



Strathmore University

Law School

**SAFEGUARDING THE PRINCIPLES OF IMPARTIALITY AND
PARTY AUTONOMY IN THE MEDIATION OF POLITICALLY
CHARGED CONFLICTS IN KENYA**

Submitted in Partial Fulfilment of the Requirements of the Bachelor of Laws Degree,
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By

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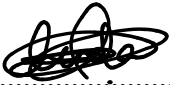
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DECLARATION

I, **NDEGWA LINDA NYAWIRA**, do hereby declare that this research proposal is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or part, submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:


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This Research Proposal has been submitted for examination with my approval as University Supervisor.

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ABSTRACT

This dissertation examines the principles of impartiality and party autonomy as cornerstones of effective mediation in politically charged conflicts, wherein their application is critical to fostering legitimate and sustainable resolutions. These principles, however, face significant challenges arising from the complexities inherent in politically charged disputes. The absence of comprehensive international guidelines governing mediation creates a lacuna in procedural standards, potentially compromising mediator impartiality and the self-determination of involved parties. This deficiency is further compounded by external pressures from international actors, who may prioritize geopolitical interests over the unique cultural, historical, and political contexts of the disputing parties, thereby undermining the integrity of the mediation process.

The mediation of the 2007-2008 Kenyan post-election crisis, led by Kofi Annan, serves as a salient, albeit brief, illustration of these challenges. Despite the mediation's success in establishing a power-sharing government, it underscored the inherent difficulties in addressing deep-seated ethnic tensions and structural issues. The presence of international actors, while providing essential support, also raised concerns about the preservation of Kenyan sovereignty and the extent to which local voices and interests were genuinely represented.

This dissertation argues that safeguarding impartiality and party autonomy necessitates the development and implementation of comprehensive international and domestic legal frameworks. Such frameworks must establish clear ethical standards for mediators, codify procedural rules that protect self-determination, and provide mechanisms for balancing international involvement with the preservation of state sovereignty and cultural relevance. Furthermore, these frameworks should address issues of compliance and the pursuit of long-term solutions by promoting community-level engagement and ensuring that mediation processes are adaptable, inclusive, and context-specific. By addressing these critical gaps, the international community can enhance the effectiveness and legitimacy of mediation as a tool for resolving politically charged conflicts.

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
APRM	African Peer Review Mechanism
CAM	Court Annexed Mediation
ECCA	Exclusive Choice of Court Agreements
ODM	Orange Democratic Movement
PNU	Party of National Unity
RPF	Rwandan Patriotic Forces
UN	United Nations
UNSC	United Nations Security Council
ICJ	International Court of Justice

LIST OF LEGAL INSTRUMENTS

1. Charter of the United Nations 33 UNTS 993.
2. Civil Procedure (Court Annexed Mediation Rules), 2022.
3. Civil Procedure Act, Cap 21.
4. Constitution of Kenya, 2010.
5. Mediation (Pilot Project) Rules, 2015.
6. Mediation Bill, 2020.
7. Treaty and Ratification Act, Cap 4D.
8. Vienna Convention On The Law of Treaties.
9. Hague Convention on the Choice of Court Agreements.
10. Singapore Convention on Mediation.

CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

Mediation is a widely recognized form of alternative dispute resolution (ADR) that facilitates negotiation between conflicting parties with the aim of reaching a mutually acceptable agreement.¹ It is a process in which a neutral third party, the mediator, assists disputants in communicating and negotiating their differences. Mediation is grounded in several core principles including voluntariness, neutrality, impartiality, and party autonomy.² These principles ensure that the mediation process is collaborative rather than adversarial, empowering parties to take control of the resolution of their disputes while fostering an environment of trust and respect.³

1.1.1 Impartiality

The principle of impartiality in mediation constitutes a cornerstone of ADR mechanisms, firmly rooted in the legal and ethical frameworks that govern the practice. Historically, the evolution of mediation as a distinct process from adversarial litigation necessitated the establishment of impartiality as a fundamental tenet to ensure fairness, equality, and procedural integrity.⁴ Impartiality, in its legal construction, is defined as the absence of bias or favoritism by the mediator toward any party involved in the dispute.⁵ It mandates the mediator to act as a neutral third party, devoid of any predisposition or influence that could compromise the equitable treatment of the disputants.⁶

The development of impartiality as a legal principle can be traced to its codification in various national and international instruments regulating mediation.⁷ These instruments recognize impartiality as essential to fostering trust among parties and safeguarding their right to self-determination. The principle obliges mediators to refrain from conduct or associations that

¹ Moore, Christopher W. *The Mediation Process: Practical Strategies for Resolving Conflict*. 4th ed. San Francisco: Jossey-Bass, 2014.

² Boule, Laurence. *Mediation: Principles, Process, Practice*. 3rd ed. Sydney: LexisNexis Butterworths, 2011.

³ Moore, Christopher W. *The Mediation Process: Practical Strategies for Resolving Conflict*. 4th ed. San Francisco: Jossey-Bass, 2014.

⁴ Benjamin L., and Ethan Michelson. 'Mediating the Mediation Debate.' *Journal of Conflict Resolution* 52, no. 5 (March 26, 2008): 737–64.

⁵ Jack, Chioma S., 'Maintaining Impartiality in Mediation', SSRN, June 3, 2023.

⁶ Gaffney, I. 'Impartiality and Neutrality in Mediation.' *Journal of Mediation and Applied Conflict Analysis* 8, no. 1 (2022): 59–71.

⁷ Carnevale, Peter J., and Sharon Arad. 'Which Side Are You On? Bias, Credibility, and Mediation.' ResearchGate. [/https://www.researchgate.net/publication/228796124_Which_Side_Are_You_On_Bias_Credibility_and_Mediation](https://www.researchgate.net/publication/228796124_Which_Side_Are_You_On_Bias_Credibility_and_Mediation) / on January 6, 2025.

could give rise to actual or perceived conflicts of interest.⁸ This duty is reinforced by ethical codes promulgated by professional mediation bodies, which impose strict obligations on mediators to disclose any circumstances that may affect their neutrality.⁹

Notwithstanding its foundational status, the practical application of impartiality has been subject to significant jurisprudential debate. Legal scholars have questioned whether absolute impartiality is attainable, given that mediators inevitably bring their own subjective experiences, values, and cultural contexts into the process.¹⁰ Moreover, certain legal doctrines suggest that mediators may need to adopt an 'active neutrality' approach, wherein they address power imbalances between parties to ensure substantive fairness, even if such actions might appear inconsistent with strict neutrality.¹¹

1.1.2 Party Autonomy

The principle of party autonomy in the context of mediation, particularly within politically charged conflicts involving international factors, is a fundamental tenet that empowers disputing parties to exercise their rights to self-determination in shaping the terms of their resolution. This principle underscores the capacity of the parties to dictate the parameters of the mediation process, including the selection of mediators, the determination of procedural rules, and the formulation of substantive agreements.¹²

Historically, party autonomy has evolved alongside the development of mediation as a recognized mechanism for conflict resolution, particularly in International Law.¹³ The 1907 Hague Convention on mediation established a framework that encouraged states to engage in non-coercive dialogue to resolve disputes peacefully, thereby reinforcing the importance of

⁸ Kydd A., 'Which Side Are You On? Bias, Credibility, and Mediation.', *American Journal of Political Science*. https://www.researchgate.net/publication/228796124_Which_Side_Are_You_On_Bias_Credibility_and_Mediation/ on January 3, 2025.

⁹ Carnevale, Peter J., and Sharon A. 'Which Side Are You On? Bias, Credibility, and Mediation.' *ResearchGate*. https://www.researchgate.net/publication/228796124_Which_Side_Are_You_On_Bias_Credibility_and_Mediation/ on January 3, 2025.

¹⁰ Gaffney, I. 'Impartiality and Neutrality in Mediation.' *Journal of Mediation and Applied Conflict Analysis* 8, no. 1 (2022): 59–71.

¹¹ Zartman I., William T, and Saadia T. 'Structural Bias, Polarized Mediation and Conflict Resolution Failure.' *Mediterranean Politics* 27, no. 3 (2022): 210–88.

¹² Babalola, Afe. 'The Doctrine Of Party Autonomy In International Commercial Arbitration: Issues And Perspectives.' *Afe Babalola University Journal of Sustainable Development Law & Policy* 6, no. 1 (2015): 229-249.

¹³ Yawanarajah, Nita. 'International Mediation and Intractable Conflict.' *Beyond Intractability*. https://www.beyondintractability.org/essay/med_intractable_conflict/ on January 5, 2025.

mutual consent and voluntary participation in the mediation process.¹⁴ This legal framework laid the groundwork for contemporary understandings of party autonomy, emphasizing that mediators must respect the wishes and interests of the parties involved.

In politically charged conflicts, especially those influenced by international dynamics, party autonomy plays a critical role in facilitating genuine dialogue and fostering trust among conflicting parties. The involvement of international actors often introduces additional complexities; while these actors may provide essential resources and expertise, they can also exert pressure that may undermine the autonomy of local parties.¹⁵ For instance, international mediators might advocate for solutions that align with broader geopolitical interests rather than those genuinely reflective of the parties' needs and aspirations.¹⁶

Moreover, party autonomy is essential for ensuring that mediation outcomes are perceived as legitimate by all stakeholders. When parties feel empowered to make decisions regarding their conflict resolution, they are more likely to adhere to agreements reached during mediation.¹⁷ Conversely, if external pressures dictate terms that do not align with the parties' interests or cultural contexts, there is a heightened risk of non-compliance and subsequent conflict escalation.¹⁸

1.1.3 How are the Principles of Impartiality and Party Autonomy Affected in Politically Charged Conflicts?

Impartiality is fundamental to mediation. It requires mediators to remain neutral and without any personal stake in the outcome.¹⁹ This principle ensures that all parties feel equally treated and that the mediator does not favor one side over another. Impartiality fosters trust in the mediator, which is essential for open communication and effective negotiation.²⁰ When parties believe the

¹⁴ Yawanarajah, Nita. 'International Mediation and Intractable Conflict.' *Beyond Intractability*. https://www.beyondintractability.org/essay/med_intractable_conflict/ on January 5, 2025.

¹⁵ Scott S. Gartner, 'Third-Party Mediation of Interstate Conflicts: Actors, Strategies, Selection, and Bias', 6 *Y.B. Arb. & Mediation* 269 (2014).

¹⁶ Scott S. Gartner, 'Third-Party Mediation of Interstate Conflicts: Actors, Strategies, Selection, and Bias', 6 *Y.B. Arb. & Mediation* 269 (2014).

¹⁷ Scott S. Gartner, 'Third-Party Mediation of Interstate Conflicts: Actors, Strategies, Selection, and Bias', 6 *Y.B. Arb. & Mediation* 269 (2014).

¹⁸ Londoño Lazaro, María Carmelina. 'The effectiveness of international mediation -The current debate.' *Revista de Relaciones Internacionales, Estrategia y Seguridad* 7, no. 2 (2012): 329-344.

¹⁹ Allakhverdova, L. 'Principles of Mediation as the Basis of this Process.' *ASEJ Scientific Journal of Bielsko-Biala School of Finance and Law* 3, no. 1 (2018): 1-4.

²⁰ MII (Mediators' Institute of Ireland). 'The Benefits of Mediation.' <https://www.themii.ie/about-mediation/the-benefits-of-mediation/> On October 12, 2024.

mediator is unbiased, they are more likely to engage fully in the process.²¹ In politically charged conflicts, maintaining impartiality becomes increasingly difficult as mediators may be perceived as biased based on their affiliations. The presence of strong political identities and entrenched positions can lead to skepticism about the mediator's neutrality, which undermines trust and can hinder open communication.²² When parties believe that the mediator favors one side, it can exacerbate tensions and lead to a breakdown in the mediation process.

Voluntariness refers to the principle that participation in mediation must be voluntary for all parties involved.²³ This principle is critical because it empowers individuals to take ownership of the resolution process, leading to outcomes that are more likely to be accepted and adhered to by all parties.²⁴ When parties feel coerced into mediation, it can lead to resentment and undermine the legitimacy of the agreement reached. Voluntariness is often compromised in politically charged situations where parties may feel coerced into mediation due to external pressures or threats. For instance, political leaders might agree to mediation not out of genuine willingness but because they perceive it as a necessary step to avoid further conflict or public backlash.²⁵ This lack of genuine consent can result in superficial agreements that are not sustainable in the long term.

