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Junk, Julian

Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

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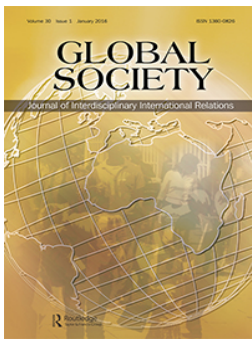
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Julian Junk

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Bringing the Non-coercive Dimensions of R2P to the Fore: The Case of Kenya

JULIAN JUNK

The ethnic violence following the 2007 presidential elections in Kenya led to a wide array of regional and international mediation efforts and diplomatic initiatives, which resulted in a power-sharing agreement and a constitutional process. That these events in Kenya have been called by some the first test case for the Responsibility to Protect (R2P) is not without irony: over the course of these international efforts, R2P was only marginally invoked. It was rather post-hoc framing of this case that brought the non-coercive elements of R2P into the limelight and turned Kenya into an R2P case. This, however, impacted the further development of R2P in two ways. First, references to the experiences in Kenya proved to be an effective frame for actors highlighting, in the run-up to the 2009 United Nations General Assembly debate, the value of preventive and diplomatic initiatives. Second, experiences in Kenya facilitated the inclusion of the procedures of the International Criminal Court in the toolbox of the wider norms of protection, though they remain controversial for some actors.

Introduction

In public discourse and scholarly analyses, the "Responsibility to Protect" (R2P) is often reduced to military intervention. As other articles in this special issue show, the coercive elements of R2P are the basis for many of the controversies surrounding this norm. From the outset, however, military means comprised only some of the many instruments enshrined in the founding documents of R2P and in the wider toolbox of protection from mass atrocities.[1] A range of political, economic and judicial means was always an integral part of the conceptual debate and R2P's operationalisation in the United Nations system.[2]

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1. For an overview of the developments of international norms of protection, see the introduction to this special issue by Kurtz and Rotmann. The contributions to this special issue deliberately move beyond a narrow reading of R2P and contextualise it as part of a wider international agenda of protecting populations from mass atrocities.

2. Attempts to structure the means and ends of R2P, for instance, range from the three main elements (responsibility to prevent, to react and to rebuild) to a pillar structure, with the first pillar highlighting the domestic responsibility of a state, the second capacity building and the third international interventions ranging from diplomacy to military interventions. See International Commission on Intervention and State Sovereignty (ICISS), "Responsibility to Protect: Report of the International Commission on

This article focuses on a case that highlighted for the first time other non-coercive modes of international interventions and corresponding norms of protection: the regional and international mediation efforts and the diplomatic initiatives in response to the ethnic violence that followed the 2007 presidential elections in Kenya. Based on this case, the article analyses debates on both R2P and on international criminal justice in subsequent years. It scrutinises two assumptions—namely, that the case of Kenya is indeed an example of R2P's successful application, and that the case had a lasting impact on the development of R2P. The analysis reveals an ironic twist: many call Kenya an R2P success case precisely because R2P was only marginally invoked during the events and then used as a post-hoc frame by those who support R2P and its wider toolbox, including mediation and criminal justice.

Thus, Kenya does not constitute a clear-cut R2P case, since the international community did not invoke this principle forcefully. The case is nonetheless relevant for the future trajectory of R2P. After a brief overview of the events in Kenya in 2007 and 2008, this article analyses[3] the references made to R2P, systematises the arguments along the dimensions of this special issue's conceptual framework and argues that these references reinterpreted the events and the role of R2P in Kenya primarily after the end of the international mediation efforts. A subsequent section analyses the impact of these discourses on the future trajectory of R2P.

The article finds two main consequences. First, the post-hoc interpretation of Kenya as an R2P case was a successful framing effort to highlight R2P's non-coercive means in the run-up to the 2009 UN General Assembly debate, which centred on the theme of operationalising R2P. Second, it contributed to the enshrinement of international criminal procedures in the toolbox of the norms of protection.

The Kenyan Presidential Elections of 2007 and Their Violent Aftermath

Kenya held its presidential elections on 27 December 2007. Electoral outcomes in the country have traditionally been based on ethnic affiliation and prone to precipitating ethnic violence. 2007 was no different, though the violence reached new levels.[4] As for ethnic affiliations, the Orange Democratic Movement (ODM), led by Raila Odinga, was backed by the Luo, Luhya and Kalenjin tribes, while the Party of National Unity (PNU), led by Mwai Kibaki, the incumbent president, was mainly backed by the Kikuyu. Polls published prior to the election predicted a narrow victory for Odinga.

On 30 December 2007, however, the electoral commission declared Kibaki the winner. He was immediately sworn in as president. The ODM contested the results as having been rigged, a claim supported by evidence collected by

Intervention and State Sovereignty", ICISS, 2001, available: <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (accessed 20 July 2014); A/Res/60/1, "World Summit Outcome" (New York: United Nations, 24 October 2005); A/63/677, "Implementing the Responsibility to Protect: Report of the Secretary-General" (New York: United Nations, 12 January 2009).

