

The March 2013 elections in Kenya and the Responsibility to Protect

INTRODUCTION

On 4 March Kenyans will vote in highly anticipated elections. These elections will be Kenya's first since widespread violence following the December 2007 presidential election shocked the country and world. The 2007/8 violence lasted two months, during which time 1,133 Kenyans were killed, over 600,000 driven from their homes and more than 110,000 private properties were destroyed. The stakes during the upcoming elections are high and, while not inevitable, there is a serious risk of a recurrence of widespread violence.

The crimes perpetrated during the deadly 2007/8 post-election violence rose to the level of crimes against humanity, according to the International Criminal Court (ICC). These are crimes that the Kenyan government, along with every other United Nations (UN) member state, committed to protect populations from at the 2005 UN World Summit when affirming its support for the Responsibility to Protect (R2P). In keeping with R2P, international actors responded swiftly to halt the violence in Kenya and the response is widely cited as the first successful example of "R2P in practice."

With less than three weeks remaining before the 2013 elections, tensions are rising again. Inter-communal violence has already killed over 480 people in the past year. Tana River, Moyale, Turkana and Samburu counties have been hit particularly hard.

Many of the underlying causes of the 2007/8 post-election violence remain. Worryingly, new flashpoints for violence and new threats from actors such as Al-Shabaab have also emerged. Furthermore, the security sector's response to recent violence in Tana River county

raises serious questions about their ability to rapidly respond to mass atrocities should they recur.

Kenyans want to see their country emerge from this election unscathed. Since 2008, the Kenyan government has, in keeping with R2P and with the support of the international community, implemented important political, electoral and judicial reforms and enacted legislation to prohibit hate speech. Yet, movement on vital security sector reform and prosecutions for the 2007/8 post-election violence has been slow and sporadic.

This is a historic moment for Kenya with a new progressive constitution and a thriving economy. As the country marks its jubilee year, honoring 50 years of independence, considerable efforts have been taken to ensure that Kenya does not experience mass atrocities once again.

It is therefore imperative that, in keeping with R2P, the Kenyan government, with the support of the African Union (AU), UN, regional allies, donors and local civil society, intensify efforts to prevent a recurrence of violence and potential mass atrocities.

BACKGROUND

Electoral violence in Kenya is not new. At least 4,433 Kenyans have been killed and over 1.8 million people displaced by such violence since 1993. The scale and intensity of the 2007/8 post-election violence was, however, unprecedented. Within hours of the announcement of incumbent President Mwai Kibaki as the victor over Raila Odinga in the 27 December presidential election, protests over the perceived rigging of results quickly turned violent and mass atrocities were committed.

Victims were often targeted on the basis of their ethnicity and corresponding perceived support for a particular candidate. The violence at first seemed spontaneous, but it soon became apparent that much of it was organized. The perpetrators included individuals and militias, which were often comprised of disenfranchised youth.

International mediation led by Kofi Annan and an AU Panel of Eminent Personalities, with support from the UN, Kenya's neighbors, key donors and civil society, helped stem the tide of violence. The mediation effort, known as the Kenya National Dialogue and Reconciliation Process, led to a power-sharing agreement and the creation of an agenda for peace. Under agenda item 4, parties to the mediation made a commitment to address "long-term issues and the root causes of the conflict," including land reform and the distribution of political power.

Kenya held a referendum in 2010 that introduced groundbreaking reforms intended to address the underlying causes of the 2007/8 post-election violence, devolve power and resources to the local authorities and hold parties more accountable for their actions. New voting rules were introduced that require the president to win more than half the national votes and garner at least 25 percent of the vote in 24 of the 47 newly established counties. Campaigning for the referendum saw the manipulation of ethnicity and religion by numerous political actors, use of hate speech and acts of violence. Despite these worrying factors, the referendum was successfully passed.

