

**An Analysis of the Post 2007 General Election Conflict
Mediation Process in Kenya**

Submitted in partial fulfilment of the requirements for the degree LL.M
(Human Rights and Democratisation in Africa)

Faculty of law, University of Pretoria, South Africa

By

Beatrice Nyawanda Odallo
Student Number: 10676237

Prepared under the supervision of
Dr Paulo Comoane

At the Faculty of Law, University of Eduardo Mondlane, Maputo,
Mozambique

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DECLARATION

I, **Beatrice Nyawanda Odallo**, declare that the work presented in this dissertation is original. It has never been presented at any other university or institution. Where other peoples' works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed _____

Date _____

Supervisor: Dr Paulo Comoane

Signed _____

Date _____

DEDICATION

To my parents who never tire to support me in all that I endeavour to achieve; my one of a kind “Mumsy” without whose many prayers I am sure none of it all would be possible. Thank you so much!!!! ☺ To Lameck who is always at the sidelines cheering me on. Thanks.

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List of abbreviations

AU - African Union

CIPEV - Commission of Inquiry on Post-Election Violence

DPA - Department of Political Affairs

IDPs - Internally displaced persons

KANU - Kenya African National Union

KNCHR - Kenya National Commission on Human Rights

KNDR - Kenya National Dialogue and Reconciliation

NARC - National Alliance Rainbow Coalition

ODM - Orange Democratic Party

PNU - Party of National Unity

TJRC - Truth Justice and Reconciliation Commission

UN - United Nations

UNDP - United Nations Development Programme

UNON - United Nations Office in Nairobi

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Chapter 1

1. Background

In December 2007, Kenya held what by all accounts were historic presidential, parliamentary and local elections which pitted the then President Mwai Kibaki and his Party of National Unity (PNU) against Mr. Raila Odinga, the leader of the Orange Democratic Party (ODM), Mr. Kalonzo Musyoka, head of ODM-Kenya, and six other candidates.¹ There was however, even before the elections were in progress, several indicators of conflict such as pervasive use of inflammatory campaign rhetoric.²

Within minutes of the Electoral Commission of Kenya's declaration of President Kibaki's victory, tribe-based rioting and violence broke out across the country.³ The results announced showed both a rapid disintegration of Odinga's previously large lead during the tallying of votes, and a 2.5% margin between the two leading candidates.⁴ As a result, suspicions of tampering were high, not least because the opposition had won 99 seats to PNU's 43 at the parliamentary level.⁵

While elections triggered the conflict, the lack of faith in the ethnically neutral nature of the government along with basic mistrust in state institutions fostered by decades of discontent with disparity and impunity caused some members of communities around the country to turn to violence.⁶ Also, although the violence was sporadic, some of it was organised⁷ because well-known gangs such as the dominantly Kikuyu *Mungiki*, who had been financed and organised by businesses and political groups in previous elections, were apparently being armed with machetes and other weapons before the elections

¹ Kofi Annan Foundation "The Kenya National Dialogue and Reconciliation: One Year Later Overview of Events" (2009) 1

² Chris Fomunyoh (Centre for Human Dialogue) "Mediating Election-Related Conflicts" (2009) 13

³ Khaled Mohammed Aman "Mediation: A Viable Solution to Africa's Political Crisis-A Case Study of Kenya's Post Election Crisis-2008" (2009) 7

⁴ Elisabeth Lindenmayer and Josie Lianna Kaye (Columbia University United Nations Studies Program) "A Choice for Peace? The story of Forty-One days of mediation in Kenya" (2009) 2

⁵ As above

⁶ Elisabeth Lindenmayer & Josie Lianna Kaye (n 4 above) 3

⁷ Human Right's Watch Report "Ballots to Bullets, Organized Political Violence and Kenya's Crisis of Governance" (2008) 20 No.1 (A)

began.⁸ Other non-Kikuyu gangs such as the dominantly Luo *Taliban*, *Baghdad Boys* and *Kosovo* and *Kamjesh* were also responsible for some of the more organised violence.⁹

The result of the outbreak of violence was loss of life, destruction of property and displacement of populations. While election violence had occurred in Kenya during previous elections in 1992, 1997 and 2002, it had never reached such catastrophic levels, with over 1,200 people killed¹⁰ and over 600,000 displaced.¹¹

On 2nd January 2008, just days after violence erupted across the country, Archbishop Desmond Tutu arrived in Kenya to mediate the conflict. However, his intervention could not have changed the fact that the moment for engagement was simply 'unripe': Odinga refused to dialogue while Kibaki was adamant that the only recourse for the opposition was through the courts, a lengthy process and a system dominated by government allies which, it was perceived, was unlikely to result in any 'just' outcome.¹² ODM's stand was that it would not negotiate with The President unless he resigned, because to do so would be tantamount to acknowledging his legitimacy.¹³ United State's Envoy Jendayi Frazier arrived on 4th January 2008 and was closely followed by the arrival of four Former African Heads of State Benjamin Mkapa, Joachim Chissano, Katumile Masire and Kenneth Kaunda.¹⁴

With no results yet in terms of mediation with the persons who had arrived, various national, regional and international efforts were organized to promote a cessation of violence and foster dialogue between the opposing sides such as the visit, of John Agyekum Kufuor, President of Ghana, in his capacity as the then Chairman of the African Union (AU).¹⁵ He also was not able to achieve much and he therefore wrote a letter to Mr Kofi Annan, asking him to take on the role of AU Special Advisor and Chief Mediator of the forthcoming mediation process.¹⁶

⁸'Kenya, Armed and Dangerous' (IRIN) 22/02/2008
<<http://www.irinnews.org/report.aspx?ReportID=76896>> (accessed 05/09/2010)

⁹ As above

¹⁰ United Nations Office of The High Commissioner for Human Rights "Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008" (2008) 5

¹¹ Kofi Annan Foundation (n 1 above) 1

¹² Elisabeth Lindenmayer & Josie Lianna Kaye (n 4 above) 5

¹³ Aman M.K (n 3 above) 8

¹⁴ Elisabeth Lindenmayer & Josie Lianna Kaye (n 4 above) 5

¹⁵ Kofi Annan Foundation (n 1 above) 1

¹⁶ Elisabeth Lindenmayer & Josie Lianna Kaye (n 4 above) 6

The former United Nations Secretary General, Mr Kofi Annan, the President of Tanzania, Mr. Benjamin Mkapa, and former Mozambican Minister and First Lady, Mrs. Graça Machel formed the Panel that would continue the mediation.¹⁷ The Panel had the responsibility of helping the parties to the conflict ensure that an escalation of the crisis was avoided and that the opportunity to bring about sustainable peace was seized as soon as possible.¹⁸ The first major breakthrough in the mediation process came on 24th January 2008 when the Panel brokered a face-to-face meeting between President Kibaki and Odinga followed by the launch of The Kenya National Dialogue and Reconciliation (KNDR).¹⁹

On 28/2/2008 PNU and ODM signed the 'Agreement on the Principles of Partnership of the Coalition Government' and in the framework of the Kenya National Dialogue and Reconciliation (KNDR), the parties agreed to enact the National Accord and Reconciliation Act 2008 to end the political crisis. It laid the foundation for power sharing and for moving the country out of the crisis.²⁰ The agreement was hailed as a power-sharing agreement that represents a triumph for peace and diplomacy, and a renunciation of the violence that scarred a country of such enormous potential.²¹

Despite there being an agreement, Kenya has been and still is in a state of political chaos and insecurity. The current situation may be a reflection of how the mediation process was undertaken. Among other things, Kibaki and Odinga tend to have different interpretations of the principles of the National Accord and the issue of how "real power sharing" should be comprehensively effected.²² Although a coalition government was formed, the absence of a coalition agreement to assist in the management of affairs and relations therein has deepened suspicions and mistrust.²³ The root causes of the conflict were not addressed and the political leaders undermined the process, there is therefore fear that conflict may arise anew.²⁴ In essence if the mediation had gone well, then fears of more violence should not arise.

¹⁷ Kofi Annan Foundation (n 1 above) 1

¹⁸ Elisabeth Lindenmayer & Josie Lianna Kaye (n 4 above) 1

¹⁹ Kofi Annan Foundation (n 1 above) 1

²⁰ Kofi Annan Foundation The Kenya National Dialogue and Reconciliation Monitoring Project "Project Context and Summary of Findings February 2009" (2009) 1

²¹ Patrick Wachira 'Finally The Peace Deal' *The East African Standard* 29/02/2008 quoted in Khaled Mohammed Aman (n 3 above) 9

²² Kofi Annan Foundation (n 20 above) 6

²³ As above

²⁴ 'Why mediation for Kenya's benefit has stalled' *The Daily Nation* 1/04/2009

<<http://www.nation.co.ke/oped/Opinion/-/440808/555728/-/44pq3o/-/index.html>> (accessed 2/06/2010)

There has been plenty of literature that discusses mediation in a theoretical nature. Others analyse mediation processes that have taken place and identify key actions that were taken as well as the decisions and the effects they had on the process. This research will refer to several kinds of literature of the kinds mentioned above. It will also draw from some of what have been called the “seven deadly sins of mediation”²⁵ which although refer to errors by mediators, I contend can be fatal to the mediation process if committed by any either party to the mediation.

2. Problem statement

Mediation of a conflict is a process that is supposed to end with the resolution of the conflict and therefore result in lasting peace. It serves no purpose if after a mediation process has been facilitated, conflict still exists between the parties over the matter which was mediated. The mediation process in Kenya has been followed by unrest among the population and disagreements among the coalition government. One can conclude thereby that the mediation process has not been successful in the long term. This paper seeks to identify, in accordance with literature on mediation, the factors that were present during the mediation that could have led to its long term failure as well as to determine if the current political situation in Kenya can be attributed to them.

3. Research questions

- a) What were the circumstances present and the actions taken surrounding or directly linked to the mediation process that could have led to the process not being successful in the long term?
- b) Is the current political state in Kenya and how it has been evolving since immediately after the 2007-2008 mediation process a reflection of how that mediation process was carried out?
- c) In respect of question (a), what could be alternatives that would have led to a better result?
- d) What steps can be taken to remedy the current political situation in Kenya?

²⁵ See generally Lakhdar Brahimi & Salman Ahmed (Center on International Cooperation) “In Pursuit of Sustainable Peace The Seven Deadly Sins of Mediation” (2008)

4. Significance of study

The significance of doing this study is, using Kenya as an example of a country in which mediation has been applied to solve conflict but which still lingers in political chaos three years later, to try and get an insight into the mediation process that took place after the 2007 post election violence, highlighting what was negative and positive about it. These findings can serve as an example as to what can be done to ensure that mediation processes are successful in the future in other conflict situations. The study can also go towards identifying alternative avenues that can be taken by mediators to avoid flawed mediation processes as well as those that can be taken to address a persisting tense environment after mediation has well ended. All these are particularly useful because of the fairly high rate at which conflicts emerge and re-emerge in Africa.

5. Preliminary literature survey

Mediation is a form of third-party intervention in conflict for the purpose of resolving that conflict through negotiation.²⁶ Conflict has been defined as “a situation of competition in which the parties are aware of the incompatibility of potential future positions and in which each party wishes to occupy a position that is incompatible with the wishes of the other.”²⁷ Mediation is useful in cases when the parties to the dispute are unable to resolve it by negotiation because of the presence of the third party who may help produce an acceptable solution.²⁸ It is necessary that the intervention be acceptable to the parties to the conflict who have to co-operate with the party intervening.²⁹ The third party (the mediator) is actively involved in the process and can advance his own proposals informally on the basis of information given by the parties as well as transmit one party’s proposals to the other party.³⁰ It cannot be forced on the parties who are opposing each other.³¹ The agreement that results from the mediation is crucial. Nathan is of the opinion that even where mediation is successful, the content of the peace settlement has a major bearing – for better or worse – on justice, security, the distribution of power and respect for human rights in the post-war society.³² If long term peace is to be achieved, Rupesinghe argues that mediation can be used only as a short term measure to lessen the

²⁶ S Touval & IW Zartman *Introduction: Mediation In Theory* (1985) 7

²⁷ HM Blalock Jr *Power and conflict: Toward a General Theory* (1989) 8-9 quoted in Khaled Mohammed Aman (n 3 above) 2

²⁸ JG Merrills *International Dispute Settlement* 3rd ed (1998) 27 quoted in

²⁹ Touval & Zartman (n 26 above)

³⁰ Merrills (n 28 above)

³¹ Merrills (n 28 above) 31

³² Laurie Nathan (Crisis States Research Centre) “Towards a New Era in International Mediation” (2010) 1

immediate violence and there is therefore need for more to be done in terms of redefining the dispute itself so as to open a space for cooperation.³³