3. The sources for this analysis are official documents, secondary literature and expert interviews. The interviews were conducted with diplomats and scholars from May to July 2013 in Washington, DC, Paris and New York, and by phone. The expert interviews were semi-structured. Some interviewees spoke only on the condition of anonymity.

4. See David Anderson and Emma Lochery, "Violence and Exodus in Kenya's Rift Valley, 2008: Predictable and Preventable?", *Journal of Eastern African Studies*, Vol. 2, No. 2 (2008), pp. 328–343.

international electoral observers.[5] Violence erupted between supporters of the two camps. As these camps were mainly divided along ethnic lines, the conflict was ethnic in nature.[6] It led to 1,133 deaths, more than 600,000 internally displaced persons and more than 110,000 destroyed private properties.[7] Observers found evidence that some of the violent clashes had been planned before the election, and that political leaders and police forces at all levels had been involved.[8]

The ethnic nature and increasing severity of the crisis, as well as the presence of international observers and diplomats, led to relatively swift rhetorical responses at the international level. On 31 December 2007, UN Secretary-General Ban Ki-moon and UN High Commissioner for Human Rights Louise Arbour called upon the Kenyan security forces to show restraint.[9] The most serious efforts at mediation were initiated by Desmond Tutu, the South African archbishop at the time, in the first week of January.[10] He was soon supported by then US Assistant Secretary of State for African Affairs Jendayi Frazer.[11] On 8 January, several former presidents of African countries and the African Union (AU)—most notably its president, John Kufuor—joined the mediation.[12] These first efforts failed, but the AU was able to pave the way for a renewed mediation attempt led by the AU.

From 10 January 2008 onwards, an AU "Panel of Eminent African Personalities", led by former UN Secretary-General Kofi Annan, was finally able to mediate between the two camps and brokered a power-sharing agreement on 28 February 2008. Kibaki was made president and Odinga prime minister. In addition, the agreement set up several inquiry and reconciliation mechanisms. Finally, it paved the way for a constitutional process, resulting in the adoption of a new constitution by referendum on 4 August 2010.

This brief overview of the events of 2007 and 2008 has not mentioned R2P once. Indeed, calling Kenya a successful R2P case stretches the criteria for calling an event as such. As the following section reveals, with one exception (a statement by Bernard Kouchner, then French foreign minister), no public reference was made

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5. EU observers were most vocal about their concerns with the electoral standards: Mike Pflanz and Natalie Paris, "EU Calls for Inquiry into Kenya Election", *The Telegraph*, 31 December 2007, available: <http://www.telegraph.co.uk/news/worldnews/1574243/EU-calls-for-inquiry-into-Kenya-election.html> (accessed 20 March 2014).

6. BBC News, "US Envoy Begins Kenyan Meetings", 5 January 2008, available: <http://news.bbc.co.uk/2/hi/africa/7172665.stm> (accessed 20 March 2014).

7. Abdullahi Boru Halakhe, "'R2P in Practice': Ethnic Violence, Elections and Atrocity Prevention in Kenya", *Occasional Paper Series, No. 4* (New York: The Global Centre for the Responsibility to Protect, 2013), p. 5.

8. For additional overviews of all developments related to this election, see: Jacqueline M. Klopp, "Kenya's Unfinished Agendas", *Journal of International Affairs*, Vol. 62, No. 2 (2009), pp. 143–158; International Coalition for the Responsibility to Protect (ICRtoP), "The Crisis in Kenya: Update Report", ICRtoP, 2014, available: <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya> (accessed 20 March 2014).

9. UN News Centre, "Secretary-General Calls for Restraint from All in Kenyan Post-Election Violence", United Nations, 31 December 2007, available: <http://www.un.org/apps/news/story.asp?NewsID=25189#.VA2bJmR_vrk> (accessed 20 March 2014).

10. Mike Wooldridge, "Can Tutu Heal Kenya's Wounds?", BBC News, 4 January 2008), available: <http://news.bbc.co.uk/2/hi/africa/7171605.stm> (accessed 20 March 2014).

11. BBC News, "US Envoy Begins Kenyan Meetings", *op. cit.*

12. Thomas Kwasi Tieku, "Multilateralization of Democracy Promotion and Defense in Africa", *Africa Today*, Vol. 56, No. 2 (2009), pp. 74–91; Afrik News, "Four Retired African Presidents in Kenya to Mediate Election Crisis", 9 January 2008, available: <http://www.afrik-news.com/article12436.html> (accessed 21 March 2014).

to an international responsibility to protect the Kenyans hit hardest by the tribal violence. If anything, according to the recollections of international diplomats and observers, R2P served as background music: it had an implicit impact on the events in Kenya without being explicitly invoked. Accordingly, this article argues that it was rather post-hoc framing that made the events meaningful for operationalising the non-coercive, non-military toolbox of international norms of protection, including diplomacy, mediation and criminal justice.