Self-determination is a key principle which emphasizes that the parties involved are best positioned to understand their needs and interests, allowing them to craft their own solutions rather than having decisions imposed upon them by a judge or arbitrator, and in this case, the mediator.²⁶ This principle promotes empowerment and accountability among participants,

²¹ MII (Mediators' Institute of Ireland). 'The Benefits of Mediation.' <https://www.themii.ie/about-mediation/the-benefits-of-mediation/> On October 12, 2024.

²²ZIFBerlin. 'PeaceMediationFramework' <https://www.zif-berlin.org/sites/zif-berlin.org/files/inline-files/peace-mediation-framework-data.pdf/> On October 12, 2024.

²³ Allakhverdova, L. 'Principles of Mediation as the Basis of this Process.' ASEJ Scientific Journal of Bielsko-Biala School of Finance and Law 3, no. 1 (2018): 1-4. Accessed 12 October, 2024. <https://asej.eu/index.php/asej/article/download/286/224/158/>

²⁴ Allakhverdova, L. 'Principles of Mediation as the Basis of this Process.' ASEJ Scientific Journal of Bielsko-Biala School of Finance and Law 3, no. 1 (2018): 1-4.

²⁵ United States Institute of Peace. 'Mediation Process.' https://www.usip.org/sites/default/files/managing_mediation_process.pdf/ on October 12, 2024.

²⁶ Gupta, Rachel 'Five Principles to Maximize Chances of Success in Mediation.' <https://mediate.com/five-principles-to-maximize-chances-of-success-in-mediation/>. On October 12, 2024.

resulting in agreements that are more likely to be durable and satisfactory.²⁷ The principle of self-determination emphasizes that parties should have control over their resolutions. In politically charged conflicts, however, external influences—such as international actors or powerful domestic stakeholders—can undermine this principle by imposing solutions that do not reflect the interests or needs of the affected parties.²⁸ This imposition can lead to resentment and a lack of commitment to any agreements reached.

The principles of party autonomy and mediator impartiality are central to the success or failure of mediation in politically charged conflicts. Party autonomy ensures that disputing parties retain control over the process and outcomes, while mediator impartiality safeguards fairness and prevents bias. However, these principles are often compromised in high-stakes mediations, particularly when power struggles, powerful mediators, and weak implementation mechanisms come into play.

In the context of the mediation process following the 2007 post-election violence in Kenya, the principles of party autonomy and impartiality were prominently illustrated, albeit with significant challenges. Kofi Annan, as the chief mediator appointed by the African Union, endeavored to maintain impartiality throughout the negotiations, ensuring that both President Mwai Kibaki and opposition leader Raila Odinga were treated equitably.²⁹ Annan's approach involved presenting proposals to the conflicting parties that aimed to address their grievances while fostering an environment conducive to dialogue.³⁰ However, the intense political climate and external pressures from international stakeholders complicated the exercise of party autonomy, as both leaders were often swayed by external influences that sought to dictate terms rather than allowing for genuine self-determination.³¹ Ultimately, while Annan's mediation facilitated a power-sharing agreement that sought to restore stability, it underscored the delicate balance

²⁷ Gupta, Rachel 'Five Principles to Maximize Chances of Success in Mediation.' <https://mediate.com/five-principles-to-maximize-chances-of-success-in-mediation/>. On October 12, 2024.

²⁸ZIF Berlin. 'Peace Mediation Framework.' <https://www.zif-berlin.org/sites/zif-berlin.org/files/inline-files/peace-mediation-framework-data.pdf>. On October 12, 2024.

²⁹ Annan, K., and Griffiths, M., 2009, 'The Prisoner of Peace - An Interview with Kofi A. Annan', Centre for Humanitarian Dialogue, Geneva, Switzerland.

³⁰ Annan, K., and Griffiths, M., 2009, 'The Prisoner of Peace - An Interview with Kofi A. Annan', Centre for Humanitarian Dialogue, Geneva, Switzerland.

³¹ Annan, Kofi. 'Kenya: Mediation is making progress - Kofi Annan.' ReliefWeb, 2008. <https://reliefweb.int/report/kenya/kenya-mediation-making-progress-kofi-annan/> on January 2, 2025.

between respecting party autonomy and navigating the complexities introduced by international factors in politically charged conflicts.³²

In the 1993 Arusha Accords, intended to resolve Rwanda's civil war, party autonomy was significantly undermined.³³ The Hutu-led government and the Tutsi-dominated Rwandan Patriotic Front (RPF) entered negotiations under coercive circumstances, with the RPF's military advances and international economic pressures forcing the government to participate.³⁴ Mediator impartiality was also compromised as power imbalances between the parties were not adequately addressed. The exclusion of extremist Hutu factions like the CDR further destabilized the process, radicalizing excluded groups and leading to non-compliance with the accords. Weak enforcement mechanisms, such as delays in forming a transitional government, allowed spoilers to derail implementation, culminating in the 1994 genocide.³⁵

Similarly, at Camp David in 1978, U.S. President Jimmy Carter's directive mediation between Egypt and Israel highlighted tensions between mediator impartiality and party autonomy. Carter's active involvement as a power mediator blurred the lines of neutrality, as he exerted significant influence over the process to secure an agreement.³⁶ While Egypt regained the Sinai Peninsula, the exclusion of Palestinian stakeholders from negotiations violated inclusivity principles and undermined long-term compliance with provisions related to Palestinian autonomy.³⁷

In contrast, Kofi Annan's 2008 mediation in Kenya exemplified adherence to these principles. Annan ensured party autonomy by facilitating voluntary participation from both President Mwai Kibaki and opposition leader Raila Odinga.³⁸ His impartiality was maintained through balanced representation and international support, while robust enforcement mechanisms such as embedding the National Accord into Kenya's constitution ensured compliance.³⁹ This inclusive

³² Office of the Prosecutor. 'The Post-Election Violence and Mediation.' ICC, 2012. <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/26D853E3-83A6-45F1-BEE9-8B64E3723C55/0/BackgroundNoteKenyaJanuary2012.pdf/> on

³³ Burnet J. , African Conflict and Peacebuilding Review 7, no. 2 (2017): 119–21.

³⁴ Burnet J. ,African Conflict and Peacebuilding Review 7, no. 2 (2017): 119–21.

³⁵ Human Rights Watch, 'Leave None to Tell the Story: Genocide in Rwanda', 1711, 1 March 1999.

³⁶ Perry, Glenn E. Arab Studies Quarterly, vol. 15, no. 1, 1993, pp. 111–13.

³⁷ Perry, Glenn E. Arab Studies Quarterly, vol. 15, no. 1, 1993, pp. 111–13.

³⁸ Peceny M. Staffan I. Lindberg, ed., Democratization by Elections: A New Mode of Transition. Baltimore. Pg 160-163.

³⁹ Cheeseman N., 'Democracy in Africa: Successes, Failures, and the Struggle for Political Reform'.(2015)

approach addressed both immediate violence and systemic grievances, demonstrating how respect for party autonomy and mediator impartiality can lead to sustainable peace agreements.⁴⁰ In summary, the application of mediation is particularly pertinent in politically charged conflicts, where the stakes are often high, and the implications extend beyond the immediate parties involved. Such conflicts can arise from electoral disputes, ethnic tensions, or governance issues, and they frequently involve deeply entrenched positions and emotions.⁴¹ The challenges inherent in resolving these disputes through mediation are manifold. First, the presence of power imbalances can skew negotiations, with more influential parties potentially dominating the process.⁴² Second, the confidentiality of mediation may limit transparency and public trust, leading to skepticism about the legitimacy of outcomes.⁴³ Third, political acceptance is crucial; without buy-in from key stakeholders and political leaders, mediated agreements may lack enforceability and sustainability.⁴⁴

1.2 Statement of the Problem

An ideal resolution of politically charged conflicts through mediation necessitates adherence to party autonomy and mediator impartiality, ensuring procedural fairness and substantive justice. These principles are critical in contexts marked by power asymmetries and historical grievances, as exclusionary practices (e.g., Rwanda's Arusha Accords) or coercive mediation (e.g., Camp David's directive approach) risk non-compliance and relapse into violence.

An exemplary framework would prioritize inclusivity, integrating all stakeholders to prevent marginalization and radicalization. Mediators must address power imbalances through equitable representation, as exemplified by Kofi Annan's Kenya mediation, which balanced party autonomy with enforceable constitutional reforms. Robust enforcement mechanisms, such as legally binding agreements and accountability structures, are indispensable to prevent unilateral

⁴⁰ Stephen B., 'Interventions: A Life in War and Peace,, European Journal of International Law, Volume 24, Issue 2, May 2013, Pg 730–732,

⁴¹ Boulle, Laurence. *Mediation: Principles, Process, Practice*. 3rd ed. Sydney: LexisNexis Butterworths, 2011.

⁴² Zartman, I. William, and Saadia Touval. 'International Mediation in Conflict Resolution.' *Journal of Conflict Resolution* 41, no. 2 (1997): 228-230.

⁴³ Law Reform Commission of Ireland. 'Alternative Dispute Resolution: Mediation and Its Role in Modern Civil Justice.' . https://www.lawreform.ie/_fileupload/reports/r98adr.pdf/ On October 14, 2024.

⁴⁴ Law Reform Commission of Ireland. 'Alternative Dispute Resolution: Mediation and Its Role in Modern Civil Justice.' https://www.lawreform.ie/_fileupload/reports/r98adr.pdf/ On October 14, 2024.

reinterpretation of terms, as seen in Camp David's ambiguous provisions on Palestinian autonomy.

The ideal resolution of a politically charged conflict via mediation should, in the interest of preserving party autonomy, vest in all stakeholders the authority to collaboratively formulate the outcome through knowing and voluntary consent. Such resolution would further necessitate impartiality, requiring that the mediator facilitate dialogue without bias toward any particular faction. The mediator shall maintain procedural fairness by balancing the power dynamics between the parties and refrain from imposing any outcome or resolution not explicitly agreed upon by the parties. To this end, the mediator is charged with guiding the parties toward critical evaluation of their respective interests, applicable legal precepts, and mutual goals. To counteract biases or asymmetries of information that may be inherent in polarized contexts, the mediator may, in an ethically sound manner, intervene for the purposes of clarifying misperceptions, identifying shared values, and reframing adversarial narratives. However, the mediator shall at all times preserve the parties' ultimate authority with respect to substantive decisions.

In Kenya, the role of mediators is pivotal in resolving conflicts, yet their impartiality can be compromised by various factors in politically charged conflicts, including political affiliations and international pressures. Mediators often find their decisions influenced by their own political beliefs or the interests of international stakeholders, which can lead to biased outcomes that do not reflect the true needs and desires of the conflicting parties. This situation raises concerns about the integrity of the mediation process, as it can undermine trust among the parties involved and diminish the effectiveness of conflict resolution efforts.

Furthermore, party autonomy is frequently at risk due to external pressures exerted by international entities advocating for swift resolutions. Exigent circumstances may exert undue influence on mediators, potentially resulting in proposed resolutions that privilege temporal efficiency over comprehensive evaluation and consideration of the historical antecedents of the dispute. This lack of comprehensive insight into the State's history and socio-political dynamics can result in proposals that are incompatible with local realities, leading to non-compliance or only temporary solutions rather than sustainable peace.

The implications of these challenges extend to issues of self-determination for the parties involved. When mediators and their teams' draft proposals without a full grasp of the State's complexities, they risk imposing solutions that do not resonate with the local populace's

aspirations or cultural context. This disconnect can foster resentment and resistance among affected communities, ultimately perpetuating cycles of conflict rather than fostering genuine reconciliation.

1.3 Research Objectives

1. To evaluate the effectiveness of the existing legal, policy, and regulatory frameworks in Kenya in the mediation of politically charged conflicts.
2. Discuss the legal challenges in upholding the principles of party autonomy and impartiality in the Kofi Annan-led mediation of the 2007/08 politically charged conflict.
3. Offer recommendations on safeguarding the principles of party autonomy and impartiality based on the case study of the Kofi Anan-led mediation of the 2007/08 politically charged conflict.

1.4 Research Questions

1. Can the existing legal, policy, and regulatory frameworks in Kenya effectively support mediation of politically charged conflicts?
2. Were the principles of party autonomy and impartiality safeguarded during the Kofi Annan-led mediation of the 2007/2008 politically charged conflict?
3. What recommendations can be offered to safeguard the principles of party autonomy and impartiality in the mediation of politically charged conflicts in Kenya based on a case study of the Kofi Anan-led mediation of the 2007/08 politically charged conflict?

1.5 Hypothesis

The existing legal, policy, and regulatory frameworks in Kenya are insufficient to effectively safeguard the principles of party autonomy and neutrality in the mediation of politically charged conflicts.