On international mediation in particular, Nathan contends that, despite its importance as a strategy for ending wars, international mediation has not been conducted and developed in a professional and systematic way and this has reduced the prospect of successful peacemaking in deadly conflicts.³⁴ He adds that the field of international mediation has placed no emphasis on training and education; on developing doctrines; strategies and operating procedures; on setting and maintaining standards; on appointments based on clear criteria and proven ability; and on learning from past experience in order to improve performance and avoid mistakes in the future. This has therefore caused a variety of problems therein.³⁵ Kairu relays that there has to be rules that are negotiated and decided upon before mediation is underway such as what information will be communicated to the media, who shall communicate it, when and how.³⁶ Sisk thinks that, when states themselves have taken the initiative to solve their conflicts, they have done better, which suggests that those domestic problems are best handled domestically, although they are rarely handled well at all.³⁷

On mediators, Brahimi and Ahmed argue that given the unprecedented numbers of peacekeepers now deployed throughout the globe, in particularly volatile areas, the role of effective mediation in peacekeeping contexts urgently needs to be given more attention.³⁸ They add that the “Seven Deadly Sins” bear repeating because the sins keep getting committed, especially in peacekeeping contexts and this has negative effects on mediation processes.³⁹ They also relay that there is need for effective mediation after the conflict, conclusion of a peace agreement and even after the deployment of a peace operation.⁴⁰ Most importantly they contend that the presence of any of the seven “sins” can be fatal to the mediator’s ability to conduct a successful mediation process.⁴¹

Every citizen has a right to “participate freely in the government of his country, either directly or through freely chosen representatives.”⁴² This right has been

³³ Kumar Rupesinghe “Conflict Transformation” (1995) 2

³⁴ Laurie Nathan (n 32 above)

³⁵ As above

³⁶ Steven Gatembu Kairu “Understanding the Mediation Process” (2008) 4

³⁷ TD Sisk *Power Sharing and International Mediation in Ethnic Conflict* (1996) 87

³⁸ Lakhdar Brahimi & Salman Ahmed (n 25 above) 11

³⁹ As above

⁴⁰ Lakhdar Brahimi & Salman Ahmed (n 25 above) 2

⁴¹ Lakhdar Brahimi & Salman Ahmed (n 25 above) 5

⁴² Article 13 (1) the African Charter on Human and Peoples’ Rights (1981/1986)

interpreted to mean that every citizen has a right to vote.⁴³ The challenge comes in ensuring this right in practice. If a citizen votes for a particular candidate as a result of one or some type of coercion, then he/she cannot be said to have been freely participating. Similarly, if a citizen knows that through voting a certain way there will be consequences such as violence, his/her participation cannot be said to be free as it is probably riddled with fear and anxiety. These form some of the body of problems that may lead to a situation in which mediation is necessary. One can therefore conclude that if this right to participate freely can be ensured in practice, long strides are made towards having peaceful elections and to have the peace subsist thereafter.

6. Proposed methodology

Information that goes into the writing of this paper will be gathered through rigorous desktop research; through reading books, articles and papers which discuss the issues raised. Semi structured interviews with persons who are knowledgeable on mediation and in particular the Kenyan mediation process will be carried out. Lastly, email correspondence with persons involved in the mediation process will also be used as a way to obtain information for this paper.

7. Proposed structure (overview of chapters)

Chapter one will be the proposal.

Chapter two will briefly discuss the nature and causes of conflict, as well as discuss what mediation processes are and what they entail. It will place Kenya in context with regard to it having experienced a conflict due to particular reasons which will be identified and discussed briefly; and it having gone through a mediation process to end the conflict. In this regard, it will briefly touch on the nature of political parties and how they can affect a peaceful election.

Chapter three will discuss the Kenyan mediation process and analyse it based on relevant literature. It will highlight the roles and actions of the parties to the mediation, the surrounding atmosphere in this regard and the agreements that resulted from the mediation process. It will then identify errors that were made during the mediation process.

⁴³ *Constitutional Rights Project and Another v Nigeria* (2000) African Human Rights Law Reports 191 (African Commission on Human and People's Rights 1998) para 50

Chapter four will discuss the current political situation in Kenya and how it has evolved since the mediation process and proceed to make a connection between it and mediation process and therefore the errors as well.

The conclusion will put forward suggestions on how mediators can avoid errors during mediation and in that way facilitate mediation processes that lead to lasting peace. It will put forward suggestions that could go towards remedying a situation where mediation has not been successful in the long term and thereby offer a way forward for those kinds of situations, using Kenya as the case study.

8. Limitations of study

Obtaining first hand inside information on the mediation process, which would greatly enrich this paper, will pose a difficulty as it will require contact with high profile personalities in Kenya who may not be able or willing to avail themselves or any information on the matter.

9. Assumptions underlying the study

That mediation is a process through which conflicts between parties in dispute can be effectively solved and therefore is also a process through which the restoration of lasting peace can be facilitated.

Chapter two

1. What is conflict?

The word conflict is derived from the Latin word “*congligere*” which indicates to strike together.⁴⁴ By and large, conflict arises as a result of disparity over goals, values, motives, ideals and resources.⁴⁵ In this respect, conflict can be described as “[a]struggle over values and claims to scarce status, power and resources in which the aims of the opponents are to neutralize, injure or eliminate their rivals.”⁴⁶

Africa has been plagued by conflicts; out of its 53 countries that are members of AU, 35 have suffered from conflicts, majority having been rebellions against the state, organized by groups based on region, ideology, race or ethnicity who take up arms against the state.⁴⁷ The gravity of the problem comes across clearly in statistics such as those of the year 1996 during which 14 out of 53 countries of Africa were afflicted by conflicts, and as a consequence, accounted for more than half of all war-related deaths worldwide and more than 8 million refugees, returnees and displaced persons.⁴⁸

2. What are the causes of conflict?

Despite the sources of conflict in Africa reflecting the differences among African countries in their histories, geographical conditions, stages of economic development, public policies and different patterns of internal and international interaction, they can mostly be tied to some common themes and experiences.⁴⁹

In circumstances where there are no sufficient structures that facilitate the realization of the wishes of the people to assume positions of power, dissatisfaction resulting from claims for power may evolve into conflict.⁵⁰ Competing for power and

⁴⁴ J Burton & F Dukes (eds) *Conflict: Reading in Management and Resolution* (1990) 16 quoted in Khaled Mohammed Aman (n 3 above) 2

⁴⁵ Khaled Mohammed Aman (n 3 above) 3

⁴⁶ Blalock (n 27 above)

⁴⁷ Khaled Mohammed Aman (n 3 above) 3

⁴⁸ Kofi Annan Report “The Causes of Conflict and the Promotion of Durable peace and Sustainable Development in Africa” (1998) quoted in C Heyns & K Stefiszyn (eds) *Human Rights, Peace and Justice in Africa: A reader* (2006) 239

⁴⁹ Kofi Annan Report in Heyns & Stefiszyn (eds) (n 48 above) 240

⁵⁰ Khaled Mohammed Aman (n 3 above) 3

manoeuvring among groups and persons to participate in and control affairs and resources have been bases for the most violent political conflicts in Africa.⁵¹

Political victory in Africa has frequently assumed a 'winner- takes- all' form with regards to resources, prestige and patronage of the office. This coupled with the fact that the State in Africa is a major provider of employment, the lack of accountability of leaders, transparency of regimes, non adherence to the rule of law and absence of peaceful means to change or replace leadership makes political control an excessively important activity with dangerously high stakes.⁵² Over all, a weak political institutionalization which is the degree of popular support and the capacity of government to maintain stability, in relation to social mobilization represented by activism of citizens who make demands on the state as a result of dissatisfaction increases the chances of instability and therefore conflicts.⁵³

Economic inequality in a society will lead to relative deprivation for the less well off groups and individuals resulting in civil violence, not forgetting existing social contradictions that may lead to economic exploitation in capitalist societies.⁵⁴ Those who profit from a conflict and lack of accountability will have little or no interest in stopping it; rather, they would, in accordance with their interests, prolong it. Examples of such persons are the international arms merchants and the central characters in the conflict who may be controlling valuable resources in the State.⁵⁵

Last but not least the effects of colonialism still linger. Prior to colonialism, settlements in Africa were culturally and ethnically homogenous but thereafter, it has been the reverse as states are now composed of completely distinct people in terms of language, culture and religion.⁵⁶ Conflict along ethnic lines is reportedly the most evident form of conflict in most African states.⁵⁷ In the case of Rwanda for example, colonialism transformed flexible social categories into rigid ethnicities, proceeded to engineer group identity competition and then by pitting one group against the other, undermined the

⁵¹ W Zartman *Ripe for Resolution: Conflict and Intervention in Africa* (1989) 12-13 quoted in Khaled Mohammed Aman (n 3 above) 4

⁵² Kofi Annan Report in Heyns & Steffens (eds) (n 48 above) 241-242

⁵³ Khaled Mohammed Aman (n 3 above) 4

⁵⁴ K Schock 'A conjunctual Model of Political Conflict: The Impact of Political Opportunities on the Relationship between Economic Inequality and Violent Political Conflict' (1996) Vol 40, No 1 *Journal of Conflict Resolution* 98-130

⁵⁵ Kofi Annan Report in Heyns & Steffens (eds) (n 48 above) 242

⁵⁶ Khaled Mohammed Aman (n 3 above) 4

⁵⁷ As above

basis of a common national identity among them.⁵⁸ Moreover, also as a result of colonialism, Africa has had to grapple with commercial relations which were instituted to satisfy the needs of trade with metropolitan countries rather than support balanced growth of an indigenous economy. Africa also inherited laws that were initially made to exploit local divisions thereby enabling monopolies on economic and political power.⁵⁹ Other sources of conflict that do not fall into the above categories may be specific to the particular countries experiencing them such as competition for scarce land and water in densely populated areas and strongly opposed visions of society and the State.⁶⁰

3. Conflict resolution

Conflict resolution refers to a process aimed at providing a solution which is generally acceptable to parties to the conflict, which they themselves have taken part in.⁶¹ There are several ways through which conflicts can be resolved. One way is through mediation. Mediation is a method of mitigating conflict through the presence and support of an intermediary who is not party to it and who enjoys the trust of the disputants. The mediator's goal is to help the disputants forge agreements which they find acceptable and to serve as a bridge between the parties in conflict, helping them to address, in a co-operative manner, the substantive issues in dispute.⁶² In mediation, unlike arbitration, there is no obligation on the part of the parties to accept the mediator's suggestions or proposals.⁶³ Moreover, it is not directed towards helping one of the participants to win.⁶⁴ The aspects of mediation that make it very suitable for dealing with difficult conflicts are that it is particularly suited to the reality of international relations (where states and other actors guard their autonomy and independence quite jealously), and that it leaves the ultimate decision on any outcome to the parties themselves.⁶⁵

4. The Kenyan post 2007 General Election conflict

Although Kenya luckily avoided civil wars and conflicts that ensued in some African countries following independence, it failed to develop political and institutional

⁵⁸ S Adejumbi 'Citizenship, Rights and the Problem of Conflicts and Civil Wars in Africa' (2001) Vol. 6 No. 2 *African Journal of Political Science* 90

⁵⁹ Kofi Annan Report in Heyns & Stefiszyn (eds) (n 48 above) 240

⁶⁰ Kofi Annan Report in Heyns & Stefiszyn (eds) (n 48 above) 242-243

⁶¹ Khaled Mohammed Aman (n 3 above) 5

⁶² Laurie Nathan "*When push comes to shove*' *The Failure of International Mediation in African Civil Wars* (1999) 2

⁶³ HW Leong "Peace and Conflict Studies, an Introduction" (2000) 182

⁶⁴ Leong (n 63 above) 180

⁶⁵ Jacob Bercovitch "International Mediation and Intractable Conflict" (2004)

<http://www.beyondintractability.org/essay/med_intractable_conflict/> (accessed 20/07/2010)

arrangements capable of promoting togetherness and co-operation among a divided people.⁶⁶ Rather, what emerged after the fall of colonialism were political and institutional arrangements that fostered patterns of domination and exclusion.⁶⁷ These statements give a foundation for the issues surrounding the violence that broke out in Kenya immediately after the December 2007 general elections.

On 27th December 2007 some ten million Kenyans took to the polls in what was by and large expected to be the most hotly contested and close-run presidential, parliamentary and civic elections in the country's 45 years since the fall of British colonial rule.⁶⁸ What followed the announcement of the presidential candidate that had won the elections, the incumbent president Mr. Mwai Kibaki was by far the most deadly and the most destructive violence ever experienced in Kenya.⁶⁹ There was a feeling that the elections had been rigged, coupled with doubt over ethnic neutrality of the government, thus the anger and the violence.⁷⁰ Over the subsequent six or seven weeks approximately 1,150 people were killed, property worth billions of Shillings was destroyed and more than 300 000 Kenyans were forced to flee their homes and livelihoods.⁷¹

5. The sources of the Kenyan conflict

Although the rigging of the general elections and the results thereof triggered the conflict, underlying it were deep-seated issues concerning inequality, land, poverty, ethnicity, political power, and high levels of youth unemployment.⁷² As seen in the lack of access to basic necessities, the rate of youth unemployment and gross inequalities, unsatisfactory fulfilment of economic and social rights have been long-standing in Kenya.⁷³ Also important to note is the nature of elections as a contest for power and therefore inherently contentious; if not conducted fairly, they will often lead to violence.⁷⁴ Several factors underlie the violence in Kenya.