Kenya as a Case of Post-Hoc R2P Framing

The most important shapers and advocates of R2P agree that the international efforts to confront the post-electoral violence in Kenya were based on this international principle. For instance, Edward Luck, then special adviser to the secretary-general on R2P, described the case as "the first instance in which the United Nations employed [an R2P] lens in shaping its responses to an on-going crisis".[13] Ban claimed that in Kenya, "for the first time both regional actors and the United Nations viewed the crisis in part from the perspective of the responsibility to protect".[14] However, these interpretations of the events in Kenya happened well after the conclusion of the international mediation efforts.

While some interpreted both the international mediation and criminal justice involvement in hindsight as the successful application of the diplomatic and criminal justice tools of R2P, these efforts were at the time rarely justified by R2P. On 2 January 2008, Ban reminded Kenyan officials "of their legal and moral responsibility to protect the lives of innocent people".[15] Similar statements invoking the responsibility of a state to protect its own citizens were made by Francis Deng, then UN special adviser on the prevention of genocide,[16] and by Arbour, then high commissioner for human rights.[17]

There was only one exception to the pattern of invoking the responsibility of the Kenyan government, as opposed to the international responsibility, to protect those being threatened with mass atrocities. On 31 January 2008, during the mediation, then French Foreign Minister Kouchner forcefully referred to R2P by broaching the subsidiary responsibility of the international community: "In the name of the responsibility to protect, it is urgent to help the people of Kenya. The United Nations Security Council must take up this question and act".[18]

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13. Edward C. Luck, "Preface", in Elisabeth Lindenmayer and Josie Lianna Kaye, *A Choice for Peace? The Story of 41 Days of Mediation in Kenya* (New York: International Peace Institute, 2009), p. iii. See similar quotes by Gareth Evans, quoted in Meredith Preston-McGhie and Serena Sharma, "Kenya", in Jared Genser, Irwin Cotler, Desmond Tutu and Vaclav Havel (eds.), *The Responsibility to Protect* (Oxford: Oxford Scholarship Online, 2011), p. 2.

14. A/63/677, *op. cit.*, p. 23.

15. SG/SM/11356, "Secretary-General Troubled by Escalating Kenyan Tensions, Violence" (New York: United Nations, 2 January 2008).

16. UN News Centre, "UN Genocide Adviser Urges End to Violence in Kenya, Sends Staffer There", United Nations, 28 January 2008, available: <http://www.un.org/apps/news/story.asp?NewsID=25425> (accessed 15 October 2015).

17. United Nations High Commissioner for Human Rights (UNHCHR), "Report from OHCHR Fact-Finding Mission to Kenya, 6–28 February 2008" (Geneva: UNHCHR, 2008), pp. 11–12.

18. France Diplomatie, "Violence in Kenya: Statement Made by French Foreign and European Affairs Minister Bernard Kouchner", 31 January 2008, available: <http://www.responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/1488-06-february-2008-news-update> (accessed 15 October 2015).

But even this statement merely invoked R2P without providing operational details or discussing the concept's criteria or scope. As one interviewee involved in the United States administration's response said:

> I am not sure whether the 2001 Canadian report and 2005 World Summit Outcome Document had a meaningful impact on how we reacted to what happened in Kenya. In fact, I am always amused when I talk to R2P people saying that this was a great R2P success story. I remember a call between our secretary of state, the UN secretary-general and Kofi Annan. No one during that time used the language of R2P. At no time did we ever consider the US engagement in what happened in the Kenyan post-election crisis as an R2P case.[19]

Therefore, the interpretation of Kenya as a successful case of the deliberate application of R2P was mainly a post-hoc characterisation by the mediation efforts and the power-sharing agreement.

Although there can be no doubt that R2P was not explicitly invoked during the events in Kenya, some observers later interpreted the international efforts as having been implicitly influenced by R2P. In Luck's words, "Operationally, did it change the way the UN went about its work in Kenya? I don't know. I'm not sure that it did in really observable ways. So whether one can show cause and effect, I'm not sure. But it was not after-the-fact labelling".[20] From this perspective, R2P rather served as a "shadow"[21] accompanying the efforts in Kenya, an undefined "background music that contributed a sense of urgency" and motivated Africans, the US and the European Union "to enter the fray with seriousness and due speed".[22]

Hence, it is only in hindsight that Annan said of his efforts in Kenya, "I saw the crisis in the R2P prism with a Kenyan government unable to contain the situation or protect its people … I knew that if the international community did not intervene, things would go hopelessly wrong … Kenya is a successful example of [R2P] at work".[23] The arguments in support of an R2P shadow that implicitly influenced international actors in their efforts to confront the Kenya crisis are empirically difficult to test. However, these direct references to R2P are certainly indicative of R2P playing a considerable role in the retrospective interpretation of the events in Kenya.

During the mediation efforts, international actors were nevertheless quite involved, even without direct R2P justifications, surely motivated in part by Kenya's importance as an essential guarantor of stability in an otherwise unstable East African region and as an ally in US counterterrorism efforts.[24] From the outset,

19. Interview with Cameron Hudson, Washington, DC, 22 May 2013.

20. Preston-McGhie and Sharma, *op. cit.*, pp. 15–16.

21. *Ibid.*

22. Thomas G. Weiss, *Halting atrocities in Kenya—Great Decision Series No. 2* (New York: Global Centre for the Responsibility to Protect, 2010), p. 24.

