

The Responsibility to Protect and Kenya: Past Successes and Current Challenges

Introduction

The passing of the 4 August constitutional referendum in Kenya is a promising sign in the broader context of efforts to prevent atrocities and uphold the responsibility to protect (R2P). The peaceful referendum sharply contrasts with the wave of violence that erupted in the wake of the disputed December 2007 presidential election, when within hours of the announcement of the results violence broke out. Less than two months later 1,133 Kenyans had been murdered, unknown numbers raped, and over 500,000 forcibly driven from their homes. The perpetrators included individuals, militias and the police with victims often targeted on the basis of their ethnicity and corresponding perceived support for a particular presidential candidate.

International actors responded swiftly to crimes that appeared to rise to the level of crimes against humanity, crimes that states committed themselves to protect populations from in adopting R2P at the 2005 World Summit. This response, consisting primarily of an African Union (AU) led mediation process but also supported by the UN, Kenya's neighbors, key donors, and civil society, helped stem the tide of violence. Human Rights Watch and others referred to the response as "a model of diplomatic action under the responsibility to protect."

As the country moves towards elections in 2012, R2P remains relevant as the risk of reoccurrence of atrocities is present. The AU, UN and key states, must work with, and urge, the government to uphold its responsibility to protect. While implementing the reforms agreed to in the groundbreaking referendum will be crucial, as many are intended to address the underlying causes of violence, this alone will not be sufficient. Additional strategies to prevent atrocities and address protection gaps, including through the creation of contingency response plans to halt atrocities should they re-occur, will need to be developed.

Applying the Responsibility to Protect to 2007/8

In committing to uphold R2P the Kenyan government accepted the responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing. The government thus had a responsibility to: ensure that government officials did not incite or facilitate the commission of crimes; mitigate rampant hate speech; deter private actors from inciting, aiding or perpetrating crimes; arrest and prosecute perpetrators; and ensure that the police and the military observe international human rights standards and develop the capacity to respond rapidly to threats of atrocities.

In the context of a contested election the government was unable and unwilling to take the steps necessary to protect its population. When incumbent President Mwai Kibaki, a member of the Kikuyu ethnic group, was declared the victor over Raila Odinga, a Luo, on 27 December 2007, people swiftly took to the streets to protest the perceived rigging of the election. The protests, which had clear ethnic undertones, led to looted stores, destroyed homes, and displaced and killed Kenyans. The violence at first seemed spontaneous, but it soon became apparent that much of it was organized and targeted. Retaliatory killings, perpetrated often by militias (formed frequently along ethnic lines, and comprised of disenfranchised youth) became commonplace.

The scale of the violence and its widespread nature was unprecedented but some level of turmoil around the elections should have been anticipated and preventive action taken to avert possible atrocities. A warning of possible political unrest was issued by the African Peer Review Mechanism in 2006 and a pattern of violence, often of an ethnic nature, had marred elections in Kenya for over twenty years. It had developed as a result of a combination of factors including: politicization of ethnicity; corruption, abuse of power and non-adherence to the rule of law; a centralized and highly personalized form of governance; inequitable development and equally important, a winner-takes-all form of political victory that was perceived as benefiting the Kikuyu, together with a widespread perception that certain groups, including the Luo, were not receiving a fair share of resources.

A culture of impunity where perpetrators of past violence were not held accountable for their acts sent the signal that there would be no consequences for crimes committed around the 2007 election. In the months leading up to the election hate speech, including by political figures, was rampant as was the sending of incendiary SMS text messages. The government failed to address these warning signs or any of the underlying causes of the violence.

The state's ability to take protective action was impeded by institutional weaknesses. At times, poorly trained police forces committed crimes with impunity, and acted with allegiance to their ethnic groups and preferred political candidates rather than to the state. The military's reach across the country was limited creating a greater reliance on the police. Reports indicate that some police refused to intervene, resorted to disproportionate force, or carried out extra-judicial killings with one third of the victims reportedly killed by the police. Senior government officials,

political figures, and business leaders supporting both campaigns are also believed to have played a direct role in instigating the violence.