1.6 Theoretical Framework

1.6.1 Transformative Mediation Theory

Transformative mediation, a paradigmatic approach to conflict resolution, is rooted in the jurisprudential principles of party autonomy and mediator impartiality, as articulated by Robert A. Baruch Bush and Joseph P. Folger in their seminal treatise *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994).⁴⁵ Their framework redefines mediation as a process designed to foster relational transformation through empowerment enabling disputing parties to reclaim agency over conflict narratives and recognition cultivating mutual understanding without necessitating substantive agreement.⁴⁶

Bush and Folger's model critiques directive mediation practices, advocating instead for non-coercive facilitation that respects *audi alteram partem* (the right to be heard) and *pacta sunt servanda* (the binding nature of agreements).⁴⁷ Their emphasis on self-determination aligns with international legal norms, such as Article 2(1) of the Vienna Convention on the Law of Treaties, which mandates voluntary consent in treaty formation.⁴⁸

Secondary scholarship, including analyses by Carrie Menkel-Meadow and Jeffrey R. Seul, interrogates transformative mediation's ethical dimensions.⁴⁹ Menkel-Meadow situates the approach within relational justice, emphasizing its capacity to address systemic inequities through moral accountability.⁵⁰ Seul, however, critiques its developmental claims, arguing that transformative outcomes hinge on contextual factors (e.g., power asymmetries) that may undermine bona fide consent.⁵¹

The framework asserts that the efficacy of mediation in politically charged conflicts is not merely a procedural concern but rather a philosophical imperative rooted in the principles of

⁴⁵ Bush, Robert A. Baruch, and Joseph P. Folger. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco: Jossey-Bass, 1994.

⁴⁶ Bush, Robert A. Baruch, and Joseph P. Folger. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco: Jossey-Bass, 1994.

⁴⁷ Folger, Joseph P., and Robert A. Baruch Bush. "Transformative Mediation: A Self-Assessment." *International Journal of Conflict Engagement and Resolution* 2 (2014): 62–85.

⁴⁸ Article 2 (1) of the Vienna Convention on the Law of Treaties. 1969.

⁴⁹ Menkel-Meadow, Carrie. "Ethics in Alternative Dispute Resolution: New Issues, No Answers." *Journal of Dispute Resolution* (1997).

⁵⁰ Menkel-Meadow, Carrie. "Ethics in Alternative Dispute Resolution: New Issues, No Answers." *Journal of Dispute Resolution* (1997).

⁵¹ Seul, Jeffrey R. "Ours Is the Way of God: Religion, Identity, and Intergroup Conflict." *Journal of Peace Research* 36, no. 5 (1999): 553–69.

justice, equity, and communal harmony. At its core, effective mediation requires a symbiotic relationship between foundational mediation principles such as voluntariness, neutrality, and party autonomy, and the legal and institutional structures that support them.⁵² This integration is essential for fostering an environment where all voices are heard and respected.

When these core principles are neglected or inadequately supported by existing regulations, the mediation process risks devolving into a mechanism that serves only the interests of the powerful.⁵³ Such elite negotiations can perpetuate systemic inequalities, sidelining the broader public and undermining the legitimacy of the mediation process itself. This raises profound questions about the nature of justice.

Conversely, when legal and institutional frameworks are enhanced to uphold these mediation principles, they can facilitate a more inclusive dialogue that promotes political acceptance and genuine stakeholder engagement. This shift not only enriches the mediation process but also aligns it with democratic ideals, where power is decentralized and shared among all members of society. In this sense, effective mediation transcends mere conflict resolution; it becomes a transformative practice that fosters social cohesion and collective understanding.⁵⁴

Thus, the philosophical underpinnings of this framework suggest that effective mediation is not simply about reaching agreements but about cultivating an ethos of collaboration, respect, and mutual recognition among diverse stakeholders. It invites us to reflect on our shared humanity and the moral obligations we hold toward one another in navigating complex political landscapes. While transformative mediation offers a *prima facie* framework for balancing party autonomy and mediator impartiality, its efficacy in politically charged conflicts remains contested. The model's reliance on voluntariness and non-interventionism risks ineffectiveness in scenarios where coercive pressures (e.g., economic duress, military leverage) compromise *opinio juris* (shared legal expectations). Thus, its application in high-stakes mediations necessitates hybrid mechanisms—such as enforceable constitutional safeguards, as seen in Kenya's post-2008 reforms—to reconcile transformative ideals with pragmatic compliance.

⁵² Faris, J. A. 'An Analysis of the Theory and Principles of Alternative Dispute Resolution.' University of South Africa, Pretoria, June 1995.

⁵³ 'Alternative Dispute Resolution (ADR): A Suitable Broad Based Dispute Resolution Mechanism.' International Journal of Conflict Management 2023.//<https://carjournals.org/journals/index.php/IJCM/article/view/1253/>

⁵⁴ 'Alternative Dispute Resolution: Mediation and Its Role in Modern Civil Justice.' Law Reform Commission of Ireland. Accessed October 9, 2024. //https://www.lawreform.ie/_fileupload/reports/r98adr.pdf/. On October 12, 2014.

1.7 Literature Review

In the book 'Mediation Dilemma,' Kyle Beardsley discusses the inherent challenges mediators face when navigating politically charged conflicts. He introduces the concept of the 'mediation dilemma,' where mediators must balance their role as impartial facilitators with the need to influence outcomes positively.⁵⁵ Beardsley emphasizes that international participation can be a double-edged sword; while it may provide necessary resources and legitimacy, it can also lead to perceptions of bias if not managed carefully. He also concludes that there are long-term limitations of mediation, particularly in preventing the recurrence of conflicts. He suggests that relying heavily on mediation can paradoxically increase the risk of future conflicts because it may fail to address the underlying causes of the conflict comprehensively.⁵⁶

However, a significant gap in his analysis is the lack of attention to the role of broader stakeholders and local contexts in shaping mediation outcomes. While Beardsley provides a thorough analysis of historical cases and the risks associated with relying on mediation, he does not adequately explore how the involvement of diverse stakeholders—such as civil society, grassroots organizations, and marginalized groups—can either enhance or undermine mediation efforts. This oversight leaves a critical aspect of mediation unaddressed, as these stakeholders can significantly influence the success or failure of mediation processes. In the case study of the Kofi Annan-led mediation in Kenya, it is clear how international involvement reveals the roles of various stakeholders in the mediation process.

The principles of neutrality and impartiality are essential for effective mediation, as they ensure that all parties trust the mediator and feel heard. However, in politically sensitive situations, these principles can be compromised due to external pressures from political actors and societal influences. John Njagi, in his work titled 'Court Annexed Mediation as a Tool for Access to Justice for Children in Kenya,'⁵⁷ addresses this challenge. He argues that when mediators face

⁵⁵ Beardsley, Kyle C. 2011. *The Mediation Dilemma*. Ithaca: Cornell University Press.

⁵⁶ Beardsley, Kyle C., and Nigel Lo. 2014. 'Third-Party Conflict Management and the Willingness to Make Concessions.' *Journal of Conflict Resolution* 58: 363–92.

⁵⁷ Njagi, John. 'Court Annexed Mediation as a Tool for Access to Justice for Children in Kenya: A Case Study of Milimani Children's Court.' University of Nairobi.

pressure from influential political figures or societal expectations, their ability to remain neutral and impartial can be eroded.⁵⁸

This erosion of trust can lead to disputes over the legitimacy of mediation outcomes, ultimately undermining the mediation process itself. Njagi's argument suggests that in politically charged environments, mediators may face difficulties in maintaining their impartiality due to several factors. For instance, political actors may exert influence on mediators to favor certain outcomes, which can compromise their neutrality. This pressure can come from various sources, including government officials, political parties, or other influential figures.

Additionally, societal expectations and biases can also impact mediators, especially if they are perceived as being aligned with certain groups or ideologies. This can lead to perceptions of bias, even if the mediator intends to remain impartial. When neutrality and impartiality are compromised, the legitimacy of the mediation process is questioned. Parties may feel that the mediator is not acting fairly, leading to dissatisfaction with the outcomes and potentially undermining the effectiveness of mediation as a conflict resolution tool.

In essence, Njagi's work underscores the importance of protecting the principles of neutrality and impartiality in mediation to ensure that mediation remains a trusted and effective means of resolving disputes. He concludes that by recognizing these challenges, mediators and stakeholders can work to create environments where these principles are upheld, fostering more successful and sustainable conflict resolution processes. Njagi's analysis of court-annexed mediation at Kenya's Milimani Children's Court reveals critical gaps in safeguarding impartiality and party autonomy. The mandatory referral of cases to mediation, while intended to streamline dispute resolution, risks undermining voluntariness, a cornerstone of mediation ethics—and party control over outcomes. This coercive framework, compounded by inadequate mediator training and accreditation, raises concerns about judicial influence over mediators, potentially compromising neutrality and fostering perceptions of bias. Furthermore, the study fails to address systemic power imbalances between disputants, which may lead to inequitable settlements, particularly in cases involving vulnerable parties.

In 'Mediation in Kenya: Current Developments and Challenges,' Kennedy Odhiambo underscores the critical importance of transparency and accountability in fostering trust among

⁵⁸ Njagi, John. 'Court Annexed Mediation as a Tool for Access to Justice for Children in Kenya: A Case Study of Milimani Children's Court.' University of Nairobi.

disputing parties.⁵⁹ He argues that without these elements, parties may be reluctant to comply with mediated agreements, which can exacerbate tensions and conflict.⁶⁰ This perspective aligns with broader legal challenges in ensuring that mediation agreements are enforceable and respected by all parties involved.

Odhiambo discusses the need for a robust framework that supports transparency and accountability in mediation. However, the paper does not provide specific recommendations on how these principles can be effectively implemented or propose concrete mediation strategies to ensure the ready and willing enforcement of mediation agreements. This gap suggests an area for further research and development in mediation practices in Kenya.

In 'Critical Analysis of Court-annexed Mediation in Promoting Access to Justice in Kenya,' by Josephine N. Maragia, the author provides an in-depth analysis of court-annexed mediation (CAM) in Kenya, noting that while CAM has the potential to enhance access to justice by providing a more flexible and efficient dispute resolution mechanism, it often falls short due to a lack of adherence to core mediation principles.⁶¹ The study reveals that challenges such as inadequate training for mediators and insufficient resources impede the effective application of CAM. To address these issues, Maragia advocates for capacity building and resource allocation to strengthen the implementation of mediation practices in Kenya. This paper supports one of the study's proposed recommendations which provides for proper channels of enforcement of CAM rules and strict adherence to mediation principles even during complex circumstances in politically charged conflicts.

Mediation is recognized as a viable alternative to litigation, particularly in politically charged contexts, due to its procedural efficiency and cost-effectiveness. Kraido Advocates in 'Mediation in Kenya: A Complete Guide & Benefits'⁶² posit that mediation offers a faster and more economical dispute resolution framework, which is critical in conflicts involving political leaders (e.g., members of parliament or government officials). Such leaders' roles necessitate cohesion

⁵⁹ Odhiambo, Kennedy. 'Mediation in Kenya: Current Developments and Challenges.' Weinstein International Foundation.

⁶⁰ Odhiambo, Kennedy. 'Mediation in Kenya: Current Developments and Challenges.' Weinstein International Foundation.

⁶¹ Maragia, Josephine N. 'Critical Analysis of Court-annexed Mediation in Promoting Access to Justice in Kenya.' University of Nairobi, 2021.

⁶² Kraido Advocates. Mediation in Kenya: A Complete Guide & Benefits./<https://kraidoadvocates.com/mediation-in-kenya/> on October 5, 2024.

and unity to effectively represent and serve their constituents, as conflicts among them risk destabilizing governance structures and perpetuating instability among governed populations. Mediation is also cost effective which further mitigates the financial burden on state resources, as it resolves disputes expeditiously compared to protracted litigation. Unlike adversarial court processes, mediation fosters collaborative outcomes that preserve relationships, which is essential for ongoing governance and public service delivery. Additionally, mediation's confidentiality ensures sensitive political disputes are resolved without public scrutiny, reducing risks of reputational damage or further polarization. The mechanism's flexibility enables parties to craft mutually acceptable solutions tailored to their interests, which may not be achievable through rigid judicial procedures. By empowering parties to retain control over the process and outcome, mediation aligns with principles of party autonomy, enhancing compliance with agreements.