On 4 March Kenyans will vote in their fifth multi-party election. The elections will be Kenya's most complex, with voters casting ballots in six simultaneous elections for candidates at the national and local level, including: president, lower house, senate, women's/youth/disabled representatives, county governors and local country assemblies. The two leading presidential candidates are Prime Minister Raila Odinga and Uhuru Kenyatta. It appears unlikely that either will achieve victory in the first round on 4 March. A run-off election to determine the winner is planned for 11 April.

Kenyatta, along with his running-mate, William Ruto, and two other men face ICC charges for crimes against humanity stemming from the 2007/8 post-election violence. Ruto's trial is set to begin at The Hague on 10 April and Kenyatta's will start the following day, the same day as the run-off election. Whether the two meet the "integrity standards" for candidates under the new constitution and will be permitted to run in the election

will be determined on 15 February when a Kenya court renders its judgment in a trial initiated by Kenyan non-governmental organizations.

As Kenya wrestles with how to deal with past crimes, inter-communal violence is rising again. Since August 2012, 183 people have been killed and 34,417 displaced by politically-motivated inter-communal violence in Tana River county, according to the UN Office for the Coordination of Humanitarian Affairs (OCHA). Members of the pastoralist Orma and agriculturalist Pokomo communities, including children and the elderly, have been hacked or burnt to death in various "reprisal attacks." Reports suggest that affected populations warned of impending violence and the police failed to take action.

The politicization of existing conflicts between ethnic communities over access to land and water is one factor contributing to a rise in violence in Tana River county and elsewhere. Worryingly, some local politicians also appear to be inciting violence as a means of influencing electoral outcomes. This includes by forcibly displacing populations to change local demographics.

Over 116,000 people were displaced as a result of inter-communal violence in 2012. Many are from areas with hotly contested local electoral races. Since Kenyans must vote at their place of registration, internally displaced persons who are unable to return home will be unable to exercise their right to vote.

In response to inter-communal violence in Tana River county and elsewhere, President Kibaki has vowed that "no effort will be spared in ensuring perpetrators of the heinous acts are brought to book." In addition to deploying the military to quell the violence and disarm both communities, a judicial commission of inquiry has been established. Dhadho Godhana, the Assistant Livestock Minister, was arrested for inciting inter-communal violence, but charges have since been dropped. Police have also arrested 56 others on suspicion of involvement in attacks.

Despite these actions, reprisal attacks continued in Tana River county. Inter-communal violence also occurred in Eastern, North East, Rift Valley and Coast provinces with Isiolo, Mandera, Mombasa, Moyale, Samburu, Turkana and Wajir counties particularly affected.

THE APPLICABILITY OF THE RESPONSIBILITY TO PROTECT

R2P is concerned with the prevention of mass atrocities, not with the political outcome of elections. However, far too often in fractured societies where ethnic politics prevail, elections can result in violent protest and the commission of mass atrocities, as occurred previously in Kenya and more recently in Côte d'Ivoire in 2011. Such periods of heightened risk necessitate increased efforts to anticipate and mitigate threats.

In committing to uphold R2P the Kenyan government accepted that it bears the primary responsibility to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing. At the core of this responsibility is the commitment to take preventive action. The government thus has a responsibility to: (1) ensure that government officials do not incite or facilitate the commission of crimes, (2) deter private actors from inciting, aiding or perpetrating crimes, (3) arrest and prosecute perpetrators and (4) ensure that the police and military observe international human rights standards and have the capacity to respond to developing threats.

The government of Kenya has, in the wake of the 2007/8 post-election violence, taken many preventive steps. These include efforts to address some of the underlying causes of conflict through the creation of a National Land Commission, the devolution of considerable power from the presidency to the legislature, judiciary and 47 local counties and the establishment of an Independent Electoral and Boundaries Commission (IEBC). The international community has provided considerable financial, technical and political support to assist the Kenyan government in carrying out these reforms. Regrettably, reform of the security sector, called for in the constitution, has yet to be rigorously implemented.