International Response

Galvanized by the violence unfolding and the government's failure to protect, regional and international actors responded swiftly. The Chairman of the AU, President Kufour of Ghana, authorized a panel of 'Eminent African Personalities' to mediate between the two presidential candidates. The panel consisted of the former UN Secretary-General Kofi Annan, former Tanzanian President Mkapa, and the former first lady of Mozambique, Graca Machel. On 10 January, Odinga and Kibaki agreed to participate in a 'national dialogue' led by the panel.

By entering into these negotiations, starting on 22 January, the parties agreed to address three agenda items in four weeks: (1) ending the violence; (2) addressing the humanitarian crisis and allowing the internally displaced to return home; and (3) creating a coalition government to lead the country and a commission of inquiry to examine the electoral process and attendant violence. By early February violence had greatly subsided and on 28 February a power-sharing government was formed.

Much remains unknown about the various factors that contributed to a cessation in violence. Undoubtedly international engagement, primarily through the AU panel, played a key role. The panel creatively used the media to update the public on the dialogue's progress and ensured that images of Kibaki and Odinga together, and messages calling for calm and unity, were regularly transmitted to the public. Kenyan civil society, notably Concerned Citizens for Peace, complemented international efforts by disseminating messages of peace at the local level.

Lingering Risks

A fourth agenda item that was to be dealt with over the course of the year, tackling the root causes of the violence, remains, with a few exceptions, unaddressed. As a result the underlying issues that contributed to the violence remain a source of tension today. However, the constitutional reforms adopted in the referendum could help address some of the causes, notably in regards to the distribution of political power and through the creation of a land commission. To make these reforms a reality the Kenyan government will need considerable international assistance.

While the referendum passed peacefully, worryingly campaigning involved the manipulation of ethnicity and religion, the use of hate speech, and acts of violence. The conduct of certain political actors and their supporters in

preparing for the referendum has thus engendered fears that ethnicity will again be used to mobilize actors to take up arms around the 2012 election. The Rift Valley is particularly susceptible to such mobilization and requires preventive attention. The region voted overwhelmingly 'no' in the referendum and experienced considerable violence following the 2007 election.

This is cause for concern because, while the government has signaled its commitment to security sector reform, the police force has yet to be reformed. Furthermore, a number of militias that perpetrated violence in 2007 continue to retain high-level political support. In addition, the belief that the government is unable to ensure the safety and security of its population, particularly outside of large urban centers, has reportedly contributed to a rise in individuals arming themselves. Finally, the potential impact of the International Criminal Court (ICC) investigation into the 2007 election violence remains uncertain. Prosecutions may deter future violence, but there is a risk that fear of prosecution, or the belief that prosecutions are biased against a particular ethnic group, could be used to instigate violence.

In advance of the referendum the government showed its commitment to prevention including by deploying 10,000 additional police. Equally significant was the unified position on the referendum that Odinga and Kibaki presented, thus helping to allay doubts about the capacity of the power-sharing agreement to survive until the elections. The government has also indicated its willingness to cooperate with the ICC's investigation, facilitated in part by the intervention of Kofi Annan – who provided a list of suspected perpetrators to the ICC. The international community should support these and other efforts, including security sector reform and domestic prosecutions, in order to improve the state's capacity to prevent and protect.

Conclusion

For those who regarded R2P as little more than military intervention, Kenya revealed how non-coercive tools, such as mediation, can help halt atrocities when employed early, with sufficient resources and international support. The response also provided a critical counter-argument to those who assert that R2P is about the powerful meddling in the affairs of the weak. The response was regionally driven, supported by the international community and is a powerful reminder of how R2P can save lives. The successful referendum is a positive step and the momentum must not be lost as the risk of atrocities remains. Preventive action must be taken today by the government, with international support, to avert crimes, and the need for a more costly and difficult response to halt crimes, in the future.