⁶⁶ SA Dersso 'The 2007 Post-election Crisis in Kenya as a Crisis of State Institutions' (2008) Vol.5 Nos.3-4 *African Renaissance* 24

⁶⁷ As above

⁶⁸ Kreigler Report "Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007" (2008) 1

⁶⁹ Commission of Inquiry on Post Election Violence "Report of the Commission of Inquiry into the Post-Election Violence in Kenya" (2008) vii

⁷⁰ Elisabeth Lindenmayer & Josie Lianna Kaye (n 4 above) 3

⁷¹ Krieglger Report (n 68 above) 3

⁷² Friends Committee on National Legislation "Kenya: Temporary Ceasefire or Lasting Peace?" (2009) 1

⁷³ OHCHR (n 10 above) 6

⁷⁴ M Ndulo & S Lulo 'Free and Fair Elections, Violence and Conflict' (2010) volume 51 – July 5 *Harvard International Law Journal* 157

Firstly is the manner in which the Kenyan presidency has been carried out. This has a link with other underlying issues: ethnicity and resource distribution. Since independence, Kenya has only had three post-colonial presidents, all of whom have been drawn from only two ethnic groups, causing and perpetuating ethnic animosity for years.⁷⁵ As is the case in almost all post-colonial African states, many of the communities now forming Kenya had no coherently common political history, and hence conflicts between them were almost nonexistent.⁷⁶ The amalgamation of such numerically and socio-politically unequal groups under the colonial state resulted in unequal patterns of relations between the groups and the state and among the groups themselves. It also imposed a dominant authority that centrally controlled all political and socio-economic powers, thereby setting the stage for rivalry in accessing the sources of patronage and power.⁷⁷ Following independence in 1963, President Kenyatta led the weak Kenya African National Union (KANU) as a moderator between two larger parties that opposed each other over the rights of the poor and landless versus those of the large farmers and business class; this political set-up was short-lived as by the 1970s, ethnic factions increasingly manoeuvred to form dominant coalitions, undermining the importance of political compromise.⁷⁸

There emerged a “personalization of power around the presidency,” essentially creating an ethnicized cult of personality around the figurehead and further undermining accountability.⁷⁹ According to the Kenya National Commission on Human Rights (KNCHR), Kenyans have come to view the mounting of ‘one of their own’ ethnic kin to the position of president as the best assurance of benefiting as individuals and as communities.⁸⁰ It was reported that the reality on the ground is that for any tribe, ‘being in opposition’ (as opposed to ‘being in government’) is dreaded as guaranteeing continued poverty.⁸¹ The Central Province (inhabited mostly by Kikuyus) during Kenyatta’s and the Rift Valley (inhabited mostly by Kalenjins) during Moi’s presidency received a high degree of development despite the fact that the government draws most of its revenue in the form

⁷⁵ Tim Murithi “Kenya in Transition: Mediation, Power Sharing and Constitutional Reform” (2008/9) *Conflict Trends* 18

⁷⁶ J Laurence ‘Ethnic politics and constitutional review process in Kenya’ (2002) 9 (2): *Tulsa Journal of International and Comparative Law* 475

⁷⁷ Dersso (n 66 above) 23

⁷⁸ Michael Kniss (Center for International and Security Studies at Maryland) “Walking Kenya Back from the Brink” (2010) 9-10

⁷⁹ Commission of Inquiry on Post Election Violence (CIPEV) (n 69 above) 23

⁸⁰ Kenya National Commission on Human Rights “On The Brink Of The Precipice: A Human Rights Account of Kenya’s Post-2007 Election Violence” (2008) 22

⁸¹ ‘Why Kenya Went Up in Flames’ <<http://www.scribd.com/doc/3285236/WHY-KENYA-WENT-UP-IN-FLAMES>> (accessed 12/06/2010)

of taxes, tourism and port services from neglected provinces such as Nyanza and Coast Provinces.⁸²

Even with a shift in the political balance after Kenyatta's death, the trend wherein the distribution of public goods such as education facilities, health, water and physical infrastructure followed patterns of access to political power continued.⁸³ During Moi's rule, he reversed existing patterns of ethnic patronage by excluding Kikuyu businesses from investment opportunities and transferring control of over 40 of 85 profitable state-owned enterprises to his Kalenjin co-ethnics.⁸⁴ Unfortunately, little change was actually enacted in Kibaki's first term as centralized presidential power and privileged status for Kibaki's ethnic group was rampant.⁸⁵ The concentration of power in an ethnicized presidency has only worsened Kenya's already severe inequality by groups, of resources and power.⁸⁶ Even the creation of new districts was done with the intention of enhancing the already existent ethnically biased structure.⁸⁷ That members of parliament are elected from Constituencies coinciding with tribal boundaries only further polarizes competition for resources along ethnic lines.⁸⁸

Secondly, European colonizers disturbed the traditional system of communal land ownership by parcelling farm tracts and most significantly pushing the Kalenjin off the best farming land in the Rift Valley.⁸⁹ Agricultural labourers from the neighbouring provinces, particularly Kikuyus from the Central Province, were recruited to work on the colonial farms and in the aftermath of Kenya's independence from the British Empire. Some of these agricultural labourers took advantage of the land-buying schemes offered by the then President Kenyatta, buying the land they had worked on.⁹⁰ This land transfer fostered deep resentment among rival ethnic groups, especially the Kalenjin, who viewed the Kikuyu as settling on their ancestral land, a factor which made land grievances a key component of ethno-political competition.⁹¹ This situation persisted until 1992-1993, when, during Moi's tenure, politically-instigated violence forced many Kikuyu farmers out

⁸² Dersso (n 66 above) 25

⁸³ World Bank Report "Kenya Poverty and Inequality Assessment" (2008) 12

⁸⁴ Jeni Klugman, "Kenya: Economic Decline and Ethnic Politics," in *War, Hunger, and Displacement: The Origins of Humanitarian Emergencies*, Volume 2: Case Studies, edited by E. Wayne Nafziger, et al. (New York: Oxford University Press, 2000) 313 quoted in Michael Kniss (n 78 above) 10

⁸⁵ Friends Committee on National Legislation (n 72 above) 2

⁸⁶ Michael Kniss (n 78 above) 9-10

⁸⁷ R Fox 'Bleak Future for Multi Party Elections in Kenya' (1996) Vol. 34, No. 4 *The Journal of Modern African Studies* 597

⁸⁸ J Oucho *Undercurrents of Ethnic Conflict in Kenya* (2002) 44 quoted in Michael Kniss (n 78 above) 10

⁸⁹ Michael Kniss (n 78 above) 9-12

⁹⁰ OHCHR (n 10 above) 6

⁹¹ Michael Kniss (n 78 above) 9-12

of their farms.⁹² In light of the centrality of the presidential figure and the community-based political environment, land has thus often been used in Kenya to award patronage, solidify support and build alliances.⁹³ Frustration over persistent land conflict also figured prominently in Kibaki's initial rise to power in 2002, as he made land reform a key plank of his campaign platform in an attempt to sway the opposition and after being elected, launched the Ndung'u Commission to investigate land inequality and corruption. Although the final report focused on corruption more than land distribution, it did present some useful recommendations which Kibaki principally ignored as being too controversial.⁹⁴

Thirdly, with past events showing that no Kenyan leaders have been held accountable for instigating unrest with hate speech or for financing violence, the Kenyan society has been accustomed to accept political violence as standard practice around elections.⁹⁵ The national government has gone as far as rewarding district officers and chiefs that participated in violence following General Elections with positions in government.⁹⁶ Ever since the restoration of multiparty democracy in December 1991, in 1992 and 1997, Moi was elected in a violent environment; Moi's party KANU instigated violence to exclude opposition leaders from certain districts.⁹⁷ This indicates that in Kenya, violence can be drawn on even to win elections.⁹⁸ The deliberate use of violence by politicians coupled with a lack of punishment of the perpetrators has led not only to an escalation of violence but also to a culture of impunity which is now largely outside of the control of the State and its security agencies.⁹⁹ This can explain the spontaneity with which the violence broke out in certain areas in Kenya. During the 2007 General Elections, the KNCHR observed that violence became a strategy for remedying political and resource grievances based on persistent horizontal inequities in land, education, jobs, and political power, and stemming from longstanding traditions of patronage, corruption, and resource distribution policies which the electoral process could not resolve.¹⁰⁰

Lastly, over the last decade, a number of youth vigilantes emerged in Kenya, offering an attractive but illegal avenue of socialization and income opportunities; whereas the

⁹²OHCHR (n 10 above) 6

⁹³ OHCHR (n 10 above) 6

⁹⁴ R Southall 'The Ndungu Report: Land & Graft in Kenya' (2005) 32 no 103 *Review of African Political Economy* 150 retrieved from <www.nabuur.com/files/attach/2008/10/task/doc_45349d1d36be1.rtf> (accessed 09/09/2010)

⁹⁵ Michael Kniss (n 78 above) 9

⁹⁶ Human Rights Watch (n 7 above) 17-20

⁹⁷ OHCHR (n 10 above) 6

⁹⁸ CIPEV (n 69 above) 22

⁹⁹ As above

¹⁰⁰ KNCHR (n 80 above) 7

Government banned many of these groups in March 2002, most remained active.¹⁰¹ The most notorious of these is the *Mungiki* (renowned for its brutality), which over the last decade became a criminal organisation running an extortion empire with ultra violent methods and suspected political links.¹⁰² Other communities such as the Kalenjins have their own militias, which reportedly launched large-scale attacks against their perceived enemies and along the north-western border areas.¹⁰³ It is against this background of political and other violence, deep economic inequalities and sustained far-reaching impunity that the presidential elections took place and post-election violence swiftly followed.¹⁰⁴

6. The role of ethnic political parties in conflict with a particular focus on the Kenyan experience

Political parties in general are an essential component of representative democracy as they, among other activities, organize voters, aggregate and articulate interests, craft policy alternatives, recruit and socialize new candidates for office, set policy-making agendas, integrate disparate groups and individuals into the democratic process, and provide the basis for coordinated electoral and legislative activity.¹⁰⁵ There exists however ethnically based political parties which are defined as parties portraying themselves as the champions of a particular ethnic group or category to the exclusion of others, making this central to their activities; they are distinguished from each other, not based on *what* they represent but rather *who* they represent.¹⁰⁶

The culture of political parties in a State is directly linked to the purposes for its subsistence but the State itself subsists for reasons that should be determined by its national interests. In Kenya unfortunately, public discourse on a common national interest has been rather unimaginative as the population was for a long time largely concerned with whether KANU would even allow other parties to be recognised by law.¹⁰⁷ Indeed multiparty politics is no guarantee of development as while it may on one hand empower vulnerable groups, increase transparency, mediate conflict and achieve redistribution of income to the poor, it may on the other hand subvert the broader

¹⁰¹ OHCHR (n 10 above) 7

¹⁰² OHCHR (n 10 above) 7

¹⁰³ As above

¹⁰⁴ As above

¹⁰⁵ Benjamin Reilly, Per Nordlund & Edward Newman (United Nations University) "Political Parties in Conflict-Prone Societies: Encouraging Inclusive Politics and Democratic Development." (2008) 1

¹⁰⁶ Robert A Dowd & Michael Driessen (Afro Barometer) "Ethnically Dominated Party Systems and the Quality of Democracy: Evidence from Sub Saharan Africa" (2008) 1-2

¹⁰⁷ Makau Mutua "Political Parties in Transition: The Kenyan Experience" in C Maina & F Kopsieker (eds) *Political Succession in East Africa: In Search for a Limited Leadership* (2006) 113

process of democratization by among other things, mobilizing ethnic groups against each other.¹⁰⁸ The bottom line however, is that KANU failed at enabling the formation of irreversible awareness around which a national identity would have been defined.¹⁰⁹

All significant political parties in Kenya between 1992 and 2007 represent ethnic parties and though the country's dominant ethnic cleavages were at times overcome (such as during the 2002 general elections), these periods proved to be short-lived and tactically motivated.¹¹⁰ Consequently, the return of multiparty democracy in Kenya worsened the country's dominant ethnic cleavages in a land where ethnicity has consistently proven to provide a stronger rallying ground for political activity than party structures.¹¹¹ The immediate downfall of National Alliance Rainbow Coalition (NARC) along ethnic lines proves that ethnicity is stronger than the need to have access to state resources.¹¹²

As a result of this kind of political party, the politicization of ethnicity becomes institutionalized in the party system and in turn, the political landscape becomes ethnically centred.¹¹³ Consequently, the likelihood of violent conflict increases and the prospects for good governance are lowered where ethnic parties are dominant.¹¹⁴ The widely covered incidents of post-election violence in Kenya in 2007 and 2008 are outcomes of the ethnic political party which is omnipresent in the country.¹¹⁵ Based on the discussion of the other factors that led to the conflict in Kenya, one can safely conclude that this paragraph accurately highlights what had been taking place in Kenya.