23. Quoted in Roger Cohen, "How Kofi Annan Rescued Kenya", *The New York Review of Books*, Vol. 55, No. 13 (14 August 2008), p. 51; Serena K. Sharma, "The 2007–08 Post Election Crisis in Kenya: A Success Story for the Responsibility to Protect", in Julia Hoffmann and André Nollkaemper (eds.), *Responsibility to Protect: From Principle to Practice* (Amsterdam: Pallas Publications, 2012), p. 30.

24. Sharma, "The 2007–08 Post Election Crisis in Kenya: A Success Story for the Responsibility to Protect", *op. cit.*, p. 31; Preston-McGhie and Sharma, *op. cit.* As one interviewee, formerly with the US administration, remarked: "We had a direct national security interest in Kenya, which was our largest

diplomatic pressure was employed to bring the two main political camps in Kenya to the negotiation table. African states were involved at the forefront not only through the AU: South Africa deliberately took a low-key approach by sending Tutu and not Thabo Mbeki, then president of South Africa, in order to not politicise Annan's mediation efforts. But the country nevertheless supported the international diplomatic intervention.[25] Tanzania and its president, Jakaya Kikwete, were more actively involved in the later stages of the negotiations, upon Annan's request.[26]

   With the exception of South Africa, however, the emerging powers that fall under the BRICS label (Brazil, Russia, India, China, South Africa) were not actively involved in finding a political solution to the crisis in Kenya. In fact, most were completely absent from the debate. Only press releases vaguely indicated support for Annan's mediation efforts and, in the case of Russia, warned frequently of regional destabilisation.[27] The reluctance to be more politically active in the international efforts in Kenya was based on the view that there is a regional and thus African prerogative to confront such a crisis; moreover, there was simply not much geopolitical interest in Kenya at the time.[28] As summarised by a senior official involved in the UN efforts in Kenya and the aftermath in New York, "Frankly, I do not recall heavy member state interest in how the secretariat responded at the early stages of the crisis. The secretary-general invoked R2P within a few days after the first violence broke out. Other than a couple of Western P-5 countries and some neighbouring countries, the rest of the world was slow to engage and simply had no interest in doing so".[29]

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trading partner in Africa at that time and the most important counterterrorism partner on that continent. We had true national interest in Kenya and had to ensure that Kenya did not explode into long-term widespread violence and create a humanitarian situation that we could not deal with. That would then affect all landlocked countries that Kenya supplies. We had real interest in mobilising help to avoid the worst outcome. We did not need R2P in Kenya." Interview with Cameron Hudson, Washington, DC, 22 May 2013.

   25. Harry Verhoeven, C.S.R. Murthy and Ricardo Soares de Oliveira, "'Our Identity Is Our Ccurrency': South Africa, the Responsibility to Protect and the Logic of African Intervention", *Conflict, Security & Development*, Vol. 14, No. 4 (2014), p. 521.

   26. Preston-McGhie and Sharma, *op. cit.*, p. 10.

   27. Illustrative is a press release on 1 February 2008: The Ministry of Foreign Affairs of the Russian Federation, "К ситуации в Кении", 1 February 2008, available: <http://www.mid.ru/web/guest/maps/ke/-/asset_publisher/Ekuq3mezVhOy/content/id/350778> (accessed 13 August 2015). Similar texts were published in the same database on 3 January, 11 January, 5 February, 21 February, 29 February and 10 April 2008. The Chinese embassy in Kenya issued similar press releases. For instance: Embassy of the People's Republic of China in the Republic of Kenya, "China's Acts Prove It Is a Friend Kenya Can Rely On", 2008, available: <http://ke.china-embassy.org/eng/zt/MediaComment/t451440.htm> (accessed 13 August 2015). The pattern of restraint when it comes to being politically involved in African affairs is indicative of Chinese policy in Africa at the time: Daniel Large, "China's Role in the Mediation and Resolution of Conflict in Africa: Background Paper for Oslo Forum 2008" (Oslo: Oslo Forum, 2008).

   28. Interview with an anonymous source close to the UN in 2008, 18 August 2015, phone and email. The author contacted several diplomatic missions from non-Western and non-African states. If there were responses at all, they pointed to the non-involvement shaping the policy responses both in Kenya and at the UN. Chinese diplomats, in particular, highlighted that they viewed the issue at the time as an internal Kenyan affair. See also Ruchita Beri and Uttam Kumar Sinha, *Africa and Energy Security: Global Issues, Local Responses* (New Delhi: Academic Foundation, 2009).