The government has also undertaken studies to identify possible flashpoints for violence and develop strategies to reduce the level of risk. This includes working with the National Cohesion and Integration Commission to establish "district peace committees," training peace monitors and working with telecommunications companies to curb the possible transmission of electronic hate speech.

These are positive examples of prevention in practice. Yet it remains to be seen whether the Kenyan government, when faced with a multiplicity of potential

threats during the upcoming election period, will be able to uphold its Responsibility to Protect and prevent further mass atrocities.

THE RISK OF FUTURE MASS ATROCITIES

The potential flashpoints for the 2013 elections are more numerous than in 2007, including many impoverished, remote and rural parts of the country. The Kenyan National Security and Intelligence Service identified 27 out of 47 counties as having considerable potential to degenerate into electoral violence. Those populations deemed most at risk are in: Samburu, Turkana and Nakuru counties, Coast and North Eastern provinces, which include Tana River and Isiolo counties, and informal settlements in Kisumu, Nairobi and Mombasa.

According to contingency plans developed by OCHA and the Kenyan authorities, violence during the upcoming elections could potentially affect up to 450,000 people, with up to 150,000 requiring assistance.

The dynamics that have led to increased risk during the election period are varied. As with 2007, the mobilization of supporters along ethnic lines to gain or retain political power remains a mainstay of electoral campaigning. Kenyans' grievances over inequitable development and perceptions that certain ethnic groups are not receiving a fair share of resources continue to be manipulated by political actors, as well as business and community leaders, to garner political support. Corruption, abuse of power and non-adherence to the rule of law undermine effective governance. With a 40 percent unemployment rate there is, as in 2007/8, no shortage of disenfranchised youth who can be encouraged to take up arms.

Politics and ethnicity remain closely connected in Kenya. In the run-up to these elections, specific ethnic groups have associated themselves with The National Alliance (TNA), Coalition for Reform and Democracy (CORD) and Amani Coalition political parties. Given the history of violence around elections, the main ethnic groups, Kikuyu and Kalenjin on the TNA side and the Luo and Kamba on the CORD side, are likely to blame each other in the event that the electoral process is perceived as unfair to either group. This could easily descend into widespread violence, particularly in parts of Nairobi, Rift Valley, Nyanza and Eastern provinces.

In contrast to the last election, the introduction of hate speech legislation and efforts to track SMS messages

have helped reduce hate speech at the national level. But reports of inflammatory speech at local political rallies, on vernacular radio stations and by musicians abound.

Furthermore, the proliferation of small arms has risen, especially amongst pastoral communities in the Rift Valley and North Eastern provinces. Arms flow into Kenya across its porous borders with Somalia, Ethiopia and Uganda. In 2007/8 most victims, except those shot by the police, were killed by traditional bladed weapons. In recent inter-communal violence the use of firearms has become more prevalent. Such violence leads to a higher death toll and is more difficult and dangerous for security forces to protect populations from.

In this election period localized conflict, rather than nationwide violence related to the Presidential contest, appears to pose the greatest threat to civilians. Devolution was intended to reduce Kenya's highly centralized and personalized form of governance and help ensure that all ethnic communities are politically represented. But, local political actors, including governors, senators and country assembly representatives, now exercise considerably more influence. Thus, the locus for contestation over political control has partly shifted from the national to the local. Many local leaders seek to preserve the system of ethnic patronage that devolution was intended to remove. As a result, the mobilization of ethnic grievances to garner political support remains rampant.

This is particularly dangerous in parts of the country with a history of inter-communal tensions over access to resources. For example, a scramble for land is underway in Tana River county with foreign and domestic investors keen to buy up valuable tracts of arable land for food and bio-fuel production. In Turkana county violence associated with cattle rustling is increasingly linked to local politics and efforts to secure control over energy resources. Outbreaks of violence during the election period in one or more of these areas will be hard for the police to contain and could lead to the further commission of mass atrocities.