However, historical cases such as Kofi Annan's mediation during the 2007-2008 political crisis illustrate the complexities involved in applying mediation effectively in such contexts. The report 'Back from the Brink: The 2008 Mediation Process and Reforms in Kenya' by the Kofi Annan Foundation (2024) analyzes the legal challenges faced during this period, including issues related to enforcement and compliance with mediated agreements influenced by political dynamics.⁶³

Kofi Annan's mediation during the 2007-2008 Kenyan political crisis is a pivotal case study in understanding the complexities of effective mediation in politically charged contexts. The crisis, sparked by a disputed presidential election, led to widespread violence and displacement, necessitating international intervention.⁶⁴ Annan, as the leader of the African Union Panel of Eminent African Personalities, played a crucial role in brokering a power-sharing agreement between President Mwai Kibaki and opposition leader Raila Odinga.⁶⁵

Annan's leadership and authority were instrumental in garnering international support and trust from both parties. His ability to communicate directly with heads of State was crucial in maintaining momentum during the negotiations. He adapted his strategy to the evolving situation, initially focusing on building trust and later pushing for a power-sharing arrangement.

⁶³ Kofi Annan Foundation. 'Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.' April 2024.

⁶⁴ Kofi Annan Foundation. 'Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.' April 2024.

⁶⁵ Kofi Annan Foundation. 'Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.' April 2024.

Annan emphasized the need for a single mediation process to avoid 'diplomatic tourism,' where parties seek alternative mediators if they are dissatisfied with the current process.⁶⁶

The mediation involved extensive consultations with various Kenyan stakeholders, including religious, human rights, and business groups. This inclusive approach helped foster public confidence in the negotiations. The process led to significant reforms, including the establishment of a truth, justice, and reconciliation commission, electoral reforms, and a new constitution in 2010.⁶⁷ These reforms aimed to address underlying issues contributing to the conflict and enhance democratic governance.

Overall, Annan's mediation in Kenya demonstrates the complexities and challenges involved in applying mediation effectively in politically charged contexts. It underscores the importance of leadership, strategic adaptability, inclusivity, and international support in achieving successful outcomes. These challenges underscore the need for a robust legal framework that can adapt to the unique demands of politically charged conflicts. The report, however, did not provide concrete recommendations on how such conflicts can be better handled and how mediators can prepare adequately for the same.

The legal challenges encountered during Kofi Annan's mediation efforts highlight significant obstacles that continue to affect mediation practices in Kenya today. Nzibe and Nzibe discuss how political interference complicated mediator neutrality and undermined the overall success of Annan's efforts in their work titled 'Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.' They point out that without a clear commitment from all parties involved to adhere to mediated agreements, achieving lasting peace becomes increasingly difficult.⁶⁸ This proves to be quite difficult as parties to a mediation process may not be forthcoming or willing to enter into a mutually beneficial arrangement, especially in political conflicts where there is an expectation of a clear 'winner'.

⁶⁶ The Christian Science Monitor. Interview: Kofi Annan says Ivory Coast mediators could draw on Kenya's example. Accessed on 5 October, 2024.

<https://www.csmonitor.com/World/Africa/2011/0225/Interview-Kofi-Annan-says-Ivory-Coast-mediators-could-draw-on-Kenya-s-e/> on November 1, 2024.

⁶⁷ Kofi Annan Foundation. 'Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.' April 2024.

⁶⁸ Nzibe, David, and Nzibe, Joseph. 'Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.' African Union Panel of Eminent Personalities, April 2021. <https://www.kofiannanfoundation.org/publication/back-from-the-brink-the-2008-mediation-process-and-reforms-in-kenya/>. On November 2, 2024.

Nyaribo and Ouma, in 'Keeping Disputes Out of Court: Mediation Gaining Ground in Kenya,' further explore specific legal challenges faced during the post-election period, noting that lack of political will among key stakeholders often resulted in non-compliance with agreements reached during mediation sessions.⁶⁹This situation illustrates how external political pressures can derail even well-intentioned mediation efforts.

1.8 Justification of the Study

This study is essential for identifying gaps in Kenya's legal, policy, and regulatory frameworks regarding mediation in politically charged conflicts. By examining how core mediation principles of —impartiality and party autonomy—are upheld or compromised, the research aims to provide insights into their impact on the legitimacy and effectiveness of mediation processes. Additionally, the study emphasizes the importance of broader stakeholder engagement, including the participation of citizens, to promote inclusive conflict resolution mechanisms. Contextualizing these issues within historical precedents, such as the post-election violence of 2007-2008, will inform future practices and enhance the overall effectiveness of mediation strategies. Ultimately, the research seeks to foster political acceptance of mediation processes, ensuring that mediated agreements are respected and implemented by all parties involved. Policymakers and professional mediators are likely to benefit from this study.

1.9 Limitation of the Study

A significant limitation of this study is the confidential nature of mediation, which can restrict access to information regarding mediation processes in politically charged conflicts. This confidentiality may hinder the ability to gather comprehensive data on mediation outcomes and stakeholder experiences, as parties may be reluctant to share insights due to concerns about the implications of disclosing sensitive information. To address this limitation, the study utilizes information made public through case studies of past mediation efforts, particularly those involving well-documented instances such as the post-election violence in Kenya in 2007-2008.

⁶⁹ Nyaribo, Jomo, and Edel Ouma. 'Keeping Disputes Out of Court: Mediation Gaining Ground in Kenya.' MMAN Advocates, February 15, 2018. <https://mman.co.ke/content/keeping-disputes-out-court%E2%80%A6mediation-gaining-ground-kenya/> On October 2, 2024.

By analyzing publicly available records, reports, and accounts from key participants in these case studies, the research can draw insights into the mediation processes while respecting confidentiality agreements. This approach allows for a nuanced understanding of how mediation was conducted, the principles upheld, and the outcomes achieved without compromising sensitive information. Furthermore, leveraging documented experiences from recognized mediators and organizations involved in these processes provides a solid foundation for understanding the dynamics at play and enhances the overall validity of the findings.

1.10 Methodology

The study adopted a doctrinal or desktop-based methodology, often referred to as 'black letter' law research which focused on analyzing legal texts such as statutes, case law, legal principles, and scholarly work to ascertain the law within a specific jurisdiction. Furthermore, this study includes a case study of the Kofi Annan-led mediation in Kenya's post-election period. In this research, Kofi Annan's mediation during the 2007-2008 post-election violence in Kenya served as a critical case study. This approach allowed for a nuanced understanding of how mediation principles of impartiality and party autonomy were implemented in a politically charged environment.

1.11 Chapter Breakdown

Chapter one introduces the topic of mediation in politically charged conflicts in Kenya, outlining the significance of the study. It presents the research problem, objectives, and questions guiding the investigation. The chapter also provides a brief overview of the methodology employed and the anticipated contributions of the research to legal scholarship and practice.

Chapter two examines the existing legal, policy, and regulatory frameworks that govern mediation in Kenya, focusing on the relevant constitutional and legislative provisions as well as judicial precedents. The chapter also discusses the mediation standards and expectations placed upon mediators and the principles that guide mediation processes, especially neutrality and party autonomy. The chapter analyzes how these frameworks are designed to facilitate effective mediation while addressing any existing gaps or shortcomings.

Chapter three analyses Kofi Annan's mediation efforts during Kenya's 2007-2008 political crisis as a case study. Further, it analyzes the strategies employed by Annan, the context of the conflict, and the specific legal challenges encountered during the mediation process. The chapter discusses how political dynamics influenced the principles of impartiality and party autonomy and consequently compliance with mediated agreements while highlighting lessons learned from this historical example.

Chapter four synthesizes findings from previous chapters to discuss the broader implications of the identified problems within Kenya's mediation frameworks. It provides a justification for why addressing these challenges is critical for effective conflict resolution. Based on this analysis, the chapter offers recommendations for improving mediation practices in politically charged contexts, including suggestions for policy reforms, training for mediators, and enhancing accountability mechanisms.

**CHAPTER TWO: EFFECTIVENESS OF THE EXISTING LEGAL,
POLICY, AND REGULATORY FRAMEWORKS IN THE MEDIATION OF
POLITICALLY CHARGED CONFLICTS IN KENYA**

2.1 Introduction

The legal framework for mediation in Kenya is a multifaceted system that integrates national statutes, international treaties, and principles of International Law to facilitate the resolution of disputes outside traditional court settings.⁷⁰ This chapter delves into the statutory provisions that underpin mediation practices in Kenya, including the pivotal role of the Constitution and specific legislation and prospective legislations such as the Civil Procedure Act and the Mediation Bill of 2020 respectively. Additionally, it examines the influence of international legal instruments that promote alternative dispute resolution (ADR) mechanisms, reflecting Kenya's commitment to harmonizing its legal processes with global standards. By analyzing these various layers of legal authority, this chapter aims to provide a comprehensive understanding of how mediation is structured within Kenya's legal landscape, highlighting both its potential and challenges in fostering effective dispute resolution in the mediation of politically charged conflicts.

2.2 National Legal Instruments

2.2.1 The Constitution of Kenya, 2010

Article 159(2)(c) of the Constitution of Kenya (2010) requires the judiciary to promote alternative dispute resolution methods including mediation, in the administration of justice. Being the supreme law of the land, more statutes in Kenya established more laws to bring the Article mentioned above into effect.

Kenyan courts have interpreted Article 159(2)(c) expansively, underscoring its role in fostering amicable settlements, reducing case backlogs, and promoting party autonomy. The judiciary has applied this provision in various contexts, including politically sensitive disputes. For instance, gubernatorial election disputes often involve public officials whose cohesion is critical for governance and stability.⁷¹ Mediation offers a non-adversarial mechanism that preserves

⁷⁰National Legal Aid Service (NLAS). 'Alternative Dispute Resolution.' <https://www.nlas.go.ke/alternative-dispute-resolution/> On November 15, 2024.

⁷¹ 2. Korir Cynthia Chepkurui, 'Mediation and the Resolution of Private Misdemeanours in Kenya.' Strathmore University Law School, 2019.

relationships while resolving conflicts expeditiously.⁷² An example is the mediated resolution of disputes following the 2017 gubernatorial elections in Wajir County, where mediation facilitated reconciliation between rival factions, averting prolonged litigation and ensuring continuity in governance.⁷³

Despite its advantages, mediation in politically charged disputes faces challenges such as power imbalances between disputants and ensuring mediator impartiality. These issues can undermine party autonomy and compliance with mediated agreements. Furthermore, weak enforcement mechanisms have limited the effectiveness of mediation in high-stakes political conflicts.

2.2.2 Civil Procedure Act

Section 59 of the Civil Procedure Act of Kenya⁷⁴ references cases to mediation and arbitration. It provides that the court, where it deems appropriate to do so⁷⁵, or where the law so requires⁷⁶, direct that any dispute presented before it be referred to mediation. The principle of party autonomy is also promoted as the Court is required to direct such disputes to mediation if the parties concerned in the dispute request that the dispute be referred to mediation.⁷⁷ Lastly, Section 59 (B) (4) and (5) provide the procedure through which an agreement between the parties to a dispute as a result of the process of mediation shall be recorded and registered in court.⁷⁸ Such an agreement shall be enforceable as a judgement and an appeal is not provided.⁷⁹

The Civil Procedure Act of Kenya also operationalizes⁸⁰ the Mediation (Pilot Project) Rules 2015,⁸¹ which were implemented to mark the beginning of court-annexed mediation in the Commercial and Family Divisions of the High Court of Kenya.⁸² These Rules provide for the conduct of both the parties of the mediator and the parties to the mediation⁸³, as well as procedural rules ranging from appointment of the mediator, the role of the Court, and

⁷²Kariuki M., 'Court Annexed ADR in the Kenyan Context', University of Nairobi Press, 2020. Pg 1-5.

⁷³Korir Cynthia Chepkurui, 'Mediation and the Resolution of Private Misdemeanours in Kenya.' Strathmore University Law School, 2019.

⁷⁴ Civil Procedure Act Kenya, Cap. 21.

⁷⁵ Section 59 (B) (1) (b) of the Civil Procedure Act Kenya, Cap 21.

⁷⁶ Section 59 (B) (1) (c) of the Civil Procedure Act Kenya, Cap 21.

⁷⁷ Section 59 (B) (1) (a) of the Civil Procedure Act Kenya, Cap 21.

⁷⁸ Section 59 (B) (4) of the Civil Procedure Act Kenya, Cap 21.

⁷⁹ Section 59 (B) (5) of the Civil Procedure Act Kenya, Cap 21.

⁸⁰ Section 81 of the Civil Procedure Act Kenya, Cap 21.

⁸¹ The Mediation (Pilot Project Rules) 2015

⁸² Section 1 and 2 of The Mediation Pilot Project Rules 2015.