   29. Interview with an anonymous source close to the UN in 2008, 18 August 2015, phone and email.

Thus, some Western countries had greater presence in the discussions and threatened more far-reaching measures. Mediation efforts were "supported by the willingness of the United States and European Union to apply sanctions on those resisting a peaceful solution".[30] Plans that included, for instance, travel bans on suspected Kenyan individuals were deliberately leaked to keep the pressure high on the negotiating camps.[31] The United Kingdom played a prominent role in this regard.[32] British Foreign Minister David Miliband supported the AU efforts and put diplomatic pressure on the Kenyan actors.[33] Germany, meanwhile, sent a parliamentary foreign secretary, Gernot Erler, to Nairobi, upon Annan's request that Erler "share his experience of coalition government".[34] France and its foreign minister, Kouchner, continued to publicly critique the rigged elections.[35] At the height of the negotiations, high-level support from then US Secretary of State Condoleezza Rice and then President George W. Bush was requested and granted.[36]

The UN Security Council was only marginally involved and issued just one presidential statement supporting the AU efforts as well as the UN Secretariat's logistical assistance for Annan's mediation efforts.[37] In this statement, R2P was not directly referenced. Some argue that it was a conscious decision not to use the R2P frame explicitly and to point implicitly at the negative effects on the international efforts that might occur when invoking a contested principle and thus politicising the issue. This argument is made by Weiss, who stated that "taking the Kenyan case to the UN undoubtedly would have delayed action".[38] Mark Malloch-Brown, then British minister of state at the Foreign and Commonwealth Office, recalled, "On [R2P], its rhetorical use was very limited during the crisis. It remains an emotive and provocative term".[39] Later, then US Ambassador to the UN Susan Rice said, "It's worth noting that the Responsibility to Protect was explicitly not part of the debate in the Council … it was difficult even to build support for a Council vote of confidence in Annan's mission. Raising the R2P flag may be morally satisfying, but it can be politically fraught".[40] In this quote, Rice refers to two commonly cited arguments: R2P was at the time (and still is, as the other contributions to this special issue reveal in greater detail) contested by many international actors, and some—African actors in particular—viewed the post-electoral

30. Donald Steinberg, "Responsibility to Protect: Coming of Age?", *Global Responsibility to Protect*, Vol. 1, No. 4 (2009), p. 436.

31. Preston-McGhie and Sharma, *op. cit.*, p. 10.

32. Axel Harneit-Sievers and Ralph-Michael Peters, "Kenya's 2007 General Election and Its Aftershocks", *Africa Spectrum*, Vol. 43, No. 1 (2008), p. 142.

33. BBC News, "US Envoy Begins Kenyan Meetings", *op. cit.*

34. Lindenmayer and Kaye, *op. cit.*, p. 17. See also Sarah Brockmeier, Gerrit Kurtz and Julian Junk, "Emerging Norm and Rhetorical Tool: Europe and a Responsibility to Protect", *Conflict, Security & Development*, Vol. 14, No. 4 (2014), pp. 429–460.

35. BBC News, "US Envoy Begins Kenyan Meetings", *op. cit.*

36. *The New York Times*, "Rice, in Nairobi, Offers Incentives to End Violence", 19 February 2008; Lindenmayer and Kaye, *op. cit.*, p. 17; Preston-McGhie and Sharma, *op. cit.*, p. 10.

37. Statement by the President of the Security Council, document number S/PRST/2008/4, New York, 6 February 2008, available: <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PRST/2008/4> (accessed 10 April 2014).

38. Weiss, *op. cit.*, p. 28.

39. Quoted in Preston-McGhie and Sharma, *op. cit.*, p. 15.

40. Susan E. Rice, "Remarks on the UN Security Council and the Responsibility to Protect—International Peace Institute Vienna Seminar, 15 June 2009", United States Mission to the United Nations, 2009, available: <http://usun.state.gov/remarks/4347> (accessed 15 October 2015).

violence in Kenya as an African problem that did not pose a threat to international security and peace, making it a matter of interest for the AU and not the Security Council.

R2P was thus viewed as an ineffective frame, because it was feared by many developing countries and emerging powers as being a vehicle for continued Western dominance in world affairs.[41] Apart from this simmering dispute and, of course, the divergent view of Kenyan actors, who sought to guard their sovereignty and often reacted with hostility at the negotiation table,[42] there was hardly any controversy. In particular, the idealisation[43] of Kenya as a best-practice R2P example was more or less unanimously accepted, because the issues touched upon were those elements of R2P that have always been part of the global consensus: the application of diplomatic tools and the focus on prevention. Thus, the UN leadership decided to frame Kenya as a test case for R2P, not least to prepare for the planned Outcome Document of the 2009 General Assembly.[44]

In sum, there were three R2P-related disputes in the Kenya case. First, concerning the scope of the norm,[45] there was the question of whether post-election violence constituted a case of R2P, even if it would manifest only as political interference through mediation efforts. All involved major powers and international organisations expressed—post-hoc and at times tacitly—their belief that the international and/or regional actors should indeed interfere. But the target of those efforts, the Kenyan political elite, held the opposite opinion. Second, there was the question of whether the R2P frame would have been useful in mediation efforts. Some argued that it was not useful, for it would have, at least in this case, politicised the issue and decreased the willingness to engage in dialogue. Others seemed to be more optimistic that R2P, even in the background, served its purpose. Third, there was the more controversial question of whether Kenya was an R2P case in the academic sense. While, as discussed, some argued that R2P had always been on the minds of the international mediators, the consensus seems to be that the framing of Kenya as an R2P case came about because it influenced the R2P debate after the successful mediation. The following section focuses on this argument.

