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The Responsibility to Protect IDPs: African and Kenyan Encounters

Olivia Lwabukuna of SOAS University of London writes on R2P and IDPs in the African context

The Responsibility to Protect IDPs: The African Context

This ECR2P *Fresh Perspectives* blog, drawing on my recent article in the Journal of African Law (https://www.cambridge.org/core/journals/journal-of-african-law/article/responsibility-to-protect-internally-displaced-persons-in-africa/36B8830E164E2A01B466954BACBF9346), identifies the complementarity between R2P and Internally Displaced Persons (IDP) protection regimes, and utilizes their convergence to set out a conceptual argument for state responsibility vis-à-vis internal displacement.

It is important when conceptualising IDP protection to revisit the concept of sovereignty as responsibility that underpins both R2P and IDP regimes, and reclaim its place as a conceptual foundation for IDP protection. Within Africa, this would not be a new project because the long encounter with R2P related concepts, conceptually and institutionally, is reflected in normative and institutional frameworks for civilian protection, including those on internal displacement. The African Union's (AU) Constitutive Act in Article 4(h), and the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention (https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa)), reflect R2P's intellectual capital. Article 4(h) sets out a new paradigm of human rights, collective responsibility, and intervention to protect African civilians against mass atrocities and other human rights violations, or peace and security threats.

Of note is the fact that R2P norms within AU frameworks are more than just moral or political principles. They are embedded in the AU's Constitutive Act, generating collective legal obligations for AU member states to respond to mass atrocity crimes. Yet one must note that so far, there has been a strong tendency to embrace pillar one, two and non-coercive elements of pillar three of R2P within the African context. This might be to avoid the politicised nature of coercive elements such as military intervention which have sparked criticism against R2P, or it could be due to the limited capacity of African intervention forces, or for maintaining camaraderie among African leaders.

One of the key features of the AU's IDP protection framework is the right not to be arbitrarily displaced (https://www.fmreview.org/preventing/morel-et-al). Elaboration of the right not to be arbitrarily displaced underscores the novelty of provisions in the Kampala convention. By broadly and non-exhaustively outlining acts that are deemed to violate the right, the Kampala Convention goes beyond delineations of this existing right in international law, responding specifically to forced displacement in Africa.

In emphasizing IDPs' rights, and the responsibilities of governments and the international community, the right not to be arbitrarily displaced also elevates IDP protection from a moral imperative to a legal duty, the violation of which calls for state accountability. The obligations that the Kampala Convention places on relevant actors are in line with the principles underlying R2P's core pillars, first shouldered by the state, with a duty to support and assist by a collective of African states, followed by a collective responsibility to react and intervene in necessary circumstances.

The Great Lakes Regional (GLR) Pact (https://www.icglr.org/index.php/en/the-pact) offers another opportunity for options on engaging R2P within IDP protection contexts. At least ten of the protocols that make up the GLR Pact reflect responses to mass atrocities, including R2P trigger factors, which are consequences or causes of forced displacement. The GLR Pact has been instructive for the wider African process of intervention to protect civilians at risk by incorporating special provisions for the forcibly displaced. This has included addressing atrocity crimes like genocide, war crimes and crimes against humanity, including ethnic cleansing, which constitute R2P trigger elements, and are factors causing displacement.

The GLR Pact has set forth a path for regionally addressing impunity related to international crimes. It has been a trailblazer in linking forced displacement to international crimes and has embraced the principle of collective responsibility for the protection of the most vulnerable civilians, including the displaced. For instance, when it comes to R2P triggers, its protection ambit is wider than similar norms within the AU's Constitutive Act and framework. In addition to referring to mass atrocity crimes triggering R2P, it also refers to

situations of gross violations of human rights, reflecting wider international legal protection. This ensures that most situations of internal displacement can fall directly within the R2P protection ambit of the GLR framework. This is a significant achievement, limited only by the fact that, unlike the AU framework, the GLR framework does not specify what actions can be collectively taken by member states to address such violations when they occur, leaving discretion to an extraordinary summit.

Politics of Protection: R2P and Internal Displacement in Kenya

The response to the post-election violence in Kenya in 2008 displays how convergence in developments of both R2P and IDP protection regimes have been uniquely elaborated and implemented in Africa to enhance civilian protection. Simultaneously, the Kenyan response highlights the protection potential, and limitations, of rallying for IDP protection through R2P.

The "successful" invocation of the norm in Kenya is widely contested (https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198717782.001.0001/acprof-9780198717782-chapter-11). Yet, most criticism has focused on the failure to anticipate and prevent post-election violence and consequent displacement, whilst overlooking the nuanced responsibility to react and rebuild which can be identified within frameworks and initiatives undertaken in Kenya (legislative, policy, durable solutions facilitated through return processes and even the distribution of cash to help IDPs to settle).