⁸³ Section 9 and 10 of The Mediation Pilot Project Rules, 2015.

documentation. The project was a success, leading to the establishment of Court Annexed Mediation in the judiciary.

Presently, the Court-Annexed Mediation Rules in Kenya (hereinafter referred to as CAM) govern the mediation process in Kenya. They were established through Legal Notice No. 145 of 2022, which came into effect on September 2, 2022.⁸⁴ These Rules are established under the Civil Procedure Act and are derived from the Mediation (Pilot Project Rules) 2015.⁸⁵

These Rules are designed to facilitate mediation within the judicial process, allowing courts to refer cases to mediation at any stage before final judgment.⁸⁶ The primary purpose of these rules is to promote amicable resolution of disputes, thereby reducing the backlog of cases in the courts and enhancing access to justice.⁸⁷

One of the key features of the Court-Annexed Mediation Rules is the ability for courts to refer cases to mediation either upon request from the parties involved or at the court's discretion.⁸⁸ This referral can occur at any stage of the proceedings before a final judgment is made. To ensure that only suitable cases are referred to mediation, a screening process is implemented. This screening takes place at the close of pleadings or another appropriate stage determined by the court.⁸⁹

In 2020, the Parliament of Kenya drafted the Mediation Bill of Kenya. However, the Bill was withdrawn in February 2022 by the leader of the majority party.⁹⁰ The withdrawal of the Bill was on the grounds of enabling further consultations and also incorporating additional input by the National Dispute Resolution Steering Committee.⁹¹ The Bill sought to provide for ⁹² the

⁸⁴ Kenya National Assembly. *The Civil Procedure (Court-Annexed Mediation) Rules, 2022*. Legal Notice No. 145 of 2022. September 2, 2022.

⁸⁵ Waruingi, Loise. 'Court Annexed Mediation Process in Kenya: How Matters Are Handled.' LinkedIn Post. <https://www.linkedin.com/pulse/court-annexed-mediation-process-kenyahow-matters-loise-waruingi/> on November 27, 2024.

⁸⁶ Muriuki, K. 'Introduction of Court-Annexed Mediation into the Justice System in Kenya.' *Transnational Dispute Management* (2017).

⁸⁷ Waruingi, Loise. 'Court Annexed Mediation Process in Kenya: How Matters Are Handled.' LinkedIn Post. <https://www.linkedin.com/pulse/court-annexed-mediation-process-kenyahow-matters-loise-waruingi/> on November 27, 2024.

⁸⁸ Section 5 (1) of the Civil Procedure (Court Annexed Mediation) Rules 2022.

⁸⁹ Section 5 (1) of the Civil Procedure (Court Annexed Mediation) Rules 2022.

⁹⁰ This was done in accordance to Standing Order 140 (1) which provides that: - Either before the commencement of business or on the Order of the Day for any stage of the Bill being read, the Member in charge of the Bill may, without notice, claim to withdraw a bill.

⁹¹ Kenya National Assembly. *Withdrawal of the Mediation Bill (National Assembly Bill No. 17 of 2020)*. February 1, 2022.

⁹² Kenya National Assembly. *Withdrawal of the Mediation Bill (National Assembly Bill No. 17 of 2020)*. February 1, 2022.

Settlement of civil disputes by mediation, set out the principles applicable to mediation, provide for the establishment of the Mediation Committee and provide for the accreditation or registration of mediators and recognition and enforcement of settlement agreements

However, the leader of the majority conveyed that a comprehensive policy had been prepared, namely the National Alternative Dispute Resolution Policy, 2021, which is likely to substantially alter the content of the Bill, as well as other related legislation.⁹³

2.3 International and Regional Legal Instruments

The Constitution of Kenya provides for the application and relevance of International Law and treaties in Kenya in Articles 2 (5) and (6) which state that the “general rules of international law shall form part of the law of Kenya” and “Any treaty or convention ratified by Kenya shall form part of the law of Kenya...”⁹⁴

Furthermore, Section 8(9) of the Treaty and Ratification Act of Kenya states that “...parliament shall not approve the ratification of a treaty or part of it if its provisions are contrary to the Constitution, nor shall the House approve a reservation to a treaty or part of it if that reservation negates any of the provisions of the Constitution even if the reservation is permitted under the relevant treaty.”⁹⁵

Kenya is a Contracting State to the Convention on Choice of Court Agreements (hereinafter "the Convention"), adopted under the auspices of the Hague Conference on Private International Law on June 30, 2005, is bound by its provisions governing exclusive jurisdictional clauses and the enforcement of foreign judgments in civil or commercial matters.⁹⁶ Pursuant to Article 3(c) of the Convention, Kenya recognizes the validity of exclusive choice of court agreements (ECCAs) that designate its courts, or those of another Contracting State, as having jurisdiction over disputes arising from defined legal relationships, provided such agreements are documented in writing or through accessible means for subsequent reference.⁹⁷ Furthermore, Article 3 (d) provides that these agreements are treated as independent from the underlying contract's validity,

⁹³ Kenya National Assembly. Withdrawal of the Mediation Bill (National Assembly Bill No. 17 of 2020). February 1, 2022.

⁹⁴ Constitution of Kenya (2010).

⁹⁵ Treaty and Ratification Act of Kenya (2012).

⁹⁶ Hague Conference on Private International Law. Guide to Good Practice under the Hague Convention On Choice of Court Agreements on 30 June 2005

⁹⁷ Hague Conference on Private International Law. Guide to Good Practice under the Hague Convention on Choice of Court Agreements.

reinforcing party autonomy and legal certainty in cross-border transactions.⁹⁸ Under Article 5, Kenyan courts designated in an ECCA are obligated to exercise jurisdiction unless the agreement is nullified under Kenyan law, while courts not chosen must suspend or dismiss proceedings unless exceptional grounds apply, such as manifest injustice or public policy violations.⁹⁹

While the Convention does not directly govern mediation, its framework indirectly influences Kenya's mediation landscape by fostering predictability in jurisdictional outcomes, thereby incentivizing parties to consider mediation as a complementary dispute resolution mechanism. This interplay is evident in Kenya's court-annexed mediation system, introduced in 2015 under Judiciary guidance, which aligns with the Convention's emphasis on procedural efficiency and reduced judicial congestion.¹⁰⁰ The Convention's recognition of interim measures further allows Kenyan courts to preserve parties' rights during mediation processes.¹⁰¹ Kenya's ratification of the Singapore Convention on Mediation¹⁰² bolsters this synergy by enabling cross-border enforcement of mediated settlements, creating a cohesive ecosystem where mediation and litigation coexist as viable alternatives. Notably, Kenya's adherence to the Convention's reciprocity principles under Article 22 of the Convention and its reservations under Article 21, which permit non-application to specific matters of strong national interest, further ensure alignment with domestic policy priorities while maintaining compliance with international norms.¹⁰³ Collectively, these instruments enhance Kenya's dispute resolution framework, promoting mediation as a strategic adjunct to litigation while upholding jurisdictional clarity and enforceability under the mediation and litigation coexistence as viable alternatives.

Kenya's role in international mediation is significantly influenced by its status as a member state of the United Nations, having joined the organization on December 16, 1963.¹⁰⁴ As a member of the UN, Kenya subscribes to the principles outlined in the UN Charter, which explicitly recognizes mediation as a legitimate method for the peaceful settlement of disputes between

⁹⁸ Hague Conference on Private International Law. Guide to Good Practice on Choice of Court Agreements. under the Hague Convention of 30 June 2005

⁹⁹ Article 6 of the Hague Conference on Private International Law. Guide to Good Practice on Choice of Court Agreements. under the Hague Convention of 30 June 2005

¹⁰⁰ Court Annexed Mediation Rules 2015.

¹⁰¹ Article 7 of the Judicature Act of Kenya.

¹⁰² Singapore Convention on Mediation 2018.

¹⁰³ Singapore Convention on Mediation 2018.

¹⁰⁴ Kenya Permanent Mission to the United Nations. 'About' <https://www.un.int/kenya/about#:~:text=The%20Mission%20covers%20a%20wide,of%20interests%20to%20the%20country/> On November 27, 2024.

States.¹⁰⁵ Article 33 of the UN Charter emphasizes that parties to any dispute should seek solutions through negotiation, inquiry, mediation, arbitration, or other peaceful means.

Kenya has actively participated in various peace processes and conflict resolution efforts regionally and internationally. Its commitment to mediation is evident in its recent tenure as a non-permanent member of the UN Security Council from January 2021 to December 2022.¹⁰⁶ During this period, Kenya focused on issues such as regional peace and security, humanitarian action, and justice, human rights, and democracy.¹⁰⁷ This involvement has allowed Kenya to contribute its wealth of experience in mediation and peacebuilding to the broader international community.

Kenya held the presidency of the United Nations Security Council (UNSC) in February 1997 and May 1998 under the leadership of Ambassador Njuguna M. Mahugu.¹⁰⁸ During Kenya's presidency in 1997, the Security Council prioritized conflicts involving African countries. A notable example was Resolution 1097 (1997), which endorsed a five-point plan for the eastern Democratic Republic of Congo. This plan called for an immediate cessation of hostilities, the withdrawal of all external forces including mercenaries, reaffirmation of respect for national sovereignty and territorial integrity, protection and security for all refugees and displaced persons, and a rapid and peaceful resolution of the crisis through dialogue, electoral processes, and convening an international conference on peace, security, and development in the Great Lakes region.¹⁰⁹

Ambassador Mahugu played a crucial role in urging Angola's President Eduardo dos Santos and armed opposition leader Jonas Savimbi to adhere to the Lusaka Protocol and relevant Security

¹⁰⁵ Article 33, United Nations Charter. <https://treaties.un.org/doc/> The UN Charter explicitly recognizes mediation as one of the methods for the peaceful settlement of disputes between states. Article 33 of the Charter lists mediation alongside negotiation, inquiry, and arbitration, establishing it as a legitimate avenue for resolving international conflicts. This foundational principle underscores the UN's commitment to promoting mediation efforts through various resolutions and initiatives aimed at preventing conflicts and fostering dialogue among member states.

¹⁰⁶ Citizen Support. 'Third Time's a Charm: Kenya's Impressive Run at the UNSC.' January 9, 2023. <https://www.citizensupport.go.ke/post/third-time-s-a-charm-kenya-s-impressive-run-at-the-uns-citizen-support/> on November 27, 2025.

¹⁰⁷ KIPPRA. 'Kenya's Roles and Priority Objectives at the United Nations Security Council for 2021-2022.' Accessed <https://kippra.or.ke/kenyas-roles-and-priority-objectives-at-the-united-nations-security-council-for-2021-2022/> on November 27, 2024.

¹⁰⁸ KIPPRA. 'Kenya's Roles and Priority Objectives at the United Nations Security Council for 2021-2022.' 2024. <https://kippra.or.ke/kenyas-roles-and-priority-objectives-at-the-united-nations-security-council-for-2021-2022/> on November 27, 2024.

¹⁰⁹ KIPPRA. 'Kenya's Roles and Priority Objectives at the United Nations Security Council for 2021-2022.' 2024. <https://kippra.or.ke/kenyas-roles-and-priority-objectives-at-the-united-nations-security-council-for-2021-2022/> on November 27, 2024.

Council resolutions.¹¹⁰ Additionally, through a presidential statement delivered by Ambassador Mahugu, the Security Council demanded that both the Government of Unity and National Reconciliation and Savimbi's UNITA guarantee the unconditional safety and freedom of movement for all UN and international personnel in Angola.

During this period, Kenya's involvement in the UNSC reflected its commitment to addressing African conflicts diplomatically.¹¹¹ The emphasis on mediation and dialogue was evident in Kenya's approach to various regional issues, demonstrating its role as a mediator in promoting peace and stability across the continent.

While the International Court of Justice (hereinafter referred to as the ICJ) primarily functions through litigation rather than mediation, it plays a critical role in adjudicating disputes and providing advisory opinions on legal questions referred to it by UN bodies.

The court encourages parties to consider mediation before resorting to litigation, recognizing that mediation can facilitate dialogue and lead to mutually acceptable solutions. Although there is no formal doctrine of *stare decisis*¹¹² in International Law, the ICJ has established a practice of referring to its previous advisory opinions as guiding precedents.¹¹³ These advisory opinions are legal advice given by the ICJ to the United Nations or its specialized agencies, and greatly influence international mediation and conflict resolution.¹¹⁴ While these opinions are not binding, they carry substantial legal weight and moral authority¹¹⁵, often serving as instruments of preventive diplomacy and contributing to the development of international law.¹¹⁶

This practice reflects an understanding that peaceful dispute resolution methods, including mediation, should be prioritized.