Kenya and Its Impact on R2P and on International Criminal Justice

As explained earlier, Kenya has been described as the first successful test case of R2P, but this characterisation seems to stem primarily from the case's impact on the ensuing debates about R2P. In essence, it paved the way for a renewed focus on preventive strategies and related capacity-building measures.[46] These measures have been implemented mainly at the domestic level, but they have been shared

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41. Cohen, *op. cit.*, p. 48; Steinberg, *op. cit.*, p. 436.

42. Lindenmayer and Kaye, *op. cit.*, pp. 11–20; Steinberg, *op. cit.*, p. 434; Serena K. Sharma, "The 2007–8 Post-election Crisis in Kenya: A Case of Escalation Prevention", in Serena K. Sharma and Jennifer Welsh (eds.), *The Responsibility to Prevent: Overcoming the Challenges of Atrocity Prevention* (Oxford: Oxford University Press, 2015), p. 297.

43. Preston-McGhie and Sharma, *op. cit.*, p. 2.

44. *Ibid.*, p. 17.

45. For a common framework of disputed issues, see the introduction to this special issue.

46. Halakhe, *op. cit.*, pp. 14–15.

more widely by diplomats within the UN context as well. For instance, during the third meeting of the Global Network of R2P Focal Points, which took place on 11 and 12 June 2013 in Accra, Ghana, the case of Kenya was discussed as an example of successful implementation.[47] Most prominently, Kenya became a reference and a test case for the mass atrocity prevention agenda of the US government, a domestic operationalisation of the prevention goals of R2P.[48] Two main impacts on the trajectory of international norms of protection can be identified: Kenya proved to be a successful frame for highlighting the non-coercive parts of R2P in the debate on operationalising the norm, and a milestone in the strengthening of the criminal justice toolbox within the realm of the wider norms of protection.

First, references to the experiences in Kenya proved to be an effective frame for actors highlighting the value of R2P in the run-up to the 2009 General Assembly, which aimed at operationalising R2P. These actors saw Kenya as a rare opportunity to frame a positive, affirmative case by highlighting the diplomatic toolbox.[49] As Luck, one of the main architects of this focus on R2P implementation, recalled, "Relatively early, I thought that the case of Kenya provided us with a possibility to discuss prevention. It was important to show member states that we were serious about it, and that violence should not escalate".[50]

Therefore, Ban stated in his report to the General Assembly on the implementation of R2P: "As demonstrated by the successful bilateral, regional and global efforts to avoid further bloodshed in early 2008 following the disputed election in Kenya, if the international community acts early enough, the choice need not be a stark one between doing nothing or using force. A reasoned, calibrated and timely response could involve any of the broad range of tools available to the United Nations and its partners".[51] Furthermore, Ban highlighted the indispensability of regional responsibility and capacity in responding to the crisis.[52]

This shows that those driving the efforts to implement R2P and to discuss its operationalisation before the 2009 General Assembly saw Kenya as a rare opportunity to have a positive case study at hand to confront the many who doubted R2P at the time.[53] The fact that Kenya's potential to serve as a model for successful prevention strategies in the realm of R2P was highlighted is also indicative of a deliberate framing effort, because the actual violence was not prevented at all despite the many signs that should have alerted international actors well before the election.[54]

In the following years, this framing proved to be successful. Members of the Security Council highlighted on several occasions that the UN contributions to the international mediation efforts were a success story, and that the Kenya case revealed, both in 2008 and in the subsequent elections of 2013, the value of

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47. Interviews with US diplomats in Washington, DC, 24 May 2013, and in New York, 28–29 May 2013.

48. See, for instance: Joel D. Barkan, *Electoral Violence in Kenya: Contingency Planning Memorandum No. 17* (Washington, DC: Council on Foreign Relations, January 2013); Julian Junk, "The Two-Level Politics of Support: The United States and the Responsibility to Protect", *Conflict, Security & Development*, Vol. 14, No. 4 (2014), pp. 551–555.

49. Sharma, "The 2007–08 Post Election Crisis in Kenya: A Success Story for the Responsibility to Protect", *op. cit.*, p. 28; Luck, *op. cit.*; Lindenmayer and Kaye, *op. cit.*, p. 2.

50. Interview with Edward Luck, 14 June 2014, Berlin.

51. A/63/677, *op. cit.*, p. 9.

52. *Ibid.*, p. 23.

53. Sharma, "The 2007–8 Post-election Crisis in Kenya: A Case of Escalation Prevention", *op. cit.*, p. 281.

54. *Ibid.*, pp. 293–294.

non-coercive means of international involvement.[55] The international press continues to label Kenya an R2P success case: African security concerns intersected with global human security ambitions, and there was a focus on diplomatic, not military, tools and regional solutions, with African statesmen playing the most visible roles in the mediation efforts.[56] Even representatives from states that are usually not at the forefront of shaping norms of protection occasionally referred to the experiences in Kenya positively.[57]

These interpretations, however infrequent, did not provoke any disputes, let alone contradicting voices. This was despite the fact that the mediation efforts and accompanying international pressures were intrusive to such an extent that those generally wary of any breach of traditional state sovereignty, like the BRICS, could have easily voiced concerns. But as the following example of the criminal justice instruments shows, while the case of Kenya was not devoid of those concerns, they did not relate to the general interpretation of Kenya as a successful R2P case.