¹⁰⁸ Benjamin Reilly, Per Nordlund and Edward Newman (n 105 above) 1

¹⁰⁹ Makau Mutua (n 107 above)

¹¹⁰ Sebastian Elischer (German Institute of Global and Area Studies) "Ethnic Coalitions of Convenience and Commitment: Political Parties and Party Systems in Kenya" (2008) 24

¹¹¹ As above

¹¹² As above

¹¹³ Robert A Dowd & Michael Driessen (n 106 above) 3

¹¹⁴ As above

¹¹⁵ Sebastian Elischer (n 110 above)

Chapter three

1. The mediation process

Mediation can only be effective when political and psychological dynamics of serious conflict that make disputant parties fiercely resistant to negotiations are understood and then managed in order to transform them.¹¹⁶ This would mean that the factors that would make the parties in conflict not want to resolve the conflict are somehow changed and the result is that the parties are able to resolve the conflict between them and peace prevails. This chapter aims to describe and analyse the Kenyan mediation process from certain aspects to discover if the above did indeed happen.

Even in 2009, analysis of the mediation process more than a year after their completion remained timely for two primary reasons; the parties still had not fulfilled all of the commitments undertaken during the mediation and the possibility of a return to violent confrontation remained all too real.¹¹⁷ It is my contention that since then, not much has changed in terms of the two reasons above and therefore analysis of the process with regard to developments surrounding it still remains relevant.

The mediation process began on 22nd January 2008 three weeks after the post-election violence erupted across Kenya, and was led by the Panel of Eminent African Personalities, consisting of former President Benjamin Mkapa of Tanzania, former South African First Lady Graça Machel, and former United Nations Secretary-General Kofi Annan as Chairperson.¹¹⁸ This Panel was charged with helping the parties to the conflict ensure that an escalation of the crisis was avoided and that the opportunity to bring about a sustainable peace was seized as soon as possible.¹¹⁹ It was mandated by the AU and had the technical support of the United Nations (UN), including the Department of Political Affairs (DPA), the United Nations Development Programme (UNDP), United Nations Office in Nairobi (UNON), as well as the Geneva-based Centre for Humanitarian Dialogue.¹²⁰

¹¹⁶ Laurie Nathan (Crisis States Research Centre) "Mediation and the African Union's Panel of the Wise" (2005) 1

¹¹⁷ Elisabeth Lindenmayer & Josie Lianna Kaye (n 4 above) iii

¹¹⁸ Elisabeth Lindenmayer & Josie Lianna Kaye (n 4 above) 1-2

¹¹⁹ As above

¹²⁰ As above

When the Panel arrived in Kenya, violence was rampant and continued to escalate.¹²¹ Thousands of people were trapped in Kibera, the largest slum in Nairobi, without access to medical aid and houses in the Rift Valley continued to be subjected to arson attacks. Gangs which had been operating largely underground re-emerged in Nairobi to offer protection to slum-dwellers living in fear.¹²² As numerous Kenyans fled to safer areas, with many victims forced to live under tents, international airlines cut the number of flights to Nairobi almost by half in response to the sharp drop in tourism, dealing an awful blow to the Kenyan economy.¹²³ Despite all this, Kibaki and Odinga continued to refuse to engage in dialogue—the former insisting upon his rightful place as President of Kenya, who would manage this crisis internally and the latter stating that the election had been rigged and his win stolen away.¹²⁴ If there was an encouraging aspect to Kenya's post-election week of agony, it is that civil society—the churches, the organizations that fought for democratization throughout the 1990s, the media, and even Kenya's singers and music entertainers—came forward to appeal for negotiations.¹²⁵ Moreover, the international community also did their part; former British Prime Minister Gordon Brown, U.S. Secretary of State Condoleezza Rice, and EU Secretary General Javier Solana pressured both principals.¹²⁶ Last but not least, the Kenyan Diaspora in North America and the U.K, a small but prosperous community of professionals and business people that maintain close ties with their homeland, and which is an important source of remittances and investment also called for a negotiated settlement.¹²⁷

Desmond Tutu's brief attempt at mediating before the arrival of the abovementioned Panel was frustrated by the two principals who at the time of his arrival had not yet accepted that their political futures depended on their ability to work together and share power.¹²⁸ The moment was not yet ripe for negotiation. A ripe moment describes a phase in the life cycle of a conflict where the parties feel exhausted and hurt, or where they may not wish to stand for any further losses and are therefore prepared to commit to a settlement, or at least believe one to be possible.¹²⁹ In escalating conflicts, mediation will only succeed if it can capture a particular moment when the rivals, for a range of reasons, appear most amenable to change. As a consequence, the timing of

¹²¹ Dave Opiyo & Odhiambo Orlale 'Mourners and Police Fight it Out in the City as ODM Prays for Killed Protesters' *Daily Nation* 24/01/2008

¹²² Elisabeth Lindenmayer & Josie Lianna Kaye (n 4 above) 4

¹²³ As above

¹²⁴ As above

¹²⁵ Joel D Barkan 'Breaking the Stalemate in Kenya' (2008) 4

¹²⁶ As above

¹²⁷ As above

¹²⁸ Elisabeth Lindenmayer & Josie Lianna Kaye (n 4 above) 6

¹²⁹ Jacob Bercovitch (n 65 above)

intervention in a stubborn conflict is an issue of crucial importance that must be properly considered.¹³⁰ The Kibaki government initially reacted to mediation efforts with distrust and obstinacy, refusing to agree to any compromise and using the violence as an opportunity to taint the ODM leadership with as-yet unsubstantiated accusations of being behind ethnic cleansing and other international crimes.¹³¹

The complexity of intra-state conflict (such as the Kenyan conflict) and peacemaking poses two main challenges to international mediators. First, they should acquire a thorough understanding of local history, politics, cultures and personalities before they are able to take up any important responsibility. Second, they should desist from hurrying the process and making rash interventions.¹³² Conflict is a system that is set in and nested in national and local elements and therefore its analysis needs to be broader and not just limited to the microelement of one ethnic group against another.¹³³ Each party to the conflict will have allies, supporters and sympathisers within and beyond its borders as well as enemies and detractors in the wider regional and international political spheres depending on whose interests the peace process can be either undermined or supported.¹³⁴ These all need to be looked into.

Participation, an important element of mediation, entails questions of inclusiveness, representation, decision-making power, and procedures, as well as competence on the part of the negotiation delegations which determine if the process itself will be an inclusive one or an exclusive one.¹³⁵ The more inclusive the negotiations, the more legitimate and sustainable they are, but the more complicated and the harder their management also becomes as it is more difficult for 100 people to talk with one another than it is for two people, but if the 100 can agree on a solution, the outcome is more solid and sustainable.¹³⁶ However, if there are only two people talking, both of whom are heads of states and are legitimate representatives of their respective people, such an exclusive process may be more effective and democratic than an inclusive process with hundreds of people who wield no decision-making power and no heavy influence.¹³⁷ That having been said, it should also be noted that a peace process is largely a matter of cooperation and

¹³⁰ As above

¹³¹ Human Rights Watch (n 7 above) 59

¹³² Laurie Nathan (n 62 above) 8

¹³³ Dekha Ibrahim Abdi (Berghof Foundation for Peace Support) "Insider Mediators" (2009) 6

¹³⁴ Centre For Humanitarian Dialogue "A Guide to Mediation, Enabling Peace Processes in Violent Conflicts" (2007) 9

¹³⁵ Annika Åberg et al (Mediation Support Project) "Unpacking the Mystery of Mediation in African Peace Processes" (2008) 14

¹³⁶ As above

¹³⁷ As above

partnership between different actors, parties to a conflict, other peace mediators, governments, the civil society and international organizations and as a consequence, a conventional, purely state-centric approach is not always an option.¹³⁸ Non-governmental actors can play a pivotal role as facilitators as mediation that is geared to peace-building inevitably requires the transformation of society at all levels which is not simply the monopoly of governments.¹³⁹

Civil society should not and cannot be marginalized from the negotiations; indeed, they are part of the core business.¹⁴⁰ The Kenyan process however was a fairly exclusive one.¹⁴¹ It is indeed true that the Kenyan civil society played an important role in the process by working towards peace at the grassroots level but they were in actuality not represented in the talks.¹⁴² This in my opinion was not ideal. They, working in the grassroots are in a position to provide an avenue through which one of the main challenges to the Kenyan conflict would have been tackled, which is to put through to the mediator a thorough understanding of local history, politics, cultures and personalities from the point of view of the population. In order to be in a position to help the parties identify and reach solutions to their political problems, the mediator must have an understanding of the country in all its facets, from the history and culture to the economy and social structure as well as the different explanations for why the violence erupted in the first place. In addition, why the conflict has persisted for as long as it has, and what solutions have already been tried and discussed must be understood.¹⁴³ Civil society actors did take the initial lead, when politicians were locked in an impasse immediately following the December elections and in early January 2008, to encourage mediation and peace building but still did not take part in the actual process.¹⁴⁴ Ideally, civil society actors should also be included in the mediation process since politicians can be driven by their own agendas such as being focused on how to acquire more power and how to prevent the other side from taking power (which I think was the situation in Kenya, judging from resistance to the mediation).¹⁴⁵

¹³⁸ Martti Ahtisaari (Crisis Management Initiative) 'Mediation and Peace-keeping in Africa' <<http://www.nai.uu.se/forum/entries/2010/04/08/mediation-and-peace-keepi/index.xml>> (accessed 04/06/2010)

¹³⁹ As above

¹⁴⁰ As above

¹⁴¹ Annika Åberg et al (n 135 above)

¹⁴² Jonathan Litscher "Kenya, The National Accord and Reconciliation Act 2008" quoted in Annika Åberg et al (n 135 above) 47

¹⁴³ Lakhdar Brahimi & Salman Ahmed (n 25 above) 5

¹⁴⁴ Tim Murithi (n 75 above) 19

¹⁴⁵ As above

Beyond the civil society members, the educated and the illiterate, the governors and the governed, the suspected perpetrators of the violence and the victims, the men and the women, alike understand their own country far better than the foreign mediators who have just arrived on the scene and it is therefore good sense and basic respect to listen to a diverse range of views in the country in an effort to ensure participation.¹⁴⁶ Indeed, there is no coherent concept and strategy of international mediation in national conflicts and the style of mediation will be largely dependent on the personality of the mediator and the habit of repeating what was done previously.¹⁴⁷ It is my contention however that despite these factors, participation should not be sacrificed purely because of the immense value it adds to the process both when it continues and long after it has come to an end. The Kenyan mediation being an exclusive one can be said to have sacrificed wide participation of the population.

As mentioned above, participation in the process includes participation even by the women in the society. This was not the case in Kenya. It is accurate to say that the composition of the delegations that sit at the negotiation table is decided by the conflict parties, not by the mediators, although they, (the mediators) can suggest various consultation formats or working groups to broaden the participation.¹⁴⁸ In none of a number of case studies done in Kenya examining the mediation process, were women present as main negotiators at the table.¹⁴⁹ The UN Security Council Resolution 1325 on Women, Peace and Security calls for active participation of women in peace processes.¹⁵⁰ Their participation adds value to the process in that the peculiar problems they face can be discussed and solutions explored.¹⁵¹ Women should have been present and active in the Kenyan negotiations.