¹¹⁰ KIPPRA. 'Kenya's Roles and Priority Objectives at the United Nations Security Council for 2021-2022.' <https://kippra.or.ke/kenyas-roles-and-priority-objectives-at-the-united-nations-security-council-for-2021-2022/> on November 27, 2024.

¹¹¹ Citizen Support. 'Third Time's a Charm: Kenya's Impressive Run at the UNSC.' January 9, 2023.

<https://www.citizensupport.go.ke/post/third-time-s-a-charm-kenya-s-impressive-run-at-the-uns-citizen-support/>

¹¹² American Bar Association. 'Understanding Stare Decisis.' Accessed December 9, 2024.

https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis/.

¹¹³ Article 96 of the United Nations Charter.

¹¹⁴ Lando, M. 'Advisory Opinions of the International Court of Justice in Respect of Disputes.' *Columbia Journal of Transnational Law*, 2021. Accessed November 30, 2024. <https://www.jtl.columbia.edu/volume-61/advisory-opinions-of-the-international-court-of-justice-in-respect-of-disputes/>

¹¹⁵ 'The Advisory Function of the International Court of Justice.' *Journal of International Dispute Settlement*, 2020.

¹¹⁶ United Nations. 'What is an Advisory Opinion of the International Court of Justice (ICJ)?' Last Updated: December 5, 2023. <https://ask.un.org/faq/208207/> on November 30, 2024.

The ICJ has issued advisory opinions that indirectly support mediation by emphasizing its role in conflict resolution. For example, in cases concerning State obligations under international treaties, the court has highlighted that States should seek amicable solutions through negotiation or mediation before escalating disputes.¹¹⁷ Such opinions reinforce the notion that mediation is a preferred method for addressing international conflicts.

2.4 Does The Legal, Policy and Regulatory Frameworks in Kenya Sufficiently Provide for the Mediation of Politically Charged Conflicts?

In as much as the diverse legal framework in Kenya provides for and supports mediation in various disputes, there is a gap in the mediation of politically charged conflicts. This is because the legal framework is somewhat curated to deal with mediation in family matters and commercial disputes.¹¹⁸ In politically charged conflicts, there are other factors to consider such as political and social acceptance, as well as the participation and care of the broader pool of stakeholders, which in this case, are the citizens of Kenya.

Some mediation principles are universal such as voluntariness, neutrality, impartiality and party autonomy.¹¹⁹ These principles are at the core of mediation as a dispute resolution mechanism. However, in the mediation of politically charged conflicts, there is more focus on negotiations, State interests and international participation.¹²⁰ Furthermore, there is no specific established committee that regulates and oversees such mediations, and there are no specific rules, policies or guidelines that guide such mediations.

Furthermore, the absence of comprehensive international guidelines and rules governing mediation significantly impairs the conduct of mediation processes, particularly in politically sensitive and internationally influenced disputes.¹²¹ The lack of standardized protocols creates

¹¹⁷ Princeton University. 'Advisory Function in International Court of Justice: Are States Resorting to Advisory Proceedings as 'Soft' Litigation?' Accessed November 25, 2024. <https://jpia.princeton.edu/news/advisory-function-international-court-justice-are-states-resorting-advisory-proceedings-%E2%80%9Csoft%E2%80%9D/> on November 25, 2024.

¹¹⁸ Kraidoadvocates. 'Mediation in Kenya: A Complete Guide & Benefits.' Accessed December 9, 2024. <https://kraidoadvocates.com/mediation-in-kenya/>. On December 9, 2024.

¹¹⁹ Supreme Court of Ohio. 'Core Values for Mediation.' January 2017. <https://www.supremecourt.ohio.gov/docs/JCS/disputeResolution/civilStalking/resources/coreValues.pdf/> On December 9, 2024.

¹²⁰ Arbitration India. 'Absence of Universal Mediation Procedure & Ethical Norms.' Accessed December 9, 2024. https://www.arbitrationindia.com/pdf/mediation_ethics.pdf/ On December 9, 2024.

¹²¹ Arbitration India. 'Absence of Universal Mediation Procedure & Ethical Norms.' Accessed December 9, 2024. https://www.arbitrationindia.com/pdf/mediation_ethics.pdf/ On December 9, 2024.

uncertainty regarding the roles, duties, and procedural frameworks applicable to mediators, thereby resulting in inconsistencies in mediation practices. This regulatory vacuum undermines the legitimacy and predictability of mediation processes, leaving mediators without clear criteria for addressing complex issues such as power imbalances, cultural sensitivities, and competing geopolitical interests. Consequently, the absence of a unified international framework compromises the effectiveness of mediation as a dispute resolution mechanism.¹²²

In the Kenyan context, the absence of a dedicated Mediation Act exacerbates these challenges by leaving a critical gap in the domestic legal framework for mediation. The enactment of such legislation would provide a comprehensive legal foundation for mediation processes, ensuring that they are tailored to Kenya's unique historical, cultural, and societal values. A Mediation Act could codify procedural rules, establish ethical standards for mediators, and define qualifications for both domestic and international mediators. Furthermore, it could include provisions for the appointment of international mediators while safeguarding Kenya's sovereignty by ensuring that agreements reached through mediation are consistent with national interests and constitutional principles.

The lack of such legislation also limits Kenya's ability to effectively incorporate international actors into its mediation processes. While international mediators often bring neutrality and expertise to politically charged disputes, their involvement must be carefully regulated to ensure respect for Kenya's cultural heritage and governance structures. A Mediation Act could provide clear guidelines on balancing the contributions of international mediators with the preservation of state sovereignty and local self-determination. By addressing these gaps through comprehensive legislation, Kenya would enhance the legitimacy, consistency, and cultural appropriateness of its mediation framework while aligning it with international best practices. Such a framework would strengthen Kenya's capacity to resolve disputes effectively in politically sensitive contexts while protecting its national interests.

Lastly, the lack of a Mediation Act establishing the rules and principles of mediation is an obstacle as there is no specific statute to be referenced in these special mediation processes. This leads to more focus on the elite's negotiations as opposed to protecting and involving the public as stakeholders in the matter. Furthermore, mediation is confidential in nature, meaning that if

¹²² Arbitration India. 'Absence of Universal Mediation Procedure & Ethical Norms.' Accessed December 9, 2024. https://www.arbitrationindia.com/pdf/mediation_ethics.pdf/ On December 9, 2024.

such a mediation occurs, the details will not be disclosed to the public at all.¹²³ Additionally, the involvement of international actors influences the mediator's neutrality and impartiality, while also influencing the disputing parties' autonomy. The law is also silent in such mediations as there is no Mediation Act that establishes clear rules and principles for mediation creates significant obstacles in effectively conducting mediation processes according to recognized standards. This gap often results in a focus on elite negotiations, sidelining the broader public interest and participation of citizens as stakeholders in these matters.

¹²³ Goncalves A, '4th Key-Professionalism: Create a Universal Code of Disclosure.'

CHAPTER THREE: CASE STUDY OF KOFI ANNAN'S MEDIATION OF THE 2007/2008 POLITICALLY CHARGED CONFLICT IN KENYA

3.1 Introduction

Scholars have stated that the violence following the 2007 Kenyan elections was not solely driven by ethnic hatred. Instead, they argue that the conflict was deeply rooted in Kenya's economic and political history, with economic disparities and political manipulation of ethnic identities playing significant roles.¹²⁴

In Kenya, successive regimes have consistently prioritized the political empowerment of the President's ethnic group, often at the expense of others. This has led to uneven development, with the President's region typically benefiting more than others.¹²⁵ During Jomo Kenyatta's presidency, the Kikuyu enjoyed significant advantages over other groups, like the Luo and Luhya. Under Daniel Arap Moi's rule, the Kalenjin rose to prominence, eventually succeeding the Kikuyu as the dominant group by the end of his 24-year tenure. When Mwai Kibaki took office, the Kikuyu regained their position of influence.¹²⁶

The persistence of this ethnic favoritism reflects a failure by Kenya's political leaders to break away from the colonial legacy of divide and rule.¹²⁷ This approach has been identified as one of the country's most significant weaknesses since independence, as it perpetuates ethnic divisions and undermines efforts to achieve equitable development across all regions.

3.2 Case Summary

The 2007 post-election violence in Kenya constitutes a politically charged conflict due to its roots in longstanding grievances over the distribution of power and resources, exacerbated by ethnic divisions.¹²⁸

¹²⁴ Leibold, Annalisa. Ethnic or Economic Violence: The Real Cause of Kenya's 2007 Election Violence. SSRN (2015) /https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620514/, on December 29, 2024.

¹²⁵ Oyugi, W.O. (2001), Ethnic Conflicts in the Great Lakes Region, Paper presented at the Great Lakes Conference on Ethnicity; Klopp, J. M. (2002), Can Moral Ethnicity Trump Political Tribalism? The Struggle for Land and Nation in Kenya, *African Studies*, Vol. 62, No. 2.

¹²⁶ Klopp, J. M. (2002). Can Moral Ethnicity Trump Political Tribalism? The Struggle for Land and Nation in Kenya. *African Studies*, Vol. 62, No. 2.

¹²⁷ Leys, C. (1975). Underdevelopment in Kenya: The Political Economy of Neo-Colonialism. Heinemann.

¹²⁸ Johnson, Kirsten, "A National Population-Based Assessment of 2007–2008 Election-Related Violence in Kenya." *Conflict and Health* 8, no. 1 (2014): 2.

The 2007 Kenyan presidential campaign was marked by intense passion, with the Party of National Unity (PNU) often seen as representing the dominant economic and political elite from the Gikuyu community and its allies (nicknamed the Mount Kenya Mafia), such as the Embu and Meru.¹²⁹ In contrast, the Orange Democratic Movement (ODM) symbolized a broader coalition, particularly among the Luo and Kalenjin communities.¹³⁰ This election was the closest since the reintroduction of multiparty politics in 1992, with President Mwai Kibaki declared the winner by the Electoral Commission of Kenya (ECK) with a margin of about 225,000 votes over Raila Odinga.¹³¹

Although voting was peaceful, delays and confusion in announcing the results created unease, eventually escalating into violence.¹³² The ODM disputed the outcome, alleging electoral irregularities, including claims of rigging at polling stations and discrepancies in the tallying process. Specifically, they pointed out that results were announced without necessary documentation in several constituencies and that there were discrepancies between the results reported by returning officers and those announced by the ECK.¹³³ This dispute triggered a political crisis, with Kenya experiencing widespread violence that lasted nearly a month.

The violence in Kenya resulted in significant human and material losses, with over 1,200 fatalities reported, thousands injured, and more than 300,000 people displaced. Additionally, approximately 42,000 homes and numerous businesses were either looted or destroyed. There

¹²⁹ Amnesty International. Kenyan Elections: Anxiety and Unhealed Wounds as 2007-8 Victims Return to the Polls. <https://www.amnesty.org/en/latest/campaigns/2017/08/kenyan-elections-anxiety-and-unhealed-wounds-as-2007-8-victims-return-to-the-polls/> . on December 28, 2024.

¹³⁰ Wanyeki, M. (2008), Lessons from Kenya: Women and the Post Election Violence, Africa Gender Issue, Feminist Africa 10: Militarism, Conflict and Women's Activism, Cape Town: Africa Gender Institute, University of Cape Town. Pg 91, on December 28, 2024.

¹³¹ United Nations Office of the High Commissioner for Human Rights (2008), Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008, Geneva: OHCHR; Kanyinga, K., Long, J.D., and Ndi, D. (2010), Was it Rigged? A Forensic Analysis of Vote Returns in Kenya's 2007 Election, in Tensions and Reversals in Democratic Transitions: Kenya 2007 General Elections, Nairobi, Kenya: Society for International Development; Kenya National Commission on Human Rights (2008), On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence, Nairobi: KNCHR.

¹³² Ochieng, Charles & Matanga, Frank & Iteyo, Chrispinous. (2023). Causes and Consequences of Post-Election Violence in Kenya. African Journal of Empirical Research. 4. 480-492. <https://www.ajol.info/index.php/ajempr/article/view/283560/267141/> , on December 28, 2024.

¹³³ Ochieng, Charles & Matanga, Frank & Iteyo, Chrispinous. (2023). Causes and Consequences of Post-Election Violence in Kenya. African Journal of Empirical Research. 4. 480-492.

were also substantial reports of sexual violence during this period.¹³⁴ It became clear that the election controversy had exposed deep-seated tensions within the country. The PNU maintained that Kibaki's victory was legitimate, while the ODM insisted that Odinga was the rightful winner, citing irregularities in the electoral process.¹³⁵ For the first time, both local and international observers agreed that the counting and tallying processes were flawed, further fueling the crisis.