Second, the case of Kenya contributed to the strengthening of the systematic inclusion of criminal justice instruments in the toolbox of the norms of protection.[58] But the Kenya case simultaneously intensified the opinion—particularly in African states—that the International Criminal Court (ICC) trials were biased against African politicians and that the trials could have unintended political consequences.[59]

The power-sharing agreement of 28 February 2008 included several inquiry and reconciliation mechanisms. One of them, the Commission of Inquiry on Post-Election Violence (CIPEV, or Waki Commission), produced a report on the post-election violence recommending domestic tribunals to investigate related crimes. When the Kenyan parliament failed to institutionalise these tribunals, CIPEV involved the ICC in July 2009 by naming three suspects from the PNU coalition (among them Uhuru Kenyatta, later president of Kenya) and three suspects from the ODM camp (among them William Ruto, who considered running for president).[60] On 5

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55. See, for instance, the protocols of the meetings on 16 July 2010 (United Nations Security Council, document S/PV.6360, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CPR%20SPV%206360.pdf>, pp. 4, 17–20); on 22 November 2010 (United Nations Security Council, document S/PV.6427 (Resumption 1), <http://responsibilitytoprotect.org/afternoon%20speeches.pdf>, p. 14); or on 29 January 2014 (United Nations Security Council, document S/PV.7105, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7105.pdf>, p. 52).

56. For illustrations of many more examples, see: Irwin Cotler and Jared Genser, "Libya and the Responsibility to Protect", *The New York Times*, 28 February 2011, available: <http://www.nytimes.com/2011/03/01/opinion/01iht-edcotler01.html?_r=0> (accessed 6 September 2014); *Arab News*, "UN Must Boost Moves to Halt Genocide, Study Says", 24 July 2013, available: <http://www.arabnews.com/news/458945> (accessed 6 September 2014).

57. See the remarks by the Japanese representative: UN General Assembly, Official Records, 98th Plenary Meeting, 24 July 2009 (document: A/63/PV.98, p. 21). Similarly, the remarks by the representative of the Solomon Islands: UN General Assembly, Official Records, 99th Plenary Meeting, 24 July 2009 (document: A/63/PV.99, p. 15).

58. See, for instance: Chandra Lekha Sriram and S. Brown, "A Breakthrough in Justice? Accountability for Post-election Violence", *Policy Paper No. 4* (Nairobi: Centre on Human Rights in Conflict, August 2010). Though not making a reference to R2P, Sriram and Brown argue that the Kenyan case might prove pivotal for the development of the International Criminal Court (ICC).

59. . International Crisis Group (ICG), *Kenya: Impact of the ICC Proceedings—Africa Briefing 84 of 9 January 2012* (Nairobi/Brussels: ICG, 2012). This study provides an excellent overview of the major developments of the ICC proceedings and includes a Kenyan perspective.

60. The six suspects were only officially named publicly on 15 December 2010 by ICC prosecutor Moreno Ocampo.

November 2009, then ICC Prosecutor Luis Moreno Ocampo announced that the ICC was investigating the six cases, marking the first time that an ICC prosecutor started an investigation on his or her own initiative (*proprio motu*)[61]—a decision confirmed on 31 March 2010 by the ICC Pre-trial Chamber. Objections from the Kenyan government were rejected due to doubts about whether the national judicial capabilities would suffice. On 23 January 2012, the trial against four suspects (including Kenyatta and Ruto, both of whom at the time surprisingly aligned with each other for the 2013 elections, making the ICC trials a highly politicised issue during the elections)[62] finally began.

As one expert in the field of criminal justice remarked, "The indictments in the cases of Sudan and Kenya proved to be of great importance for the future development of both the ICC and the toolbox linked to mass atrocity prevention and to R2P—and for global criminal justice in general".[63] For instance, this represented for the US, which had a longstanding pattern of ignoring or even undermining the ICC, the second time (the first being Darfur and Sudan) that it had to re-evaluate its stance on the ICC and it forcefully supported the ICC in its investigations.[64] For the ICC, using its *proprio motu* power for the first time marked a milestone, particularly at the moment when the environment was heavily politicised, and many warned the ICC against opening the investigations given the elections on the horizon.[65] This may free the formerly cautious institution to act boldly in similar instances of R2P-related cases in the future[66]—or, as the study on Libya in this special issue reveals, lower the threshold for including ICC referrals in R2P-related Security Council resolutions.

