implies that government authority may only, be exercised in accordance with written laws, which were adopted through an established procedure. The principle is intended to be a safeguard against arbitrariness on the part of those in authority.

Under the rule of law, a government must recognize that the people are sovereign. This sovereignty, of course includes; the rights to choose a government to run the affairs of the country for a given period (say 5yrs) in a free and fair elections. No doubt political pluralism is a major ingredient of a free and fair election, at least as far as the right to choice and association are concerned. These rights must not be denied; otherwise the people become slaves, not citizens. In addition to the above, under the rule of law; authority, including authority to make laws must be exercised according to law. Laws must only be made according to procedures allowed by the constitution. If a government regularly behaves in a manner that is not laid down in the law, or if it makes laws that violate the constitution, it loses constitutional legitimacy. It becomes an illegal government.

More important under the rule of law (constitutionalism) is that; since constitutionalism requires government to behave according to the law, there must be an organ to decide whether in fact the government is obeying the law of the land. That is to say, there is need for constitutional monitoring.

Many modern constitutional systems give this power to the judiciary. Some countries like France and Germany have special constitutional courts which decide whether the law is constitutional or not, before it can be passed by parliament.

There is no greater danger to liberty than a government that will not obey the law. Armed with state-power: - the military, the police force and a huge administration, a government becomes an extremely dangerous lawbreaker. Moreover, when the government itself breaks the law, it breeds contempt for the law. The primary purpose of the rule of law is to ensure respect for constitutionalism. This the rule of law does by monitoring government behavior. The rule of the law monitors government behavior firstly, by providing for political monitoring through the electoral process. Elections are a recognition of the principle that the people are; collectively, the final sovereign. A non-elected government is by definition non-democratic and cannot be described as a constitutionalist government. An elected government which abolishes elections is also non democratic, because it has by so doing, transferred sovereignty to itself rather than the people. Therefore one of the most important mechanisms for constitutional monitoring of the rule of law is an inclusive and periodic, free and fair election. It is important that the elections be inclusive because a government can hold undemocratic, but nonetheless free and fair elections. Kenya in the period under review, witnessed state-sponsored attempts to deny citizens the right to associate themselves with other political parties other than KANU. This in itself was akin to vesting sovereignty on KANU followers only, to the exclusion of non-members. In other words, if a government introduces irrelevant criteria meant to exclude some people from the electoral process in an election, such elections will be undemocratic, even if they are free and

fair for the participants. This is the kind of scenario that best explains the pre-1992 period in Kenya.

Political parties generally facilitate democratic participation that empowers grassroots support of the political system, while at the same time consolidating the citizens' aspirations, ideas and goals into national development issues. Under KANU as the only political party, Kenya had become a dictatorship. Discussions of any kind and all national issues was the total monopoly of the ruling party – KANU. It was therefore a serious violation of the right to associate, to deny people the opportunity to organize themselves into a political organization/party of their choice.

The second mechanism for constitutional monitoring is judicial review, but this is only possible and effective in an environment where the judiciary is independent. Kenya's judiciary during the period under review was far from being independent. The third type of constitutional monitoring is the international political monitoring which take the form of different human rights instruments that the world governments are expected to adopt (U.D.H.R, I.C.C.P.R, C.E.D.A.W . etc). Alongside the growth of these human rights instruments, there have grown different NGOs whose mandate is advocacy for greater respect for human rights.

The republic of Kenya is a signatory to the international covenant on civil and political rights (ICCPR), having ratified the same in 1976. Under article 40 of the covenant, state parties, Kenya included, are under obligation to submit reports to the United Nations Humans Rights Committee on the measures they have adopted which give effect to the rights recognized in the covenant and on the process made in enjoyment of these rights. Kenya, however did not submit such reports during the period under review, having

made its last submission in 1979. Failure to submit a report for such a long period of time speaks volumes on the human rights records of a country. The 1979 report was probably made to help get the much needed international support for the government of Daniel Moi who had just come to power. This method therefore could not be relied on to really assess the human rights situation in the country. Kenya was operating in "darkness" as it were, at least as far as human rights monitoring was concerned.