Many women's international organisations contributed to the efforts to address the gender-based violence that occurred in Kenya and a significant number of Kenyan women called for an immediate end to inter-ethnic killings, impunity and gross violations of human rights.¹⁵² They also appealed for urgent attention to be paid to the special needs of women and children, called for constitutional reforms, and measures to restore the rule of law and order while demanding their due place in the peace process, as reaffirmed in

¹⁴⁶ Lakhdar Brahimi & Salman Ahmed (n 25 above) 6-7

¹⁴⁷ Laurie Nathan (n 32 above) 3

¹⁴⁸ Annika Åberg et al (n 135 above) 15

¹⁴⁹ As above

¹⁵⁰ See generally Security Council Resolution 1325 (2000)

¹⁵¹ 'Women in conflict-affected areas' <<http://www.gsdr.org/index.cfm?objectid=31348DF8-14C2-620A-2779D2293E436C16#particip>> (accessed 22/09/2010)

¹⁵² Seema Shekhawat "A Gender Analysis of the Kenyan Crisis" (2008/2) Conflict Trends 16

Resolution 1325;¹⁵³ the AU Solemn Declaration on Gender Equality;¹⁵⁴ and the Protocol to the African Charter on the Rights of Women in Africa^{155,156} While some stability was restored in Kenya, the achievement of positive peace, where women are treated as equals and are free of oppression in all forms has not.¹⁵⁷ Although the need to have women at the peace building table was reaffirmed, the mediation process largely remained gender neutral.¹⁵⁸ Women need to be adequately represented in mediation teams.¹⁵⁹ In Kenya, women constitute 52% of the population, comprise the majority of voters and are those most affected by political instability and consequent violent conflict, yet they were excluded from mediation talks.¹⁶⁰

In turn, participation ensures that there is ownership of the process by the population of the country which stands in the need of mediation. Individuals and groups want to take part in decisions that affect their lives.¹⁶¹ As a principle, mediation and negotiations should be conducted within the country in conflict, or nearby because among other things, when the party leaders leave the country for negotiations, they leave a lot of uncertainty behind and agreements taken inside a country enhance national ownership, both symbolically and practically.¹⁶² In this sense then, the Kenyan mediation was in a position to be 'owned' by the population. It does not end here however. Third-party mediators should guarantee, as far as possible, that the ownership of the negotiation process lies with the parties themselves; mediators cannot solve a conflict as only the conflicting parties themselves can do that.¹⁶³ In Kenya however, it was noted that the mediation agenda seemed to rotate around the dispute between two contending political sides while failing to account for and include citizens who would ultimately be affected by the process.¹⁶⁴ Mr. Hassan Omar of the KNCHR was quoted as saying "The Kenyan people must have ownership of the process and it must be accountable to them."¹⁶⁵ It has been

¹⁵³ See generally Security Council Resolution 1325 (2000)

¹⁵⁴ See generally African Union Solemn Declaration on Gender Equality (2004)

¹⁵⁵ Article 10 Protocol to the African Charter on the Rights of Women in Africa (2003)

¹⁵⁶ Seema Shekhawat (n 152 above) 16

¹⁵⁷ As above

¹⁵⁸ 'Kenyan Women Condemn Sexual Crimes and Interethnic Killings in Post-election Strife' (30/01/2008) <http://www.unifem.org/news_events/story_detail.php?StoryID=652> (accessed 12/07/2010)

¹⁵⁹ Kruschen Govender & Yvette NGandu Report 'Towards Enhancing the Capacity of the African Union in Mediation' (2009) 29

¹⁶⁰ Kruschen Govender & Yvette NGandu (n 159 above) 28

¹⁶¹ Laurie Nathan (n 62 above) 9

¹⁶² Hans J Geissmann & Oliver Wills (Berghof Conflict Research) "Conflict Parties' Interests in Mediation" (2009) 9

¹⁶³ Hans J Geissmann & Oliver Wills, Berghof (n 162 above) 10

¹⁶⁴ 'CSO's Preliminary response to the Mediation Process in Kenya' 27 April 2009

<http://www.gendergovernancekenya.org/index.php?option=com_content&view=article&id=115%3Acsos&Itemid> (accessed 12/09/2010)

¹⁶⁵ As above

reported that Annan failed to incorporate 'eminent' Kenyans in his team assuming that no Kenyan could have helped resolve the impasse and that it could have helped if the resolution involved Kenyans and a spice of Kenyan mediation leadership.¹⁶⁶ Moreover, it was suggested that if the two sides could not have agreed on common Kenyan mediation leaders, they could have been allowed to nominate their own as such leaders would have provided a background of the crisis and co-chaired/moderated the sessions to lead to a Kenyan solution that would most likely be owned and accepted by a majority of Kenyans.¹⁶⁷

With regards to the other major challenge earlier mentioned that mediators must desist from hurrying the process, the Kenyan mediation process is testimony of such. Whatever the specific causes and features of a given conflict, the parties regard each other with deep mistrust and animosity and believe that their differences are irreconcilable.¹⁶⁸ Time needs to be taken to resolve such issues in order to enhance trust and confidence.¹⁶⁹ The psycho-political dynamics of conflict and the underlying structural problems preclude simple solutions and rapid progress.¹⁷⁰ Where the scope of the conflict is national and there is a history of violence, (such as in Kenya), the obstacles to peacemaking are far greater.¹⁷¹ A good analysis and a thorough understanding of all aspects of the conflict are important prerequisites for successful mediation in stubborn conflicts.¹⁷² Logically, a thorough analysis and understanding as required could not possibly take a short time. Unfortunately, international mediators frequently make the mistake of seeking a quick fix, underestimating the complexity of the conflict, and pushing hard for rapid results, an approach which can be counter-productive.¹⁷³

In Kenya, the mediation process was not perfect, in that the core causes of the conflict remain unresolved as the political settlement was pushed through rapidly, helping halt the immediate violence but leaving little time to develop a working partnership between Kibaki and Odinga.¹⁷⁴ Furthermore, although rationally focussed on ending the violence, the speedy construction of the power-sharing agreement meant that

¹⁶⁶ Rebecca Wanjiku 'Kenyan bloggers outline political solutions'
<<http://globalvoicesonline.org/2008/02/21/kenyan-bloggers-outline-political-solutions/>> (accessed 12/09/2010)

¹⁶⁷ As above

¹⁶⁸ Laurie Nathan (n 116 above) 1

¹⁶⁹ Dekha Ibrahim Abdi (n 133 above) 6

¹⁷⁰ Laurie Nathan (n 62 above) 7

¹⁷¹ As above

¹⁷² Jacob Bercovitch (n 65 above)

¹⁷³ Laurie Nathan (n 32 above) 3

¹⁷⁴ Friends Committee on National Legislation (n 72 above) 3

it largely disregarded the core causes of the conflict.¹⁷⁵ What is more, when a settlement was finally brokered, it was only after a host of Kenya's international partners had done everything possible in that short time to pressure Kibaki into compromise.¹⁷⁶ International mediation in national conflicts relies too much on power-based diplomacy, attempting to make progress by exerting pressure on the disputant parties through declarations, admonitions, threats and punishment, all strategies that should be replaced by a confidence-building approach to mediation.¹⁷⁷ This approach would most likely take more time than the above mentioned strategies. The mediation process matters and it takes time; a particular peace conference itself might conclude an agreement in days or weeks, but rarely without the months or years of consultations prior to convening it.¹⁷⁸ Haste partially explains why agreements that have been concluded later fail to resolve crucial underlying political issues and subsequently unravel.¹⁷⁹

The aim of the above is definitely to identify what aspects of the mediation went wrong in order to be able to see what actions can be embarked upon to find solutions for existing problems. It would be unfair however if the amount of positive influence that Annan and the Panel had in the mediation process went unmentioned. People who have a status for being well-known and well-respected, such as he, can have plenty of influence.¹⁸⁰ As a result of Annan's resilience and persistence at a crucial time, the two parties were able to sit down and attempt negotiation even after several attempts to bring them together had failed. Peacemaking must be pursued in a dedicated and continuous fashion and this means that an intermittent approach is inappropriate even when the parties refuse to enter into talks or there are long periods of deadlock in the course of negotiations.¹⁸¹ It is also evident that he was regarded as a trustworthy mediator by the parties. Mediators cannot function without securing the trust and cooperation of the disputing parties as they have to be accepted by the adversaries; to secure their positive attitudes and disposition, a mediator must be perceived as independent and credible.¹⁸²

¹⁷⁵ Michael Kniss (n 78 above) 8

¹⁷⁶ Human Rights Watch (n 7 above) 59

¹⁷⁷ Laurie Nathan (n 32 above) 3

¹⁷⁸ Lakhdar Brahimi & Salman Ahmed (n 25 above) 9

¹⁷⁹ As above

¹⁸⁰ Nico Colombant 'African Mediation Efforts Have Mixed Results' 31/05/2010

<<http://www.voanews.com/english/news/africa/African-Mediation-Efforts-Have-Mixed-Results-95278874.html>> (accessed 01/09/2010)

¹⁸¹ Laurie Nathan (n 116 above) 10

¹⁸² D Peterson 'Burundi Transition A Beacon for central Africa' *Journal of Democracy* 127 quoted in Khaled Mohammed Aman (n 3 above) 9

2. The agreements that resulted from the mediation

It is important to note that peace is not attained when the parties sign an agreement for the reason that they must still implement the agreement therefore mediation should be regarded as an integral component of implementation and subsequent post-conflict reconstruction and state-building.¹⁸³

As earlier mentioned, where mediation is successful, the content of the peace settlement has a major bearing – for better or worse – on justice, security, the distribution of power and respect for human rights in the post-war society.¹⁸⁴ This statement further highlights the importance of mediation and its success because it touches on especially important facets of the society. The final judgement of a peace process must be an assessment of the implementation of the agreement that resulted from it.¹⁸⁵

The agreements that resulted from the Kenyan mediation addressed: immediate steps that could be taken to resolve the violence and killings that were ongoing as well as promote reconciliation and healing,¹⁸⁶ the formation of The Coalition Government,¹⁸⁷ improvement of the electoral process,¹⁸⁸ investigation of the facts and circumstances surrounding acts of violence that followed the disputed general elections,¹⁸⁹ Constitutional review,¹⁹⁰ and the formation of a Truth Justice and Reconciliation Commission.¹⁹¹

While the general agreements above put a stop to the worst of the conflict, localized violence continued to smoulder in some parts of the country, and it appeared that the impact on the ground would be slow in developing.¹⁹² The violence can be said to have

¹⁸³ Laurie Nathan 'Plan of action to build the African Union's mediation capacity' Presented at the seminar "Towards enhancing the capacity of the African Union (AU) in mediation" (2009) 11

¹⁸⁴ Laurie Nathan (n 32 above) 1

¹⁸⁵ Centre For Humanitarian Dialogue (n 134 above) 14

¹⁸⁶ See generally "Kenya National Dialogue and Reconciliation through the mediation of by H.E. Kofi Annan and the Panel of Eminent African Personalities on the Resolution of the Political Crisis Annotated Agenda and Timetable" (2008)

¹⁸⁷ See generally The National accord and reconciliation Act (2008)

¹⁸⁸ See generally "Kenya National Dialogue and Reconciliation Mediated by H.E. Kofi Annan and the Panel of Eminent African Personalities 14 February 2008 Agenda Item Three: How to Resolve the Political Crisis" (2008)

¹⁸⁹ See generally Kenya National Dialogue and Reconciliation "Commission of Inquiry on Post-Election Violence" (2008)

¹⁹⁰ See generally Kenya National Dialogue and Reconciliation "Longer Term Issues and Solutions: Constitutional Review" (2008)

¹⁹¹ See generally Kenya National Dialogue and Reconciliation "Truth Justice and Reconciliation Commission" (2008)

¹⁹² Brookings Institution "Towards a Lasting Peace: Addressing the Political and Humanitarian Situation in Kenya," (2008) 2

stopped but it is now 2010 and the impact of the agreements as was spoken about cannot be said to have been felt. The question remains why? The manner in which the political situation has developed may give some answers to this critical question.