While prevention is an important aspect of protection, including, under certain circumstances, obligating the due diligence of states to take all reasonable prevention (https://heinonline.org/HOL/LandingPage?handle=hein.journals/gloresp1&div=33&id=&page=) measures, Kenya teaches us not to overlook other dimensions of R2P short of military intervention (https://www.tandfonline.com/doi/full/10.1080/13600826.2015.1092422), when prevention is no longer possible, especially within displacement contexts.

The Kenyan R2P context also displays the importance and viability of a regional, as opposed to purely internationally (western) driven operationalization. It offers a glimpse into how the international community (the UN, African Union and Western states) understood and opted to operationalise the principles of R2P within that particular context. They opted to offer technical and financial support to the AU supported mechanism of the Panel of Eminent African Personalities, whilst allowing the AU and regional leaders led by former UN Secretary General Kofi Annan to oversee the process, limiting resistance flowing from neo-colonial arguments.

Perhaps that is what is valuable and yet limiting about the Kenyan R2P operationalisation. Its emphasis on being overly politically conscious, thus avoiding all aggressive colonial connotations of R2P, ensured that the intervention itself was successful, but it later created limitations in implementing subsequent programs. It has been argued that R2P was conceptually employed as a moral principle driving the political mediation in Kenya, without being legally or politically acknowledged and this has had implications for how state responsibility for the protection of key affected populations, including IDPs, could be established in Kenya.

Even though the ethnic nature of the violence raised serious concerns that Kenya was teetering on the brink of a genocide (https://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report), the circumstances in Kenya had not escalated to an extent requiring military intervention. That, combined with the willingness of key political players to take responsibility and their resolve to participate in mediation, meant pillar one, two and non-coercive elements of pillar three of R2P were deemed preferable.

Yet more importantly, whilst the process of operationalising R2P in Kenya took place within the regional confines of the AU Peace and Security Council (PSC), it was slightly operationally different from the AU's 'Panel of the Wise (https://www.peaceau.org/uploads/aupow-book2-.pdf)' (Panel). The Panel is an organ of the PSC established to prevent and peacefully resolve conflicts on the continent by diplomatically assessing and intervening in situations to prevent further escalation. Of note is the fact that the PSC is responsible for implementing article 4(h) of the AU's Constitutive Act. This confirms the lack of a legal foundation in the Kenyan scenario linking the political mediation to the AU's legal intervention framework. So whilst key processes happened within politically relevant organs of the AU (https://www.ajol.info/index.php/ajcr/article/view/83272), there was no evidence of accountability back to the AU's intervention system.

This politically motivated and legally uncommitted R2P approach had its drawbacks, especially on legally addressing humanitarian consequences of the crisis. For instance, other dimensions of R2P "operationalised" in Kenya – including the process of halting the conflict (and thus the displacement) and the element of rebuilding, including finding durable solutions for displacement – starkly display the limits of R2P in displacement contexts. R2P approaches that are fixed within pillar one, two and non-coercive elements of pillar three (employed in Kenya as dialogic and politically mediated solutions), become difficult to operationalise effectively without the political will of key players within a specific country.

In Kenya, this has meant that accountability for the displacements has effectively failed. The Truth, Justice and Reconciliation Commission (TJRC), an organ mandated to investigate past violations (https://roape.net/2018/09/06/the-limitations-of-truth-commissions-lessons-from-kenya/), including arbitrary displacement, has been muddled in controversy (https://digitalcommons.law.seattleu.edu/tjrc/) with the final 2013 report lost somewhere (https://www.justiceinfo.net/en/44424-how-kenya-s-truth-commission-report-became-a-political-ghost.html) between a Parliamentary implementation committee and political inconvenience. ICC referrals and subsequent indictments (https://www.icc-cpi.int/itemsDocuments/261119-otp-statement-kenya-eng.pdf) emanating from a criminal justice option within the R2P toolkit have also failed to proceed (https://digitalcommons.law.seattleu.edu/tjrc-icc/).

There is a conceptual complementarity between R2P and IDP protection. Kenya provided an illustration of what R2P can and cannot deliver in situations of internal displacement. Perhaps what is most unfortunate is the fact that the Kenyan intervention avoided linking the response structure to any humanitarian or intervention legal frameworks in Africa that are underpinned by R2P. Whilst this de-politicised the process, it also made it difficult to promote accountability. With R2P in Africa emphasising both political and legal commitments, requisite political will is required for efforts aimed at IDP protection and accountability for violations to be successful.

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