As for the role of NGO's in putting the state on check regarding human rights violations, it must be pointed out that the period under review is what one would call the peak of Moi's dictatorship and as to such NGOs could do very little to have any impact. Moreover, the NGOs were themselves victims of the same government as far as Human rights observance was concerned. Their activities were extremely monitored and highly restricted. Few Kenyan's could openly report their suffering to these NGO's for fear of being victimized by the state. The registration of NGOs was during this period strictly controlled under the office of the President and many were the threats of de-registration of NGOs perceived to be errant.

A part from the churches, there were really no major NGOs that were actively involved in the issues of clashes and clash victims. The Red Cross would, for example, provide assistance, but mainly within church sanctuaries. . Insecurity was a major issue for the NGO's. All the same, there were NGOs, which did a commendable job in trying to bring to the attention of the International Community the human rights problem in the country at the time. These included Kenya human rights commission, I.C.J. (Kenya chapter), FIDA etc. As expected the Moi government kept harassing leaders of such NGOs while at the same time engaging in state propaganda and disinformation to discredit their work. For example, the government

formed the standing committee on human rights and appointed a university professor (Mutungi) to head it. This is a body that the Moi regime used to hood wink the public on his government's concern for respect to human rights. It was state controlled, state funded and its officials appointed by the president himself. The government was in effect monitoring itself. The result was the massive harassment, arrest and even jailing of pro-multiparty advocates. Unauthorized evictions, incitements against certain sections of the society, discriminates resource allocation by the state and blatant looting of public coffers for dubious operations became the order of the day. There was already a great deal of structural conflict. It only needed a spark to bring it in the open. The Majimbo debates, as has been pointed out, became that spark. The tribal clashes became a reality.

On the basis of available data as pertains to first hypothesis we have come to the conclusion that there exists a positive relationship between human rights observance and management of internal conflict. It was not lack of adequate security personnel and equipment (resources) or preparedness that contributed to tribal clashes. The police force and the Provincial Administration were well aware of the impending clashes and if anything connived at it.

In many if not all clash torn areas, the police officers, and the Provincial Administration heavily relied on and overemphasized the use of "barazas" as away of bringing to an end the clashes. While "barazas" may be an important tool for the dissemination of information, particularly regarding government policy in times of peace, and may also be used to promote reconciliation where the matter in dispute is simple and clear, in regard to the serious and ethnic nature of the clashes, the "barazas" could not and indeed did not achieve much. They appeared to be excuses for not taking decisive action to stop the clashes. This kind of inaction and dilly-dallying

on the part of the government officers only led to clashes taking longer than they should have.

Though the Kenya Government has recognized civil and political rights by entrenching them in the constitution, observance has not been given any serious attention. As has already been pointed out, a brief summary of the violations reveal that: those whipping tribal sentiments (incitements) were never arrested. A large number of people who were arrested were mainly the unemployed and superstitious youths who participated in the frontlines. The conniving senior politicians and government officials were never touched.

As pertains to the second hypothesis, we have come to the conclusion that the dependant and independent variables have a positive relationship. When communities and individuals who openly incited others into violence and participated in the mayhem continue to walk free without any action being taken against them, others who had suffered under their hands had to take self retaliatory measures. When no meaningful governmental action was seen to be taken against arsonists, looters and killers; the people had to resort to self defense etc.

Majimbo rallies where open incitements to violence were advocated were never stopped at all by the authorities. Instead, senior police and Provincial Administration officials would always provide security and even attend them. It was apparent that to the Provincial Administration and police officers, human nature being what it is, it was probably not possible for them, after along time of one party system, which was the only regime under which they had grown, operated, prospered and flourished; to now adjust to, let alone, completely and with wide open arms, welcome the introduction of

political system that was in principle, not only contrary to what they had enjoyed, but also one which on the face of it, might affect their status quo . They were, to put it realistically, an intrinsic part of the one party system. To this extent it is the finding of this work that, it was really never the government's official position that it was supporting the clashes, but certain government officers, particularly in these two departments, either acquiesced to or supported the clashes.