Chapter four

1. How the political situation in Kenya has evolved since the mediation

Despite the initial success of brokering an agreement and preventing more widespread deadly conflict in 2008, Kenya wobbles on the edge of an unsettled peace as where perpetrators of the violence have not been held accountable and the coalition government struggles to maintain the shared power arrangement.¹⁹³ Moreover, while Kenyans are frustrated with a lack of tangible results on a long list of necessary reforms, ethnic tensions still remain high and fears are rising of a return to violence before or during the next presidential elections, set for 2012.¹⁹⁴ In addition, the coalition government lacks any form of meaningful cohesion and seems unable to cooperate in power-sharing.¹⁹⁵ In sum, Kenya is reverting towards instability and the threat of open conflict because the divisive politics that existed before the 2007 election are back in place.¹⁹⁶

Activist Mwalimu Mati who heads the Mars Kenya Group political watchdog, speaking about the power sharing agreement, has been quoted as saying, "[i]t looks less perfect now" and adding that "[s]omething had to be done to end the conflict but perhaps it could have been better thought through," Kenyans' faith in their rulers is at its lowest because the pledged reforms are nowhere to be seen and while the government doubled in size to accommodate feuding parties, so did the corruption.¹⁹⁷ Most of those who acquired land illegally are public officials and politicians while those accused of financing and organizing post election violence are politicians, government officials and businessmen.¹⁹⁸ Those accused of grand corruption remain politicians, government officials and businessmen, many of whom sit in Cabinet while those accused of extra judicial killings are appointed by the President and supervised by the Prime Minister.¹⁹⁹ Since its enactment, the arrangement has largely failed to effectively control executive

¹⁹³ Friends Committee on National Legislation (n 72 above)⁴

¹⁹⁴ As above

¹⁹⁵ As above

¹⁹⁶ Tom Maruko 'Lessons from Kenya's mediation process' 02/04/2009

<<http://pambazuka.org/en/category/comment/55322>> (accessed 20/07/2010)

¹⁹⁷ 'Kenya Mediation Fails Reality test' 2010 < <http://www.capitalfm.co.ke/news/Kenyanews/Kenya-mediation-success-fails-reality-test-7926.html>> (accessed 28/07/2010)

¹⁹⁸ 'Kenya's Grand Coalition Government has failed to implement the National Accord Agreement and its reform package. Kofi Annan must not be fooled by the Government Spokesman, Dr. Alfred Mutua; Kenyans rate the reform performance as (F):- GRAND FAILURE!' 04/10/2009 <

<http://blog.marsgroupkenya.org/?p=1339>> (accessed 04/07/2010)

¹⁹⁹ As above

power or to alter public perceptions of the government, as each principal has used the façade of political cooperation to cover his efforts to reinforce his ethno-political alliance for the next election.²⁰⁰

Making power-sharing governments work is not a straightforward endeavour by any prospects given that government partners share few, if any, common interests.²⁰¹ Furthermore, they have low expectations about their partners' reliability and are plagued by security fears.²⁰² Consequently, reaching joint decisions is extremely difficult, and leaders do not have strong incentives to move beyond the positions they held during peace talks.²⁰³ The power-sharing agreement emerged on paper with very little understanding of how the parties would actually work together or implement real reforms. As a result, disputes have emerged over even essential issues in the agreement such as the creation of commissions to investigate the violence and review the election process, as well as over the TJRC.²⁰⁴

The actions geared towards electoral, economic, constitutional, security, and land reforms have shown few meaningful results.²⁰⁵ While commissions and taskforces have been appointed, few substantive results have emerged as there has been no real progress on fundamental reforms and there is fear that any number of contentious events in the coming years such as competition over scarce resources or the 2012 elections could spark a new wave of violence.²⁰⁶ To make matters worse while jostling to form alliances for the next election and, in some cases, defending themselves against allegations of direct participation in the violence, political leaders are unable to devote ample attention to real reform.²⁰⁷ In addition, there is increased factionalism within the different political parties and these divisions have increasingly intensified; the two main parties in the coalition still continue to lack cohesion and oppose to one another on important issues.²⁰⁸

²⁰⁰Center for Strategic and International Studies "Practical Perspectives on Constitutional Reform in Kenya: A Conversation with Kenyan Members of Parliament" (2010)

²⁰¹ Katia Papagianni (Centre for Human Dialogue) "Power sharing, transitional governments and the role of mediation" (2008) 4

²⁰² As above

²⁰³ Katia Papagianni (n 201 above) 5

²⁰⁴ Friends Committee on National Legislation (n 72 above) 3

²⁰⁵ Friends Committee on National Legislation (n 72 above) 1

²⁰⁶ Friends Committee on National Legislation (n 72 above) 5

²⁰⁷ Expressed by experts Makau Mutua and Maina Kiai at "Kenya on the Brink: Democratic Renewal or Deepening Conflict", a conference held at the National Endowment for Democracy on 22 July 2009. See also Amnesty International. 16 June 2009. "Kenya: Statement on the conclusion of the mission led by Amnesty International's Secretary General." AI index: AFR 32/007/2009.

²⁰⁸ The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project 1 Status of Implementation of Agenda Items 1-4 Fourth Review Report (2009) vii

Public frustration perseveres over the lack of those most responsible for the violence being held accountable for their actions and although Kenya was advised to create a local tribunal to prosecute perpetrators, little progress was made.²⁰⁹ To increase pressure, Annan passed a list of accused perpetrators, which likely included high-ranking government officials, onto the International Criminal Court.²¹⁰ Only through an independent judiciary, the essential guardian of the rule of law, are checks and balances on political power, justice and separation of powers assured.²¹¹ Although Kenya lacks a truly independent judiciary, the Kenyan government decided in July 2009 that prosecutions would be pursued through Kenya's own courts.²¹² There have been reports that go as far as saying that Kibaki and Odinga appear to have no interest other than shielding alleged perpetrators named by the KNCHR and "stopping accountability against persons bearing greatest responsibility for crimes, particularly crimes against humanity, relating to the General Elections."²¹³ The UN has reported that police killings continue with impunity.²¹⁴ Despite the fact that active political violence has generally stopped, gang activity and armed groups are still on the rise, some with continued ties to politicians and some infiltrating the public security sector.²¹⁵ New forms of crime have arisen in different parts of the country while in areas affected by post election violence, threats against certain communities perceived as 'outsiders' persist.²¹⁶ Logically, the groups themselves are emboldened by the failure to successfully prosecute members suspected to have taken part in criminal activities in the past mainly due to lack of policy guidelines on how to deal with organised crime; the fact that some of them enjoy the backing of powerful political leaders limits actions that would eliminate these groups.²¹⁷

Political and economic inequality are still widespread, characterized by Africa's largest slums neighbouring areas of excessive affluence and made worse by high salaries and tax benefits for the political class.²¹⁸ All the while, a large youth population faces few

²⁰⁹ Friends Committee on National Legislation (n 72 above) 5 see also Statement by Professor Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions United Nations Human Rights Council, Geneva (3 June 2009) 2

²¹⁰As above (Prof Alston)

²¹¹ H J Steiner & P Alston *International Human Rights in Context: Law, Politics, Morals* (1996) 711–712

²¹² International Criminal Court Press release "Waki Commission List of Names in the Hands of ICC Prosecutor" 16/07/2009 < [http://www.icc-cpi.int/menus/icc/structure of the court/office of the prosecutor/comm and ref/kenya/pr439](http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/kenya/pr439)> (accessed 05/10/2010)

²¹³ Mars group (n 198 above)

²¹⁴ United Nations "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; Addendum; Mission to Kenya" (2009) United Nations General Assembly, Human Rights Council A/HRC/11/2/Add.6

²¹⁵ Friends Committee on National Legislation (n 72 above)4

²¹⁶ KNDR (n 208 above) vi

²¹⁷ As above

²¹⁸ Friends Committee on National Legislation (n 72 above) 3

economic prospects.²¹⁹ This has been rampant even in the past as it has been noted that regardless of being endowed with vast natural and human capital, Kenya suffers from severe disparities in terms of income, power, and social structures.²²⁰ While the poor make up more than 56% of the population, a well organized but, tiny elite commands most of the country's wealth.²²¹ In addition to these previously existing problems, the human suffering caused by the violence also continues even after the violence has ceased. For example, while some effort has been made to address the plight of internally displaced persons (IDPs), many still live in dire condition as their camps were officially closed prematurely without preparation for those who had fled to return to their communities.²²² The return of IDPs in many instances will depend on the resolution of disputes that caused their eviction and flight in the first place, and their resolution is therefore very important.²²³ The closure of formally established camps did not end displacement as some IDPs failed to get back to their farms because of fear of attacks while others did not have enough resources to rebuild their lives.²²⁴

Resolving the problems that Kenya faces and instituting the much needed reforms seems to be perceived by the political actors as acting against their personal interests.²²⁵ On the one hand Kibaki, who is expected to retire in four year's time, has little incentive to resolve the problems identified by the mediation process while Odinga, on the other, would like to remain politically viable and will therefore minimise the risks he takes.²²⁶ Further highlighting the lack of political will is that the National Budgets for the years 2008/2009 and 2009/2010 did not provide resources for some of the major result oriented reforms in the National Accord and no reforms can therefore be expected; the Budget 2009/2010 brought to Parliament is heavy with wasteful recurrent expenditure for the Ministers.²²⁷

Kenya recently endorsed a new Constitution that seeks to unite the country, but it will take much more to ensure ethnic harmony and some leaders have urged caution

²¹⁹Friends Committee on National Legislation (n 72 above) 3

²²⁰ RG Otieno Kopyo "The Role of the State in the Formation of Political Parties in Kenya -Legal and Societal Framework" A paper presented at the Regional Conference on Political Parties and Democratisation in East Africa (2005) 4

²²¹ As above

²²² Friends Committee on National Legislation (n 72 above)5

²²³ 'Audit of Mediation Process'

<http://www.marsgroupkenya.org/corruption/index.php?option=com_content&task=view&id=545&Itemid=31> (accessed 01/10/2010)

²²⁴ KNDR (n 208 above) vi

²²⁵ Tom Maruko (n 196 above)

²²⁶ As above

²²⁷ Mars group (n 198 above)

despite the upbeat mood that swept across the nation.²²⁸ Just before the constitutional referendum Ozonnia Ojielo, senior peace and development adviser at the UNDP in Kenya said "[t]here is sufficient justification for people to be afraid, mainly because of hate messages and leaflets asking some communities to leave certain areas," and added that "[t]here are also political actors using innuendoes."²²⁹ Also reported were many other incidences of hate speech and people being told to leave their residence in peace or be forced to leave in pieces and although eventually there were no serious incidences of violence, it was manifest that the past still haunts Kenyans.²³⁰ Bethuel Kiplagat, Chairman of the TJRC has been quoted as saying "I am afraid the seeds of the next conflict are dormant, waiting to explode again" while referring to the need for the healing of the individuals and communities, an acknowledgement of wrong doings, counselling and reparations, all of which have not taken place.²³¹

2. Can the evolution of and the current political situation in Kenya be attributed to the faults in the mediation process?

It is true that the problems that Kenya has been experiencing have persisted over a long period. The mediation was supposed to be a way through which these problems could be tackled and solid long terms plan made to address those that were not immediately tackled. Despite the fact that some of the problems have been ongoing, the mediation process did not result in realistic ways through which the problems could be resolved. The development of the political atmosphere can be partly attributed to the way the mediation process unfolded as well as the agreements that resulted from the mediation.

a. The mediation process was carried out too fast

The mediation process was rushed and this prevented the burning issues underlying the conflict from being looked into extensively and handled appropriately.²³² As a result of this, the underlying issues of ethnic rivalry, land distribution and discrimination continue to trouble Kenyans. The threat of an outbreak of violence and the way in which the government continues to function based upon ethnic lines is testimony to this. For the reason that these problems have been present since colonial times, they should have been

²²⁸ 'Analysis: Kenya not out of the woods yet' 9/08/2010
<<http://www.irinnews.org/Report.aspx?ReportId=90101>> (accessed 12/09/2010)

²²⁹ 'KENYA: Divided by the colours of a new constitution' 30/07/2010
<<http://www.irinnews.org/Report.aspx?ReportId=90011>> (accessed 12/09/2010)

²³⁰ As above

²³¹ "Analysis: Kenya not out of the woods" (n 228 above)

²³² Friends Committee on National (n 72 above) 3 see also Michael Kniss (n 78 above) 8

central to the mediation in that instead of making only long term plans to handle them, the long term plans should have been augmented by in-depth analysis a firm foundation set in an effort to solve them. The Kenyan experience illustrates the point that in post-conflict negotiations there is often a trade-off between short-term and long-term goals as it proved expedient to defer many divisive issues during the negotiations. However, deferring fundamental issues, such as land reform, and perceived inequalities between ethnic groups, means that such issues may not be addressed at all or may derail the peace accord in subsequent years.²³³ It is understandable that the immediate issue to be handled at the time of the outbreak of the violence was to avoid lives being lost and the actions proposed here would have taken a longer time, but ethnic rivalry and discrimination are so alive in the Kenyan society that the time taken to solve them after the stopping of immediate violence, but before signing of the final agreement would have been well worth it.

b. Ownership of the process and exclusion of women

As mentioned in the previous chapter, the negotiation process lacked women and was devoid of 'eminent Kenyans. Furthermore, civil society was not directly included in the negotiations. Consequently, the process and the agreements cannot be said to have been without a doubt owned by the Kenyan people. Exclusion of cross sections of the population from the process means that many voices were not heard. This has had serious implications in acceptance of the agreement as a Kenyan agreement. As a consequence implementation of the agreement has emerged as a new problem. If the agreement was regarded as one for and by Kenyans, (a Kenyan solution), ²³⁴ it would most likely be accepted by the population and its implementation would probably be facilitated by it being embraced by the population.

c. Ambiguity of the agreement itself

It suffices to say that the agreement resulting from the mediation process was ambiguous on some key issues. Firstly, the powers of the new Prime Minister remained unclear as the agreement stipulated that the Prime Minister would "co-ordinate and supervise" affairs of government, without specifying exactly what power and authority would be vested in the position and how executive powers would be divided between the Prime Minister

²³³ Jeremy Horowitz "Power Sharing in Kenya Power Sharing Agreements, Negotiating and Peace Processes" (2008) 15