The Annan-led mediation process was crucial in ending the violence and setting the stage for further reforms. It was followed by other agreements and reports aimed at addressing the underlying issues that led to the crisis. One such document is the Kenya National Dialogue and Reconciliation Agreement¹³⁶ for the Implementation of the Recommendations of the Commission of Inquiry into Post-Election Violence, which outlines steps for reform and accountability.

3.2.1 International Involvement

The 2007-2008 Kenyan post-election crisis was not merely a domestic issue but had profound regional implications.¹³⁷ As a critical economic and communication hub in East Africa, Kenya's stability is essential for maintaining regional trade, security, and economic development.¹³⁸ The crisis's impact extended beyond Kenya's borders, affecting regional stability and prompting swift intervention from the international community.¹³⁹

International stakeholders recognized that they could not afford to disregard Kenya's post-election crisis for several compelling reasons. Firstly, Kenya's strategic position in East Africa meant that instability there could have far-reaching consequences for regional trade,

¹³⁴ Office of the High Commissioner for Human Rights (OHCHR). UN Human Rights Team Issues Report on Post-Election Violence in Kenya. Press Release, March 18, 2008. <https://www.ohchr.org/en/press-releases/2009/10/un-human-rights-team-issues-report-post-election-violence-kenya/> on December 27, 2024.

¹³⁵ Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.

¹³⁶ Government of Kenya. The Kenya National Dialogue and Reconciliation Agreement for the Implementation of the Recommendations of the Commission of Inquiry into Post Election Violence. (2008) <https://www.legal-tools.org/doc/f6930d/pdf/> on December 24, 2024.

¹³⁷ Brown S. 'Donor Responses to the 2008 Kenyan Crisis: Finally Getting It Just About Right?' African Affairs 108, no. 432 (2009): pg 351-371.

¹³⁸ Brown S. 'Donor Responses to the 2008 Kenyan Crisis: Finally Getting It Just About Right?' African Affairs 108, no. 432 (2009): pg 351-371.

¹³⁹ Brown S. 'Donor Responses to the 2008 Kenyan Crisis: Finally Getting It Just About Right?' African Affairs 108, no. 432 (2009): pg 351-371.

security, and economic development.¹⁴⁰ Any disruption in Kenya could ripple across the region, impacting neighboring countries and undermining regional stability.¹⁴¹ Secondly, the crisis led to a severe humanitarian emergency. The violence resulted in over 1,300 deaths and the displacement of more than half a million people, creating a significant humanitarian crisis that required immediate international attention.¹⁴² The scale of human suffering and displacement necessitated a rapid response to alleviate the suffering and prevent further escalation.¹⁴³ Subsequently, the international community, including organizations like the African Union and influential nations, recognized the need to stabilize Kenya to prevent further destabilization in the region and to protect their diplomatic and economic interests.¹⁴⁴

The African Union, with strong international support, mandated a Panel of Eminent African Personalities, chaired by Kofi Annan, to lead a mediation process between Kenya's lead protagonists. This intervention was critical in preventing further escalation and in promoting a fragile peace, though challenges related to accountability and reform persisted.

Engaging effectively in fragile and conflict-affected States requires a deep understanding of the local context, particularly when navigating political settlements and transitions. International stakeholders must become more attuned to the political realities on the ground to enhance their current approaches in fragile States. This involves recognizing the structural factors, key actors, institutions, and incentive structures that influence internal political dynamics.¹⁴⁵ In essence, they need to comprehend the socio-political and economic context, the structural and immediate conditions that contribute to conflicts.

In the case of Kenya before the 2007 crisis, critics argue that international donors lacked a comprehensive analysis of the country's historical, political, and economic dynamics.¹⁴⁶ Specifically, they failed to grasp the pervasive influence of informality and neo-patrimonialism

¹⁴⁰ Kagwanja P. 'Kenya: A Country in Crisis.' *Journal of Contemporary African Studies* 26, no. 3 (2008): pg 257-273.

¹⁴¹ Brown S. 'Donor Responses to the 2008 Kenyan Crisis: Finally Getting It Just About Right?' *African Affairs* 108, no. 432 (2009): pg 351-371.

¹⁴² Kagwanja P. 'Kenya: A Country in Crisis.' *Journal of Contemporary African Studies* 26, no. 3 (2008): pg 257-273.

¹⁴³ Kofi Annan. "The Kenya National Dialogue and Reconciliation Process." *Journal of African Law* 52, no. 2 (2008): Pg 153-165.

¹⁴⁴ Kofi Annan. "The Kenya National Dialogue and Reconciliation Process." *Journal of African Law* 52, no. 2 (2008): Pg 153-165.

¹⁴⁵ Kanyinga, K and Walker, S 2013 Building a Political Settlement: The International Approach to Kenya's 2008 Post-Election Crisis. *Stability: International Journal of Security & Development*, 2(2): 34, pp. 1-21,.

¹⁴⁶ Barkan, J. D. (2008a). Kenya After Moi. *Foreign Affairs*, 87(1), 87-100.

within Kenyan politics, including informal political power sources that significantly shape political behavior.¹⁴⁷

There are suggestions that the international community focused primarily on formal institutions rather than the incentive systems that drive political actors' actions, leading to a misguided optimism about Kenya's stability in East Africa. This oversight contributed to a false narrative that Kenya was an island of stability, despite underlying tensions.¹⁴⁸

Critics also contend that the international community overlooked growing signs of violence in the pre-election period. It is noted that the potential for political violence during the 2007 elections was high, yet international actors failed to recognize these warning signs, mistakenly believing that political violence was a relic of Kenya's past.¹⁴⁹ For instance, there was a violent incident involving the extrajudicial killings of nearly 500 suspected *Mungiki* members by the police, which was met with a surprisingly muted response from the international community.¹⁵⁰

The international community lacked a unified understanding of the Kenyan context, partly due to the sensitivity and limited sharing of formal governance and conflict analyses conducted by donors. Notable analyses included the African Union's African Peer Review Mechanism (APRM) Report¹⁵¹ from 2006 and the Kenya Joint Assistance Strategy (KJAS).¹⁵² The African Peer Review Mechanism (APRM) is a self-monitoring tool established by member states of the African Union. Through this mechanism, participating countries assist each other in adhering to agreed-upon political, economic, and corporate governance values, codes, and standards. These standards are aligned with the development objectives outlined in the New Partnership for Africa's Development (NEPAD). Notably, Kenya was among the first four African countries, along with Ghana, Rwanda, and Mauritius, to join the APRM in March 2004 at Abuja, Nigeria. This early adoption reflects Kenya's commitment to enhancing its governance and development practices through peer review and collaboration.

¹⁴⁷ Mueller, S. D. (2008). The Political Economy of Kenya's Crisis. *Journal of Eastern African Studies*, 2(2), 185-210.

¹⁴⁸ Mueller, S. D. (2008). The Political Economy of Kenya's Crisis. *Journal of Eastern African Studies*, 2(2), 185-210.

¹⁴⁹ Brown, S. (2009). Donor Responses to the 2007 Crisis in Kenya. *Canadian Journal of African Studies*, 43(1), 1-27.

¹⁵⁰ Cheeseman, N. (2008). The Kenyan Elections of 2007: An Introduction. *Journal of Eastern African Studies*, 2(2), 166-184.

¹⁵¹ African Peer Review Mechanism (APRM). (2006). Country Review Report of the Republic of Kenya. African Union.

¹⁵² Kenya Joint Assistance Strategy (KJAS). (2007). Government of Kenya and Development Partners. Nairobi: Government of Kenya.

The APRM report, compiled after the divisive 2005 constitutional referendum, accurately predicted future troubles if Kenya did not address its ethnic divisions, corruption, and poor governance.¹⁵³ Despite its insightful conclusions, the report's impact was short-lived.

3.3 The Mediation Process

The President of the African Union at the time of the crisis, Ghana's president John Kufuor, called an emergency meeting of the AU Commission and consulted African heads of State and the United Nations.¹⁵⁴ He planned a visit to Kenya and even sent representatives of the African Union to prepare for his visit.¹⁵⁵ However, he was informed that senior Kenyan officials were resisting AU intervention, stating that it would only amount to a cup of tea. President Kufuor then met with former UN Secretary General Kofi Annan to discuss the crisis.¹⁵⁶ Both agreed that Kufuor should go to Kenya to try and intervene. However, both sides of the dispute had to accept the visit.

While this was happening, President Kibaki sent a special envoy to Kufuor to brief him of the escalating violence. He invited Kufuor to Kenya to meet with both him and Raila Odinga, with the hopes of dialogue and reconciliation.¹⁵⁷ Kufuor, with some challenges, flew to Kenya and engaged the parties for two days. Unfortunately, his efforts did not lead to a truce. This was attributed to mistrust from the end of Raila Odinga, who even refused to meet Kufuor, fearing that it would mean that he was recognizing President Kibaki's election.¹⁵⁸

Kufuor then suggested that he put forward a panel, led by Kofi Annan, to facilitate dialogue between the parties from a neutral standpoint. Kofi Annan then made preparations for the mediation process, emphasising that it would be a single mediation process to prevent 'forum shopping'.¹⁵⁹ Multiple international agencies supported the process, which later proved crucial.

¹⁵³ African Peer Review Mechanism (APRM). (2006). Country Review Report of the Republic of Kenya. African Union. <https://au.int/en/organs/aprm/>

¹⁵⁴ 47 Kufuor to go to Kenya in attempt to ease crisis, Reuters, 5 January 2008.

¹⁵⁵ Brown, S. (2009), Donor Responses to the 2008 Kenyan Crisis: Finally getting it right?, *Journal of Contemporary African Studies*, 27:3, pp. 389-406.

¹⁵⁶ Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.

¹⁵⁷ Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.

¹⁵⁸ 47 Kufuor to go to Kenya in attempt to ease crisis, Reuters, 5 January 2008.

¹⁵⁹ Griffiths, M. (2008), *The Prisoner for Peace: An interview with Kofi A. Annan*, Geneva: Centre for Humanitarian Dialogue. - The term forum shopping generally refers to the practice of choosing a legal or mediation forum that is most favorable to one's case,

President Kibaki invited the President of Uganda, President Yoweri Museveni, who suggested a meeting with Kofi Annan before the mediation process to discuss a peace plan.¹⁶⁰ Annan declined the meeting and firmly stated that both parties to the mediation had to agree to such a meeting. He quickly consulted Raila Odinga who confirmed that the ODM had not made any such agreement.¹⁶¹ President Museveni, now compromised, no longer had a role in the mediation process and subsequently left. This illustrated Annan's impartiality as a mediator as attending the meeting would have undermined his credibility and neutrality and caused mistrust from Raila Odinga.

The Panel met ODM first for the preliminary mediation meeting where Raila Odinga set out their conditions for negotiation. They demanded that President Kibaki resign, a re-run of the election be conducted and a power-sharing transitional government to facilitate constitutional, land and legal reforms.¹⁶² However, the ODM emphasised that they were willing to reach an agreement provided that the implementation of said agreement would further be guaranteed by an international arrangement.¹⁶³ A challenge arose during the preliminary meeting with PNU, as they agreed to negotiate on the grounds that there were no preconditions made by their rival party.¹⁶⁴ They insisted that President Kibaki had fairly won the elections, and that any disputes should be resolved in court.¹⁶⁵ Furthermore, the violence was still escalating and the Panel sought to present evidence of progress to the public to de-escalate it. However, both parties were hesitant to meet. However, Annan finally got them to agree to meet publicly.

On 24th January 2008, Annan met the two principals alone and advised both parties that the people of Kenya were the ones suffering the most from the dispute. He encouraged them to commit to genuine dialogue and be willing to compromise as they addressed both short-term political issues and long-term solutions for the same.¹⁶⁶ This meeting subsequently ended with

¹⁶⁰Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.

¹⁶¹ Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya. Pg 24.

¹⁶² Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya. Pg 25.

¹⁶³Confidential progress report to the AU Chair, 28 January 2008.- Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya. Pg 24.

¹⁶⁴ Panel of Eminent African Personalities (2008), Confidential progress report to the AU chair, 28 January. Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya. Pg 24.

¹⁶⁵ Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.