The arrest of multi-party advocates as happened to Mbuthi Gathenji, Matiba, Rubia and many others, amounted to legal terrorism; that is, using the law to justify and to indulge in excessive punishment and the punishment of the innocent. This is dangerous and unconditionally inhuman. The situation even becomes worse with a judiciary effectively under the control of a President who is openly opposed to the demand of its citizens for more political space. Majimboism was nothing, but a tool by those who were not prepared to accept the defeat which usually follow any free and fair election; and who lack the confidence that they will obtain power after such free and fair election. Finally, democracy, rule of law and human rights are values which are not realizable in a one party system, whether that system, is communist, right wing, military or civilian. Single party by their very nature, degenerate into totalitarian dictatorship with the inevitable social and economic decay. This is the kind of society that KANU under Moi wanted maintained, a society full of human rights violations. The third hypothesis that there is no correlation between observance of international human rights and internal conflict and its management is therefore disapproved.

5.2 **RECOMMENDATION**

- (i) In this study, we have highlighted the universality of human rights and particularly their binding nature. Although Kenya has domesticated

the civil and political rights in its constitution, the other two species of rights are yet to find room in the constitution. There is need for the country to have both the second and third generation rights enshrined in the constitution. Furthermore, consideration should be given to ways of promoting greater understanding and awareness of legal and human rights issues among government officials, politicians, religious leaders, community leaders and the general population. The courts have a very important role in ensuring protection of human rights. Magistrates and judges must stand firm when adjudicating in human rights cases. There is therefore need to consider extending security of tenure to magistrates as well, while at the same time removing the power of appointment of judicial officers from the executive. Without this the independence of the judiciary will continue to be compromised.

There is also need to have a national development policy to address the issue of regional parity as far as government driven development agenda is concerned. All regions of the country should be assured of certain basic development projects such as water, roads and health facilities.

- (ii) This study recommends some form of compensation for the victims of the 1991-1997 clashes. Those who lost their land parcels should be facilitated to go back, as long as they are able to prove ownership. A special fund should be set by the government to compensate victims across the board, at least as away of owning up to responsibility on the part of the government.

Finally, the perpetrators of this mayhem must not be allowed to go scot free. Criminal violent acts of this nature, although political and may be said to have been committed by the government (mainly through omission), can easily be traced to individuals. Cases of genocide, mass murders, massacres and general brutality and terrorism against citizens by those in power are frequently a result of power being vested in the hands of one or few individuals. Very often the government asks demands and encourages its agents to engage in criminal activities against its citizens. At times government officials commit criminal acts which on the surface appear to be committed by the government. It is submitted in this work that the latter is what took place in Kenya during the period under review. It is therefore recommended that such individuals be made to account for their actions. Both Kiliku and Akiwumi Commission reports have made recommendations on those who need to be investigated with a view to prosecution. It's recommended here that all those mentioned by the two commissions in their reports be investigated and if found culpable, prosecuted for their roles in the clashes. Above all former President Moi should equally be made to account for his role in these human rights violations; at least in the spirit of the Nuremberg trials.

5.3 **ISSUES FOR RESEARCH**

Ethnic politics has been quoted as one of the main causes of conflict in Kenya, yet ethnic diversity is a reality that is here to stay in Kenya. There is need to research on how negative ethnicity can be removed as an issue in Kenyan politics. How can Kenyans have an ethnic free political competition? Tanzania has been cited as a successful story for having managed to promote nationalism at the expense of ethnicity, despite having more ethnic communities than Kenya. Unless Kenyans see themselves as one nation, particularly in political competition, ethnicity

and its ugly consequences, including ethnic conflicts are likely to continue re-occurring.

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