²³⁴ Rebecca Wanjiku (n 166 above)

himself and the President.²³⁵ It was not specified in more details how the Coalition Government would be formed in terms of portfolio balance and in that regard the agreement ignored altogether the ODM proposal that portfolios should be matched, for example, those in the social sector to be grouped and shared equitably.²³⁶ Second, the Accord left unresolved the question of how long the Coalition Government would last and what would happen if it collapsed even before the next election in 2012.²³⁷ It is true that given the ambiguities in the power-sharing agreement, its success would hinge on the political will of the two sides to the accord.²³⁸ It is also true however that the chaos in which the coalition is functioning and the inability to agree on key matters as well as the conflict over what the principals can or cannot do can be partly attributed to the ambiguities in the agreement. The people who really lose in this battle are the Kenyans who need their lives to move forward and for reforms to be instituted, yet the principals fail them in their inability to work together and institute the reforms Kenyans yearn for. Kenya's power-sharing includes only very minimal guarantees of inclusion and outlines broad principles for power-sharing.²³⁹ This is insufficient.

d. A lack of commitment on the part of the principals with regard to the mediation process and putting the agreement into practice

The success of a power sharing agreement hinges largely on the political will of the two sides.²⁴⁰ This has not been the case in Kenya however. There is a stark lack of political will on the part of the principles to keep to their sides of the bargain. This can be attributed to the lack of political will that existed during the negotiation process and went unchallenged and uncurbed as well as the attitudes of the principals towards the agreement. The lack of budgetary allocations to go towards reforms and again the inability of the two sides of the coalition government to work together on key issues is a clear result of the past and existent lack of political will. Granted, lack of political will is not something that the mediators can do much about. The responsibility here lies with the principals themselves to change the status quo. The mediators facilitate talks but the real work is with the principals themselves. If they are unwilling, as they have been in the Kenyan case, the problems that we see now and that are discussed in this chapter swiftly follow. If the parties are unwilling to co-operate with each other, whether before, during

²³⁵ Jeremy Horowitz (n 233 above)9

²³⁶ Email correspondence with Prof Anyang' Nyong'o 13/10/2010

²³⁷ Jeremy Horowitz (n 233 above) 9

²³⁸ Jeremy Horowitz (n 233 above) 10

²³⁹ Jeremy Horowitz (n 233 above) 15

²⁴⁰ As above

or after the negotiations, then there is not much that a mediator who should not be seen as the solution or the provider of the solution to a country's conflict, can do about it.²⁴¹ Examples are such as, the non prosecution of criminals, rampant corruption and disagreement over the institutions that can contribute significantly to a better future for Kenyans such as the TJRC.

e. Lack of an enforcement party

A third-party enforcer for a peacekeeping agreement is necessary because parties cannot be trusted to honour the agreement.²⁴² There was no in building of a strict monitoring process for deliverables.²⁴³ No third-party enforcer is available in Kenya.²⁴⁴ It makes sense that if there was a third party to see to it that the points in the agreement are put into practice there would be some kind of pressure on the parties to actually do so. If it is left up to them, as it has so far, there will hardly be any change seen. It would have therefore been prudent to put in place a body to see to the implementation of the agreement. In short the mediation has been in crisis because Kenya's political leadership has undermined it and there is no international pressure or sanctions so that the various political actors and the forces that precipitated the crisis feel unchallenged.²⁴⁵

²⁴¹ Email correspondence with Dr. Laurie Nathan 30/09/2010

²⁴²Civil society: participating in peace processes Celia McKeon, Conciliation Resources Chapter published in People building peace II, Paul van Tongeren, Malin Brenk, Marte Hellema and Juliette Verhoeven (eds) Lynne Rienner Publishers, London, 2005 < <http://www.c-r.org/resources/occasional-papers/civil-society-participating.php>> (accessed 05/10/2010)

²⁴³ Email correspondence with Prof Anyang' Nyong'o 13/10/2010

²⁴⁴ Jeremy Horowitz (n 233 above) 15

²⁴⁵ Tom Maruko (n 196 above)

Chapter 5

1. How mistakes can be avoided during the mediation process

a. Patience

Mediators deployed by states and multinational organisations frequently focus more on the solutions to a conflict than on the actual peacemaking process in itself. This they do by formulating solutions, endeavouring to win the parties' consent thereto, and pressing for rapid results through a combination of persuasion and leverage.²⁴⁶ They might adopt this approach because they regard the solution as fairly obvious and consider the demands of one or more of the parties to be completely unreasonable or it may be because of a high level of fatalities and the financial cost of a drawn-out engagement.²⁴⁷ The bottom line however, is that whatever the motivation, a mediator's confidence that he or she can quickly bring the parties to their senses is both naïve and arrogant.²⁴⁸ Every mediator has to recognise this in order to be able to reconcile him/herself with the process knowing full well that it may take a long time to resolve it. Patience implies the calm to think through a situation which will go even further towards avoiding errors. Conflicts have multiple historical, structural, political, social and economic causes that are complex and deep-rooted and which are only made worse by mutual hatred and suspicion by the protagonists.²⁴⁹ No matter how serious the situations in which they find themselves in, mediators have no option but to be patient.²⁵⁰ Understanding the importance of patience may ensure that mediators exercise it and that a comprehensive agreement that will cater for future problems is the result of the negotiations.

b. Learning more about mediation as a process of conflict resolution

Another means through which mistakes can be avoided during mediation is through developing a learning culture based on review, assessment, research and adaptation.²⁵¹ It has been said that a major reason for the difficulty in resolving disputes lies in the failure of scholars to ground their position in solid empirical evidence as most of the research

²⁴⁶ Laurie Nathan (n 116 above) 7

²⁴⁷ As above

²⁴⁸ As above

²⁴⁹ Laurie Nathan "No Ownership, No Peace: The Darfur Peace Agreement" (2006) 3

²⁵⁰ As above

²⁵¹ Laurie Nathan (n 32 above) 2

presented as evidence turns out to be based primarily on conjectures, opinions and ad hoc observations.²⁵² Although this statement is put forth in relation to the actual solving of the disputes, it is my opinion that the same actions can apply in the case of trying to avoid errors during mediation to most extents. A lot of lessons can be learned by examining individual cases of mediation.²⁵³ Successful and unsuccessful cases of mediation have to be systematically compared in order to understand what conditions are needed for a successful mediation. More research has to be done in the field of intrastate conflicts because solving such kinds of conflicts is emerging to be very important.²⁵⁴ These studies can be important for all the parties to the mediation and not the mediators only. If the protagonists are interested in peace, then they also can benefit from information that has resulted from situations similar to those they find themselves in.

The reviews of mediation processes and evaluations of mediators can only be used productively if they are written up and disseminated in a manner that is helpful to mediators and their political principals. The essential point however is that systems are set up to ensure that the identified lessons lead to changes in strategy, techniques and procedures.²⁵⁵ Ideally then, this would mean that the chances of making mistakes are then very slim. The information that comes from reviews can be so important that it influences the mediation substantially.²⁵⁶ Some caution has to be applied to this however. As national conflicts have similar characteristics and challenges, much can be learnt from comparative research with a thematic focus.²⁵⁷ The lessons are important, but just as important is to recognise the individuality of every situation; a mediator has to be awake not only to what she or he can learn from but also to what may not be suitable for a certain situation.

c. Pushing for and allowing for ownership of the mediation process by the protagonists and the general population

An additional mistake made during mediation that can have a long lasting negative effect on peace building is exclusion of some people from the process; an enduring peace agreement cannot be forced on the parties in that it has to be shaped and owned by them

²⁵² M Kleiboer 'Understanding success and failure of international mediation' (1996) 40 (2) *Journal of Conflict Resolution* 360 – 389 quoted in Laurie Nathan (n 62 above) 14

²⁵³ Isak Svensson (Crisis Management Initiative) "The Nagorno-Karabakh conflict, Lessons from the mediation efforts" (2009) 14

²⁵⁴ As above

²⁵⁵ Laurie Nathan (n 32 above) 3

²⁵⁶ J Bercovitch "Understanding mediation's role in preventive diplomacy" (1996) 12 (3) *Negotiation Journal* 241 - 258

²⁵⁷ Laurie Nathan (n 32 above) 3

since it cannot be implemented without their consent and co-operation and its sustainability requires their adherence to its provisions in the long term.²⁵⁸ Politically and psychologically, the question of ownership is most sensitive and important in relation to the compromises contained in a peace settlement as compromises entail concessions to a hated adversary and give rise to perceptions of weakness and defeat.²⁵⁹ If the process is owned by the people, then the compromises that result would be easier to accept. The responsibility here lies with all the parties to the conflict and the general population to participate and make their voices heard during the mediation. The responsibility of the mediators in this regard would be to encourage participation in the process, and create a forum which enables this without exclusion. The result of extensive participation is that the issues underlying the conflict will also be explored.

Ownership of both the mediation process and the outcome is crucial for execution of the resulting agreement.²⁶⁰ If the negotiating parties have a strong sense of ownership of the process, the chances of compliance with and cooperation in implementing subsequent peace agreements increase.²⁶¹ However, ownership of the process does not absolve the mediator from being very well informed about the conflict. Not being well informed can lead to the mediator making yet other mistakes during mediation. A critical issue is on the advancement of proposals is not whether a mediator should advance proposals but how and when to do so.²⁶² A mediator can only know how to approach the protagonists if he/she is adequately informed about the conflict.

2. Recommendations for the Kenyan case

It is accurate to say that some of the recommendations given here below would apply to other post conflict and post mediation situations apart from Kenya. Kenya does however have its own peculiar circumstances and therefore some recommendations would be applicable only to the Kenyan case. Moreover some may term the ideas below speculative as they haven't in essence been tried and tested but all they serve to do is provide avenues through which the problems being experienced may perhaps be resolved.

²⁵⁸ Laurie Nathan (n 249 above) 3

²⁵⁹ Laurie Nathan (n 249 above) 14

²⁶⁰ A Sarjoh Bah "The African Union In Darfur: Understanding The Afro-Arab Response to The Crisis" (2010) 17

²⁶¹ A Sarjoh Bah (n 260 above) 18

²⁶² Laurie Nathan (n 62 above) 10

Firstly, Kenyans need to recognise ethnicity for what it really is: ethnic groups give support (through belongingness) and solidarity to their members to counter balance the alienation prevalent in the modern world.²⁶³ On the other hand, (as in the Kenyan case), ethnicity could be the basis for unequal treatment of people and it may be the cause of prejudices against members of other ethnic groups.²⁶⁴ Kenyans need to recognise and embrace the difference that is ethnicity but the unity in being Kenyan. They need to learn to live with dignity even in their difference.²⁶⁵

As in India in the 1950s and Nigeria in the 1980s, it is evident that the most promising mechanism for resolving ethnic strife that may also work in Kenya is to restructure the basic ground rules of the political game. Given the prominence of ethnicity in African politics, democratization across the continent requires more than expanding the political and economic rights of individuals in that accommodation of group rights must be part of the equation.²⁶⁶ Kenya, like many other African countries, is guilty of undermining democracy and human rights by deliberately defining citizenship within narrow parameters of ethnic belonging.²⁶⁷ For democratic ideals, values and institutions to thrive in the country, citizenship must be defined and construed from a national rather than ethnic perspective.²⁶⁸ For democracy itself to thrive, the Kenyan population needs to appreciate and embrace diversity and live as brothers and sisters, giving way to national healing and reconciliation which is followed by lasting peace.²⁶⁹ Reconciliation, a mutual process, means coming to terms with one's old adversaries and creating a new partnership based on just relationships, thereby restoring humanity for persons on both sides of the conflict.²⁷⁰ This on the other hand has to be accompanied by deep and lasting reparations which can only be a result of dialogue between the aggrieved and the State²⁷¹ as well as truth telling through which everyone who needs to can understand the causes, motives and perspectives of those responsible for their suffering and thereby begin to bring closure to their trauma.²⁷² Although elections are not synonymous with democracy,

²⁶³ WB Teshome 'Ethnicity and Political Parties in Africa: The Case of Ethnic-Based Parties in Ethiopia' (2008) Volume 1/5 Fall *The Journal of International Social Research* 781

²⁶⁴ As above

²⁶⁵ Interview with Mr Zitha Centre for Studies in Democracy and Development (CEDE) 24/08/2010

²⁶⁶ Joel D. Barkan (n 125 above)

²⁶⁷ Morris Kiwinda Mbondenyi "The Curse of Ethnic Belonging: An Analysis of Kenya's 2007 Post-Elections Conflicts in the Light of Democracy and Human Rights" 8 retrieved from <http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=morris_mbondenyi> (accessed 03/09/2010)

²⁶⁸ Morris Kiwinda Mbondenyi (n 267 above) 11

²⁶⁹ As above

²⁷⁰ Leong (n 63 above) 192-193

²⁷¹ Charles Villa-Vicencio "Transitional Justice and Human Rights in Africa" in A Bosl & J Diescho *Human Rights in Africa Legal Perspectives on their Protection and Promotion* eds (2009) 38

²⁷² As above

they are a central component of a functioning democratic system.²⁷³ There is an urgent need to reassert the fundamental democratic rights of citizenship being accessible to all Kenyans, including of course the very important right to change government through free and fair elections.²⁷⁴

Secondly, many Kenyans associate conflicts in the society with politicians and therefore the political basis of violence and insecurity in general have to be addressed. In this regard, the failure to successfully prosecute people who participated in the post-2007 election violence could be emboldening certain individuals, preparing them to act with impunity.²⁷⁵ There is need to prosecute powerful and influential people behind any form of violence as actions against them will go far in ending impunity and deterring those mobilised by politicians from engaging in further acts of violence.²⁷⁶ In the same breath, corruption, which may require removal of senior members of the government from power and prosecution of former senior government officials, urgently needs to be addressed.²⁷⁷ Kenya must take a firm stance against all that threaten the well being of the general population regardless of their influential positions in society.