The redrawing of electoral boundaries under the 2010 constitution is linked to the devolution process. It also contributes to increased competition between ethnic groups seeking to hold onto or gain political influence. In some cases the new boundaries have altered the ethnic make-up of certain wards, constituencies and counties. In Nakuru county, for example, this will result in a number of hotly contested elections that may see political power shift from one ethnic group to another.

This could spark violence among groups that already have long-standing grievances against each other.

Particular cities and populations also face their own unique threats. In Mombasa, the emergence of the secessionist movement the Mombasa Republic Council (MRC) has increased tensions in the city. The police have reportedly used disproportionate force in the past against perceived MRC supporters, including members of the local Muslim community. A significant number of Muslims are also located in tightly contested swing provinces in the presidential election, which may contribute to the risks they face.

The Somali population also faces a heightened risk. Motivated in part by the Kenyan government's offensive against it in Somalia, Al-Shabaab, an Islamist terrorist group, has reportedly carried out a number of attacks in Garissa, Nairobi and elsewhere. These attacks are being used to drive a wedge between Christian and Muslim communities in Kenya as a means of fomenting violence and destabilizing the country. This has also contributed to the further marginalization of the Somali population.

The government has recently ordered that all Somalis living in urban areas be relocated to refugee camps in the north of the country. Should violence break out during the electoral period or a terrorist attack be launched, the Somali community, and Muslims more broadly, may be targeted by the police and others. This risk is particularly acute in Coast and North Eastern provinces.

POPULATIONS AT HEIGHTENED RISK

- Those living in Isiolo, Nakuru, Samburu, Tana River and Turkana counties
- Those residing in Coast and North Eastern provinces
- Those living in informal settlements in Nairobi, Mombasa and Kisumu
- Somali communities
- Muslim communities

Finally, populations living in informal settlements in urban centers also face considerable risk. During previous elections, informal settlements experienced some of the worst violence. These impoverished communities have historically been multi-ethnic, but since 2008 many have become segregated along ethnic lines. This undermines efforts at reconciliation and makes impoverished populations even more vulnerable. Potentially violent protests within these settlements

between supporters of opposing candidates pose a grave threat to residents of these densely populated areas.

While conflict emerging from local elections is more likely, violence associated with the presidential election also remains a risk. With contenders determined to meet the requirement of winning at least one quarter of support in 24 counties, populations in tightly contested areas may face intimidation and violence as candidates and their supporters try to influence the outcome. The threat is particularly acute in Coast and North Eastern provinces as well as in Nairobi.

Some of the most horrific atrocities during 2007/8 were acts perpetrated by members of the Kikuyu and Kalenjin communities against each other. The recent union of Kenyatta, a Kikuyu, and Ruto, a Kalenjin, on the Jubilee electoral ticket appears to be helping to diffuse tensions between these two communities. However, should the court in the integrity case determine on 15 February that Kenyatta and/or Ruto cannot stand in the election, this may also lead to violent protests.

In response to these multi-faceted threats, the Kenyan government's ability to uphold their R2P is undermined by their failure to advance significant reforms to the security sector. Given the role that the security forces played in the 2007/8 post-election violence, security sector reform should have been a top priority for the Kenyan government and the donor community. Moreover, key benchmarks such as human rights and elections preparedness training have not been completed. Instead, the security forces responsible for providing protection during the elections, notably the police, appear ill-prepared to fulfill their responsibilities.

In particular, the response to the recent violence in Tana River county does not bode well. As in 2007/8, the police were unable to rapidly deploy when they received early warning of impending attacks. Once deployed, they were often unable to halt unfolding violence. A lack of resources also impairs the ability the police to adequately protect civilians and themselves. For example, it is alleged that police in Turkana county lack basic resources, including sufficient functioning vehicles. While attempting to halt cattle rustling in the region, 42 inadequately prepared and under-resourced policemen were recently killed.