¹⁶⁶ Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya

the handshake, where both principals held a short press briefing and addressed the country, and affirmed their desire for dialogue, and encouraged Kenyans to be peaceful.¹⁶⁷

Annan had recognised that direct negotiations between the principals would inevitably lead to confrontation and therefore asked them for representatives for the dialogue.¹⁶⁸ The Panel also went out into the field to see firsthand the effects of the post-election violence and prepared proposals for the government on how to assist and compensate the victims. They further encouraged the two principals that their main priority and unavoidable responsibility was to resolve the political crisis before them.¹⁶⁹

Eventually, after various stages of the mediation, the mediation was successful. The signing of the Principles of Partnership Agreement on February 28, 2008, was a watershed moment, as it brought an end to the violence and paved the way for a new political framework.¹⁷⁰ Kofi Annan noted that this marked the moment when Kenya pulled back from the brink.¹⁷¹ The agreement led to the formation of a Grand Coalition Government, which included both major political parties, ensuring a shared governance structure that helped stabilize the country.¹⁷²

The success of the mediation was further reinforced by the adoption of a new constitution in 2010, which included a progressive Bill of Rights and a devolved governance structure. This constitutional reform was a key outcome of the KNDR process and has been instrumental in fostering a more inclusive and democratic political environment in Kenya.¹⁷³

3.4 How the principles of party autonomy and impartiality were affected and safeguarded during the mediation process.

3.4.1 Party Autonomy

¹⁶⁷ Oral interview, Kofi Annan, 3 December 2010

¹⁶⁸ Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.

¹⁶⁹ Confidential annotations to the suggested agenda, Minutes of the Kenya National Dialogue and Reconciliation, First Session, 29 January 2008.

¹⁷⁰ Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya.

¹⁷¹ Kofi Annan, article, 3 March 2008. Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya. Pg 61, Accessed 28 December 2024.

¹⁷² Griffiths M. (2008), The Prisoner of Peace: An interview with Kofi A Kofi Annan, Centre for Humanitarian Dialogue.

¹⁷³ The Kenya National Dialogue And Reconciliation (KNDR) Monitoring Project [/https://Constitutionnet.Org/Sites/Default/Files/Project-Context-And-Summary-Of-Findings.Pdf/](https://Constitutionnet.Org/Sites/Default/Files/Project-Context-And-Summary-Of-Findings.Pdf/) , on January 3, 2025.

Party autonomy was illustrated through both parties agreeing to the mediation. This ensured commitment and demonstrated willingness and a level of trust in the appointed mediator. Subsequently, Annan's inclusive approach ensured that both parties, led by President Mwai Kibaki and opposition leader Raila Odinga, maintained control over their decisions throughout the negotiations. This was achieved through several key strategies. Firstly, Annan presented proposals rather than imposing solutions, allowing the parties to consider and negotiate terms that were acceptable to them. This is seen when the Panel drafted and sent proposals to the principals for their perusal and consideration. Furthermore, the Panel never forced appearances between the disputing parties and always ensured that they both voluntarily met at a venue they both agreed to. Thirdly, the Panel provided the alternative of having the principals appoint representatives of their choice to represent them and act in their capacity during the mediation process in order to avoid confrontation. Additionally, during preliminary mediation meetings, Annan listened attentively to the conditions set by both parties, ensuring that their concerns were addressed and respected.

Moreover, Annan never imposed his will on the parties but instead encouraged conciliation through a participatory process. He emphasized the importance of a single mediation process, preventing what he termed 'diplomatic tourism,' or 'forum shopping', where parties might seek alternative mediators if they were dissatisfied with the current process. This approach allowed the parties to focus on finding mutually acceptable solutions without external pressures or competing mediation efforts. The mediation process was structured to ensure that all agreements were signed by both parties and witnessed by Annan, providing a sense of ownership and commitment to the outcomes. This strategy not only protected party autonomy but also fostered a sense of responsibility among the parties for implementing the agreed-upon terms.

In terms of international involvement, this case illustrates how international participation can positively influence such a mediation. The international community supported the mediation through funding, humanitarian assistance and encouraging the parties to settle. At no point was there negative political pressure applied to force the hands of the parties.

The success of the mediation was further enhanced by Annan's ability to garner both Kenyan and international support for the process. His leadership and authority were crucial in maintaining

momentum during the negotiations, as he adapted his strategy to address emerging challenges and keep the talks moving forward. The eventual establishment of a Grand Coalition Government, facilitated by the mediation, marked a significant achievement in protecting party autonomy while promoting national stability. This power-sharing arrangement allowed both major political parties to participate in governance, ensuring that their interests were represented and respected. Furthermore, since all the terms of the agreement were developed by the parties, representing Kenyans, there was no foul play or interference with the sovereignty of the Republic of Kenya during the mediation process.

3.4.2 Impartiality

It is well observed that Annan employed various strategies to maintain neutrality and ensure that both parties were treated equally. The inclusive approach was crucial in fostering trust and confidence among the parties, which was essential for achieving a successful resolution to the conflict.

Firstly, Annan treated both principals—President Mwai Kibaki and opposition leader Raila Odinga—as equals, regardless of Kibaki's position as the incumbent president. This equal treatment was reflected in the smallest details such as the seating arrangements during negotiations¹⁷⁴, where both leaders were accorded the same level of respect and attention.

Annan's impartiality was further demonstrated by his willingness to meet with both parties separately, allowing each side to express their concerns and conditions without fear of bias.

Annan also ensured that both parties were consulted and agreed upon key decisions, such as the meeting with President Yoweri Museveni of Uganda. By cross-checking with both parties about their agreement to this meeting, Annan maintained transparency and ensured that neither side felt pressured or coerced into accepting external interventions.

Despite significant international involvement and pressure, Annan focused on Kenya's best interests and the parties' dispute without succumbing to external influences. He always ensured that any decisions made were made solely by the parties. He subtly addressed the humanitarian

¹⁷⁴ Kofi Annan Foundation. Back from the Brink: The 2008 Mediation Process and Reforms in Kenya. <https://www.kofiannanfoundation.org/publication/back-from-the-brink-the-2008-mediation-process-and-reforms-in-kenya/> on January 2, 2025.

and political crisis by reminding the parties of their responsibility to the citizens of Kenya before themselves. This also reflected the interests of the international community indirectly. This strategy allowed Annan to maintain control over the negotiations and ensure that the parties remained committed to finding a mutually acceptable solution.

The success of Annan's mediation was also facilitated by his ability to garner international support without compromising his impartiality. As much as he was the United Nations Chair at that time, he presented himself as a facilitator of the negotiation process. By absolving himself of that responsibility in the context of the mediation, he demonstrated his neutrality and impartiality by focusing entirely on the dispute at hand. Furthermore, his global stature and credibility as a mediator helped maintain momentum during the negotiations, as he adapted his strategy to address emerging challenges and keep the talks moving forward. The eventual establishment of a Grand Coalition Government, facilitated by the mediation, marked a significant achievement in promoting national stability while respecting the interests of both parties.

3.4.3 Shortcomings of the Mediation

While the mediation successfully addressed the immediate need to stop the violence and humanitarian crisis, as well as the disputed election results, it did not adequately address Kenya's long-standing issue of post-election ethnic violence. The mediation focused on immediate solutions, such as establishing a power-sharing government and setting up commissions to investigate electoral irregularities and post-election violence. However, it did not fully address the structural causes of ethnic disparities and tensions that have historically plagued Kenya's elections.

Despite the establishment of commissions like the Waki Commission, which recommended a special tribunal to prosecute those responsible for violence, the underlying ethnic divisions remained unresolved. The power-sharing agreement and subsequent reforms, such as the new constitution in 2010, were important steps toward stability, but they did not eliminate the ethnic tensions that continue to surface during presidential elections. Today, Kenya still experiences post-election tensions, highlighting the need for more comprehensive solutions to address these deep-seated issues.

CHAPTER FOUR: RESEARCH FINDINGS, CONCLUSION AND RECOMMENDATIONS

4.1 Research Findings

The principles of party autonomy and impartiality are fundamental to the effective mediation of politically charged conflicts and must be safeguarded to ensure legitimacy, fairness, and sustainability in conflict resolution processes. The 2007-2008 Kenyan post-election crisis serves as a critical case study, illustrating both the importance and challenges of upholding these principles. Kofi Annan's mediation, which led to the establishment of a power-sharing government, highlighted the complexities of balancing these principles in a politically sensitive environment. While the mediation process succeeded in restoring stability, it also underscored the need for comprehensive legal frameworks to address structural issues and safeguard these principles in future mediations.

Impartiality is central to the credibility of any mediation process. A mediator must remain neutral and independent, ensuring that all parties are treated equitably and that no undue influence compromises the process. Annan's impartial approach during the Kenyan mediation fostered trust among the conflicting parties, enabling constructive dialogue. However, as demonstrated by this case, impartiality can be challenged by external pressures, prior relationships with parties, or geopolitical interests. To mitigate such risks, mediators must adhere to strict ethical standards and disclose any potential conflicts of interest, as outlined in various international mediation guidelines and codes of conduct.

Equally critical is the principle of party autonomy, which ensures that parties retain control over the mediation process and outcomes. In politically charged conflicts like Kenya's post-election crisis, respecting party autonomy empowers stakeholders to craft solutions that reflect their unique cultural, historical, and political contexts. However, external actors often exert pressure on parties to reach agreements that align with international interests rather than local realities. This undermines self-determination and risks producing outcomes that lack legitimacy or long-term viability. Comprehensive legal frameworks, such as a Mediation Act tailored to Kenya's context, could address this gap by codifying procedural rules that balance party autonomy with international involvement while safeguarding state sovereignty.

The absence of a dedicated Mediation Act in Kenya further exacerbates these challenges. While Kenya has made strides in institutionalizing mediation through mechanisms like Court-Annexed Mediation, the lack of a comprehensive legislative framework leaves gaps in regulating mediator conduct, ensuring cultural sensitivity, and integrating international actors into domestic mediations. A Mediation Act would provide clear guidelines on mediator appointment, ethical standards, confidentiality, and enforcement of agreements. It would also accommodate Kenya's diverse cultural values and historical experiences while setting provisions for engaging international mediators without compromising national sovereignty.

The 2007-2008 Kenyan mediation provides valuable lessons for future conflict resolution efforts. It underscores the importance of impartiality in building trust among parties and highlights how respecting party autonomy fosters ownership of outcomes. However, it also reveals the limitations of ad hoc approaches to politically charged mediations. Comprehensive legal frameworks are essential to institutionalize these principles and address the structural issues that perpetuate conflict. Future mediations should prioritize inclusivity by engaging communities at all levels and ensuring that international support respects local contexts.

4.2 Conclusion

In conclusion, this thesis underscores the imperative of safeguarding the principles of party autonomy and impartiality in the mediation of politically charged conflicts. The efficacy of mediation as a conflict resolution mechanism hinges on its ability to preserve the voluntariness and agency of disputing parties while ensuring mediators maintain neutrality and avoid undue influence. Through a critical examination of jurisprudential frameworks and empirical case studies, this research highlights the need for robust legal and institutional safeguards to prevent coercive referrals, address power imbalances, and enforce mediated agreements. Ultimately, the preservation of these principles is crucial for fostering sustainable peace agreements that respect the rights and interests of all parties involved, thereby promoting justice and stability in politically sensitive contexts.

4.3 Recommendations

Firstly, it is crucial that Kenya enacts a comprehensive Mediation Act, which will provide a solid foundation for mediation practice in the country. Such a statute would positively influence mediation as the law reflects the various special circumstances of the country. The withdrawn Mediation Bill of 2020 provided a framework for civil dispute resolution through mediation, including accreditation of mediators and recognition of settlement agreements. However, the Bill should be revised to include provisions for community mediation, which is essential for addressing local disputes and fostering social cohesion. Community mediation can help resolve conflicts at the grassroots level, reducing the likelihood of larger-scale violence, while addressing the key underlying issues such as ethnic tensions. Such provisions will positively influence politically charged conflicts.

Secondly, any future mediation process should ensure public participation. While the Annan-led mediation successfully brought together political leaders, there was dissatisfaction among the public, who felt that their concerns were not adequately addressed. Public participation can be facilitated through town hall meetings, public forums, and social media engagement. This would help build trust in the mediation process and ensure that the agreements reached are more representative of the broader population.

International actors can play a supportive role in mediation, but it is crucial that they respect the sovereignty of the State. Understanding the local context is essential for effective mediation, and international actors should focus on providing technical assistance and support rather than dictating terms. The involvement of international leaders like Kofi Annan, who possess neutrality and impartiality, can be beneficial. Annan's leadership in the Kenyan mediation process demonstrated the value of having a respected international figure facilitate negotiations. For future mediations, a leader of an international organization would be an ideal candidate to conduct such efforts. This individual should possess the same qualities of neutrality, impartiality, and trust that Annan embodied. The success of the Annan-led mediation serves as a foundation for how politically charged conflicts should be addressed.

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