Thirdly, new efforts need to be redirected towards implementation of the agreements that resulted from the mediation. In this regard, active support from the conflict's key constituencies and the political and economic resources provided by national and international political leadership are necessary. Implementation has to be driven and success requires extraordinary vision, energy and tolerance from all parts of society.²⁷⁸ Regrettably, absence of 'unity of purpose' has made it difficult for the Coalition Government to pass some important bills in parliament and to make critical decisions on important matters that pertain to the reforms.²⁷⁹ The momentum required to implement the reforms can be generated if hard decisions are made on key issues and through developing a common agenda for parliamentary business.²⁸⁰ Any new implementing bodies need to give careful thought to continuity of personnel in an effort to retain core elements of the previous mediation team, and in order to ensure that all the intangibles and unspoken understandings of a prior negotiating process are not lost with institutional

²⁷³ Ndulo & Lulo (n 74 above) 157

²⁷⁴ P Kagwanja & R Southall 'Introduction: Kenya - A democracy in retreat?' (2009) 27: 3 *Journal of Contemporary African Studies* 276

²⁷⁵ KNDR (n 208 above) 51

²⁷⁶ As above

²⁷⁷ Ted Dagne "Kenya: Current Conditions and the Challenges Ahead" (2009) 9

²⁷⁸ Centre For Humanitarian Dialogue (n 134 above) 14

²⁷⁹ KNDR (n 208 above) 51

²⁸⁰ As above

or leadership changes.²⁸¹ Assessment of how far reforms have been implemented need to be done in order to give some bearing of what remains to be done. In this regard, it has been suggested that an up to date provisional progress report that enjoys the greatest input from the agencies that are working on the reform agenda and not government must be released.²⁸² The government cannot be a referee in its own assignment.²⁸³ More specifically, it has been suggested that a committee to work with the Panel of eminent Africans in ensuring the systematic assessment and oversight of the implementation of the agreement be established to end the current discretionary assessment environment.²⁸⁴

Fourthly, political parties having been part of the problem in Kenya, have a role to play. The peace building community has mostly neglected the vital role of political parties, which can play either a constructive or a regressive role in democratic development and peace building and paid more attention to elections instead.²⁸⁵ Kenyans have to define their national interest and in doing this, make sure that all parties are required to believe in Kenya as one idea and in all Kenyans as one people and that they are disallowed from peddling hateful, tribal or regional exclusivism and ethnic exceptionalism, preach that Kenya and all parts of it belong to all those who live in Kenya.²⁸⁶

In addition, there is need for political classes that have a firm commitment to the nation, a political citizenry that is loyal to the idea of the state and a country and a viable base for economic development; these will go a long way towards ensuring the development of the state and secure human rights.²⁸⁷ Statehood is weak because people have not reconciled themselves with the idea that they “are” the State and in this way respect it enough not to want to destroy it.²⁸⁸ One can go as far as saying the country is in need to a breed of “prophets” who believe in it and will stand for it.²⁸⁹

More importantly, institution building should remain the primary objective of long-term and sturdy reconstruction.²⁹⁰ Institutions go beyond such entities as the executive,

²⁸¹ Elizabeth Cousens (The OSLO forum Network of Mediators) ‘It ain’t over ‘til it’s over: what role for mediation in post agreement contexts?’ (2008) 69

²⁸² Statement by the Partnership for Change on the Kofi Annan Visit to Kenya issued at Nairobi (2009) 5

²⁸³ As above

²⁸⁴ As above

²⁸⁵ Benjamin Reilly, Per Nordlund and Edward Newman (n 105 above)3

²⁸⁶ Makau Mutua (n 107 above) 116

²⁸⁷ Makau Mutua (n 107 above) 187

²⁸⁸ Interview with Mr Zitha , Centre for Studies in Democracy and Development (CEDE) 23/08/2010

²⁸⁹ As above

²⁹⁰ Gilbert M. Khadiagala And Terrence Lyons “The Challenges Of Leadership in Post Conflict Transitions: Lessons from Africa” (2006) Conflict Trends 14-15

the legislative, the judiciary and electoral commissions; they also include the rules and regulations that govern the functioning of these entities.²⁹¹ The revision of the electoral system in such a way that promotes inclusion and encourages peaceful coexistence and consistency would also be instrumental to lasting peace. There is a need to clearly separate the three branches of government (executive, legislative and judiciary) and defining their powers clearly.²⁹² In this regard, not only the role and control of parliament over the executive should be beefed up, but the independence of the judiciary should also be fully reinstated.²⁹³

While a new Constitution can facilitate the revitalisation of the political landscape, (as will the new constitutional dispensation in Kenya, hopefully) societal healing will require a greater degree of intervention at the national and community level. In this regard, the embattled TJRC has to be permitted to document the grievances and atrocities committed in the past because unless Kenyan's can confront their past and come to terms with it, even a new Constitution may not be able to prevent the revival of ethnic animosity and competition which would not augur well for national stability.²⁹⁴ In sum, although the successful push for a new constitution has in some way helped to bring back the timetable for reform on cause, implementation of the most concrete and result oriented outputs of the mediation should be concentrated on.²⁹⁵ Institutions with a weak cultural base will have a short shelf-life and it is therefore important, to begin, through education, to promote a core of values shared across the country.²⁹⁶

Furthermore, the role of grassroot organisations cannot be downplayed in trying to remedy the situation in which Kenya finds itself.²⁹⁷ Grassroots organisations initiate tasks such as the reconstruction of holding peace commissions, prayer meetings and vigils, organising festivals of culture and art, promoting contacts amongst parties to the conflict all the while assessing community needs. These processes often address the need to evaluate underlying assumptions of culture and difference and in turn foster an

²⁹¹ L Moremong 'Contextualising the Campaign, Voting and Violence in the 2007 Kenyan Elections: A Review Commentary' (2008) Vol.5 Nos 3-4 *African Renaissance* 60

²⁹² Dersso (n 66 above) 29

²⁹³ As above

²⁹⁴ Tim Murithi 'Kenya's Constitutional Renewal: A Post-Referendum Analysis' 2010

<<http://www.currentanalyst.com/index.php/conflictsregional/136-kenyas-constitutional-renewal-a-post-referendum-analysis>> (accessed 7/10/2010)

²⁹⁵ Email correspondence with Prof Anyang' Nyong'o 13/10/2010

²⁹⁶ FK Iraki 'Culture & Development: Lessons learnt from the Post-Election Violence in Kenya' (2010) Vol. 2 No.1 *The Journal of Language, Technology & Entrepreneurship in Africa* 274

²⁹⁷ Intereview with Mr Zitha , Centre for Studies in Democracy and Development (CEDE) 23/08/2010

environment of forgiveness and equality.²⁹⁸ Their position within communities places them in close proximity to each individual, building trust, respect and confidence between those directly involved in the conflict.²⁹⁹ This is helped along by the impression that they display compassion and understanding to parties on both sides of the conflict.³⁰⁰ Despite a lack of coercive powers they can give assistance to conflicting parties in addressing their interest in a locally workable way.³⁰¹

In order to aid them however, the States have to create an environment conducive to grassroots action as, if a government is adamant that the conflict will continue grassroots actors may be persecuted.³⁰² If an environment is not conducive to the furthering of a peace culture grassroots action will fail. By environment, it is meant that the economic, social, political and military conditions must be conducive to grassroots action and in particular, the community in which grassroots action is based should be ready to move beyond revenge and genuinely desire positive social transformation.³⁰³ The involvement of international organisations and grassroots organisations can create networks between civil society actors in the country to galvanize political will at top political levels.³⁰⁴ There is a point of caution to note when it comes to the grassroots organisations as at times, they are not always fully independent and may partly represent state interests or may be reluctant to criticize fully government policy openly.³⁰⁵ However, from the above discussion, one can safely conclude that grassroots organisations cannot take a backseat in the quest to address Kenya's situation.

More than just the grassroots organisations, conflicts are transformed when all actors and stakeholders are participating from different level and sectors of the conflict systems, for an effective response structure needs to use a combination of approaches and processes contributing to long term sustainability.³⁰⁶ Conflict transformation seeks to address questions often neglected by leading practitioners of conflict resolution such as structural violence, cultural identity and the role individuals can play in diminishing conflict intensity and duration.³⁰⁷ It recognises the need to involve a range of actors, in a

²⁹⁸ Kate Muller "The Role of Grassroots Actors in Conflict Transformation" (2003) 13-14

²⁹⁹ Kate Muller (n 298 above) 14

³⁰⁰ A Fadzil "International Conflicts and the Roles of NGOs" (2004) 5

³⁰¹ A Fadzil (n 300 above) 4

³⁰² Kate Muller (n 298 above) 17

³⁰³ Kate Muller (n 298 above) 16-17

³⁰⁴ Nona Mikheilidze & Nicoletta Pirozzi (MICROCON) "Civil Society and Conflict Transformation in Abkhazia, Israel/Palestine, Nagorno-Karabakh, Transnistria and Western Sahara" (2008) 12

³⁰⁵ Nona Mikheilidze & Nicoletta Pirozzi (n 304 above) 14

³⁰⁶ Dekha Ibrahim Abdi (n 133 above) 6

³⁰⁷ H Miall et al *Contemporary Conflict Resolution* (1999) 21

number of roles, in order to establish lasting peace.³⁰⁸ It is important to note nevertheless that due to the dynamic nature of conflicts, conflict transformation theory does not provide a concrete guide for action and as a consequence success and direction of conflict resolution mechanisms are largely contextual.³⁰⁹ Nonetheless, it is an all encompassing strategy that the Kenyan society can definitely apply.

It goes without saying that avoiding the conflict in the first place would have been best. Preventive diplomacy can be used to ease tensions before they result in conflict or act swiftly to contain conflicts that have already broken out through early warnings that can be facilitated through information gathering as well as informal and formal fact-finding.³¹⁰ It is reported that preventive diplomacy is still not used enough as a means to address conflicts before they start or escalate further. In the period between 1993 and 2004 there were seventy-six low-intensity intrastate armed conflicts, each of which resulted in fewer than 1,000 battle deaths. There were slightly more than 3,000 separate interventions taken by third parties in those low-intensity conflicts many of which were successful in emerging or simmering conflicts. However, in some low-intensity conflicts the UN and regional organizations still do not take a sufficiently proactive approach to prevent conflicts.³¹¹ This is just a point worth noting for the future of Kenya and other countries especially when there are signs of impending violence. Conversely, Kenya can focus on long-term development and preparation for rapid, effective crisis response. In this regard, capacity-building, in the form of training for conflict resolution, mediation, and peace building, can empower the broader civil society for purposes of averting violence and contributing to restoration of violated peace.³¹² The lessons of the violence in 2008 and its consequences for ordinary Kenyans are starkly clear.³¹³ These can serve as a motivation for Kenyans to work hard to avoid being in the same situation again.

In conclusion, to remedy the problems that stare in the face of the Kenyan population, Kenyans and their leaders have to take responsibility in putting in place the reforms that were agreed upon. They need to have a common purpose of rebuilding the country to be one in which there is political stability, peace, respect for human rights and

³⁰⁸ K Rupesinghe (ed) *Conflict Transformation* (1995) 76

³⁰⁹ Kate Muller (n 298 above) 13

³¹⁰ Boutros Boutros Ghali Report "An agenda for peace: Preventative Diplomacy, Peacemaking and Peacekeeping" (1992)

³¹¹ International Peace Institute "Mediation and Peace Processes" 2009 (35)

³¹² George Wachira et al "Citizens in Action Making Peace in Kenya in the Post Election Crisis in Kenya 2008 (2010) xiii see also generally Progress report of the Secretary-General "Implementation of the recommendations contained in the report of the Secretary-General on the causes of conflict and the promotion of durable peace and sustainable development in Africa" (2009) 14

³¹³ George Wachira et al (n 312 above) 64

everyone embraces their fellow Kenyan regardless of their differences. It is not too late for Kenya despite the fact that problems persist even after international mediation. The country can reclaim its title as the peaceful hub in East Africa

17,691 excluding bibliography, table of contents, list of abbreviations, acknowledgements, dedication and declaration

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