With multiple flashpoints, many located in remote areas, the security forces will be stretched thin. There will be nearly 45,000 polling stations in Kenya and each requires two police officers present. With roughly

70,000 police, or 160 per 100,000 people, Kenya still falls below the UN-recommended standard of 220 per 100,000.

This hardly engenders public confidence that the police will be able to adequately protect them during the election period. Many Kenyans view the police as corrupt and ineffective, reducing the likelihood that individuals will provide them with intelligence about imminent threats. In this context, what is especially troubling is that some Kenyans, particularly those from communities affected by the 2007/8 post-election violence, are taking up arms to protect themselves. Militias, often formed along ethnic and political lines, pose a grave risk to civilians.

The police may also pose a threat to civilians. Nearly one-third of the 2007/8 post-election violence victims were killed by the police. The government-mandated Waki Commission report concluded that 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. While some police refused to intervene to stop the violence, others resorted to disproportionate force or carried out extra-judicial killings.

A culture of impunity also endures. With the exception of the ICC case there has been little movement to prosecute those responsible for inciting, aiding or perpetrating mass atrocity crimes during the 2007/8 post-election violence. Attempts to pass a bill to establish a Special Tribunal to look into these crimes and hold alleged perpetrators accountable was defeated twice in Parliament, eventually triggering ICC investigations and prosecutions. A Truth, Justice and Reconciliation Commission to look into human rights violations committed between 1963 and 2008 has yet to issue its report and has sought three extensions thus far.

On the positive side, key political actors at the national level appear to be heeding warnings from the Kenyan government and the ICC to not incite violence. But, in the absence of prosecutions for previous electoral violence would-be perpetrators may believe that there will be no consequences for such activities. The failure to confront impunity for past crimes threatens a recurrence of such crimes during the upcoming elections.

UPHOLDING THE RESPONSIBILITY TO PROTECT

In keeping with R2P the government of Kenya, AU, UN and key donor states must intensify their preventive engagement. In the long-term, international actors must work with the Kenyan government to overcome deficits in its reform efforts. Today, it is imperative to prioritize proximate preventive strategies. Central to this is strengthening the capacity of the IEBC. The trigger for the 2007/8 post-election violence was the perceived rigging of the election results. If the 4 March elections proceed smoothly with few to no irregularities, the risks associated with moments of vulnerability in the electoral calendar will be greatly minimized.

MOMENTS OF VULNERABILITY

- Announcement of the 15 February integrity case ruling
- Final campaigning before the 4 March vote
- 4 March voting
- Announcement of 4 March national and local election results, particularly if there are delays
- Campaigning during the period between the 4 March election and 11 April run-off
- 11 April voting
- Announcement of the 11 April election results

Within Kenya, expectations are high and every effort must be made to ensure that the IEBC is able to retain public confidence. To aid in this, the Kenyan government must constantly manage public expectations and perceptions, since failure to do so effectively may have deadly consequences as was witnessed during the January 2013 party primaries. Riots in Kisumu over perceived favoritism towards Prime Minister Odinga's sister, who was running for office, resulted in the killing of an election worker.

The IEBC faces an unprecedented challenge. On 4 March nearly 45,000 polling stations will need to be staffed. Ballots will need to be gathered and counted in a transparent manner so that the outcome for the 1,882 contested local and national seats can be released in a timely fashion. To ensure a successful outcome and reduce the risk of the election process becoming a trigger for violence, political, technical and financial support must be given to the IEBC. The government and local civil society also need support to further implement voter education in a coordinated manner.

Kenya's Chief Justice must also be given the support and resources needed to carry out his mandate. The constitution commits to the adjudication of electoral disputes within thirty days of the election. The public's faith in this process must be preserved in order to counter those who argue that the resort to violence is the only option.