However, there are critical voices as well. In the proceedings in Sudan, Uganda, the Democratic Republic of the Congo, the Central African Republic, Libya and Côte d'Ivoire, Kenya is frequently referenced by those arguing that there is a Western bias in how the ICC chooses these cases, to the detriment of African political leaders.[67] At the same time, others advise the ICC to take the political impacts on elections and political stability into greater account, and argue thus for continued caution when opening investigations.[68] In Kenyan domestic politics, the trial against its sitting president is certainly a rallying cry for the supporters of Kenyatta and seems to strengthen his position,[69] as was vividly on display when Kenyatta

61. It could do so because Kenya was a signatory state to the ICC statute since 2005.

62. ICG, "Kenya's 2013 Elections—Africa Report 197 of 17 January 2013" (Nairobi/Brussels: ICG, 2013); Gabrielle Lynch and Miša Zgonec-Rožej, "The ICC Intervention in Kenya—Programme Paper Africa/International Law 2013/01, February 2013" (London: Chatham House, 2013).

63. Phone interview with Beth van Schaack, 10 June 2013.

64. *Ibid.*

65. Mayeul Hiéramente, "Wahlen in Zeiten der Strafverfolgung: Die Situation in Kenia und der Internationale Strafgerichtshof", *Die Friedens-Warte: Journal of International Peace and Organization*, Vol. 88, Nos. 1–2 (2013), pp. 187–205.

66. Michael Contarino and Melinda Negrón-Gonzales, "The International Criminal Court", in Gentian Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect* (Cambridge: Cambridge University Press, 2013), pp. 411–435.

67. Fatou Bensouda, the current chief prosecutor of the ICC, strongly rejects this claim: Fatou B. Bensouda, "Reflections from the International Criminal Court Prosecutor—2012 Jonathan I. Charney Distinguished Lecture in Public International Law", *Vanderbilt Journal of Transnational Law*, Vol. 45, No. 4 (2012), pp. 955–961.

68. ICG, *Kenya: Impact of the ICC Proceedings*, op. cit.

69. BBC News, "Kenyatta Appears at ICC in Hague for Landmark Hearing", 8 October 2014, available: <http://www.bbc.com/news/world-africa-29530638> (accessed 21 October 2014).

returned to Nairobi after he appeared at an ICC "status conference", a pre-trial hearing, on 8 October 2014.[70] Because of frequent acts of obstruction on the Kenyan side, including the intimidation of potential witnesses, the ICC was unable to gather enough evidence. On 5 December 2014, ICC Prosecutor Fatou Bensouda withdrew the charges against Kenyatta.

This illustrates how existing criminal justice instruments continue to fight uphill battles on a case-by-case basis because of three central challenges: political interference of governments with investigations, the ICC prosecutor's heavy dependence on state cooperation and controversies over the potential negative effects of ICC investigations on peace processes.[71] It illustrates that the early attempts to label Kenya a success case in terms of international criminal justice disguise too many of the negative consequences that the failure of the Kenyatta trial might have for this tool of norms of protection. It also illustrates that frames of success and failure are subject to ups and downs over the course of political developments. At the very least, however, the case of Kenya broadened the spectrum of instruments actually applied by the ICC.

Conclusion

This article has shown that even though the international efforts in Kenya might not have been driven directly by R2P, they certainly had an impact on the future development of the non-coercive instruments of R2P and of the wider norms of protection at various institutions. It was not so much contestation that advanced the norm,[72] but rather the deliberate and successful framing effort to interpret Kenya as an international best-practice example of diplomacy, prevention and criminal justice, which could be referenced in the political discussions about operationalising R2P. There were disputes over the scope of R2P (there was largely consensus that it could be applied to the events in Kenya), the politicisation effects of invoking R2P and whether international efforts can be considered an R2P case at all. These disputes were easily brushed aside by the two reinterpretations of the international involvement in Kenya: as a successful case of using the non-military, non-coercive instruments of R2P, and as a milestone (though somewhat controversial) for the ICC, which exercised its *proprio motu* power for the first time. It remains somewhat absurd, however, that events positively influenced by the notable absence of a direct invocation of a norm were later referred to as the first successful application of that precise norm. What appears to be ironic is nevertheless important for conceptualising norm development and its impact on policymaking, and the case of Kenya can serve as a reminder to critically engage with the founding myths of categorising a situation as a success or failure.

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70. BBC News, "Uhuru Kenyatta at ICC: Kenyans Greet Returning President", 9 October 2014, available: <http://www.bbc.com/news/world-africa-29548753> (accessed 21 October 2014).

71. Caroline Fehl, "Growing Up Rough: The Politics of Justice in the International Criminal Court's Second Wave of Cases—PRIF Report" (Frankfurt a.M.: Peace Research Institute Frankfurt, 2015).

72. As was later the case with Myanmar (see the corresponding study on Myanmar by the author in this special issue).

Acknowledgements

Disclosure Statement

Funding

About the Author

Julian Junk is a research fellow at the Peace Research Institute Frankfurt and in the working group "International Organization" (Chair of Christopher Daase) at the Centre of Excellence "Normative Orders" at Goethe University Frankfurt. His research areas are foreign policy analysis with a focus on Western security and Africa policy, the management of international organisations with a focus on United Nations peacekeeping, and international norm development with a focus on the Responsibility to Protect.