Additional proximate strategies focused on deterring potential perpetrators should also be prioritized. For example, at the national level potential spoilers should be reminded that they might face targeted sanctions including asset freezes and travel bans. The United States implemented sanctions during the 2007/8 post-election violence, and such measures are believed to have played a role not only in changing the behavior of certain hardliners, but in contributing to a positive outcome from the mediation process. At the local level, resources should be dedicated to strengthening dispute resolution mechanisms and urging religious and ethnic leaders to engage with the process.

Humanitarian organizations already have plans in place to assist people that may be displaced by electoral violence. The AU, UN, East African Community (EAC), Kenya's neighbors and concerned states need to have coordinated contingency plans in place in order to halt mass atrocities should they occur.

NECESSARY ACTION

To The Government of Kenya

- Continue to publicly urge all political parties and candidates to work towards a peaceful, credible and free election.
- Dedicate additional resources to accelerating civic education efforts explaining the electoral process and the legal avenues available for contestation of disputed results.
- Ensure that the security forces deploy to flashpoints, exercise restraint, abide by international law and standards on the use of force and protect all Kenyans irrespective of their ethnic identity.
- Warn all Kenyans, including government officials and members of the security forces, that they will be held responsible for inciting, aiding or perpetrating mass atrocity crimes.
- Urge traditional leaders to diffuse tensions by facilitating local conflict mediation.
- Take steps to ensure that internally displaced persons are able to vote.

- Take steps to ensure that marginalized groups, including Somali and Muslim communities, are adequately protected.
- Provide political and financial support to the Chief Justice and judiciary so that they can adjudicate election disputes in a timely fashion.

To Regional Actors

- Re-affirm the mandate of the Panel of Eminent Personalities and ensure that the panel is present in Kenya during the election period.
- The AU Chairwoman and UN Secretary-General should issue a joint public statement urging all parties to work towards a peaceful, credible and free election, warning those who incite or perpetrate crimes that they will be held accountable and affirming their support for the AU Panel of Eminent Personalities.
- The AU Peace and Security Council should issue a presidential statement or communiqué echoing these sentiments.
- Consistent with the Responsibility to Protect, support the development of effective contingency plans to rapidly halt mass atrocities should preventive efforts fail.

To The UN Secretary-General

- Brief the UN Security Council on the UN's preventive diplomacy efforts and its contingency plans.
- Ensure that Kenya is understood as an example of "R2P in practice" that requires ongoing international engagement.

To The UN Office in Nairobi

- Immediately expand support for civic education programs.
- Urge the presidential candidates to issue a joint public statement committing to a peaceful election and to dispute resolution through the courts.

To The UN Security Council

- Release a statement welcoming the upcoming election, acknowledging the important steps taken by the government of Kenya in adopting a new constitution, echoing the desire of the Kenyan people for a peaceful, credible and free election and urging the candidates and their

supporters to refrain from inciting or resorting to violence.

- Consistent with the Responsibility to Protect, be prepared to take immediate action to rapidly halt mass atrocities should preventive efforts fail.

To Key Donors (Canada, Denmark, European Union, Finland, Germany, Netherlands, Norway, United Kingdom, United States of America)

- Accelerate civic education projects.
- Ensure the IEBC has the resources needed to hold a credible and free election, including by facilitating the training of temporary poll workers.
- Be prepared to use the threat of targeted sanctions to deter those who may seek to foment violence.
- Support domestic and international election monitoring efforts.
- Liaise with local civil society members who are gathering early warning information.

CONCLUSION

The domestic and international response to post-election violence in Kenya during 2007/8 showed that non-coercive tools, such as mediation, can help to halt atrocities when employed early, with sufficient resources and vigorous international support. In the face of the considerable risks facing the country as it approaches the March 2013 elections, now is the time to intensify proximate preventive efforts. By local, regional and international actors working together in a coordinated and sustained manner, Kenya may yet prove that commitment to R2P's core tenet, prevention, can save lives and help transform a country.