

# Review - The Responsibility to Protect and the International Criminal Court

Written by Par Engstrom

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PAR ENGSTROM, FEB 20 2017

### **The Responsibility to Protect and the International Criminal Court: Protection and Prosecution in Kenya by Serena K. Sharma, London: Routledge (2016)**

Serena K. Sharma's *The Responsibility to Protect and the International Criminal Court: Protection and Prosecution in Kenya* is a well-researched account of international efforts to address the violence following Kenya's disputed 2007 presidential election. The book is divided into two main parts that examine two overlapping, yet distinct, perspectives on the reckoning with post-election violence in Kenya: through the lens of the 'responsibility to protect' or R2P doctrine, and the involvement of the International Criminal Court (ICC). In contrast to those who highlight the tensions between these two distinct, yet partially overlapping, sets of international normativity, Sharma sees the post-election crisis in Kenya as an opportunity to explore the potential complementarity between the 'responsibility to protect' and the 'responsibility to prosecute'. The book's process-tracing of the mediation process in Kenya is detailed and constitutes a significant contribution to our understanding of atrocity prevention in practice.

With regards to the book's discussion of the influence of the R2P doctrine in Kenya, Sharma critically examines the prevailing view among many R2P supporters that the response to the post-election crisis in Kenya constitutes one of the few success stories for this doctrine. The book's overall assessment of the role of R2P remains somewhat ambivalent. On the one hand, Sharma is sceptical of some of the more enthusiastic claims made by R2P proponents, and suggests that in the end R2P only played a minor role in conflict resolution efforts in Kenya. In terms of the key factors explaining the outcome of the negotiations in the Kenyan case, the book highlights individual agency (in the form of the central role played by former UN Secretary-General Kofi Annan), but also aid conditionality, more coercive diplomacy and external pressures. On the other, Sharma argues, nonetheless, that the Kenyan case demonstrates that mediation on the basis of the R2P doctrine can prevent atrocities without the "resort to military force" (p.46). More specifically, Sharma argues that the R2P framework influenced the thinking of the actors involved (p.56). It is not clear, however, from the analysis in the book, to what extent R2P actually informed the negotiations between the parties. For example, Sharma recognises that the mediation in Kenya was led by the African Union (AU) rather than the United Nations (UN), and the AU was reluctant to explicitly refer to R2P in its mediation efforts. In other words, the book offers limited evidence of any concrete influence that the R2P doctrine might have had in practice.

In relation to the role of the ICC in Kenya, the book offers plenty of insights into how Kenyan accountability efforts, limited as they were, operated in the 'shadow of the ICC'. The book tracks the disputes and struggles between the ICC's Office of the Prosecutor (OTP) and Kenyan political elites. Sharma offers a particularly interesting analysis of these dynamics with regards to the so-called Waki list: i.e. the list of names of alleged perpetrators of post-election violence initially handed over to Kofi Annan by the chairman of the Kenyan Commission of Inquiry on Post-Election Violence, and which was then given to the Prosecutor of the ICC, Luis Moreno Ocampo, in light of the Kenyan government's unwillingness to hold perpetrators to account at home. In contrast to the Kenyan government's argument that the ICC's involvement destabilised the fragile political situation in Kenya, Sharma argues that the ICC had a stabilising influence, particularly during the subsequent 2013 election. However, far from a congratulatory

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account of its involvement, Sharma also examines the unintended consequences of ICC's role. In particular, the ICC's opening of investigations into Kenya's post-electoral violence provoked an 'alliance of accused', which prompted the alignment of interests of opposing ethno-political communities in Kenya. Following the 2013 election, this alliance undermined the prospects of cooperation between the Kenyan government and the ICC, as, most notably, President Uhuru Kenyatta and Deputy President William Ruto used the machinery of the state to effectively shield themselves from prosecution. The ICC's charges against Kenyatta were dropped in 2014, and the case against Ruto was terminated in April 2016. For Sharma, this highlights the dependence of the OTP, and the ICC more generally, on government cooperation for bringing successful prosecutions.

Similar to its examination of the R2P doctrine at play in the Kenyan case, one can sense certain ambivalence in the book's overall assessment of the ICC. On the one hand, the attempts by the ICC to prosecute high-level officials may be thought to constitute an important achievement in itself and they were symbolically important given Kenya's record of complete impunity for high-level officials. Moreover, Sharma convincingly shows that Kenya's constitutional reform process can be seen, at least partially, as a response to ICC pressures. On the other hand, the (unsuccessful) prosecution of just a few senior Kenyan officials appears not to have brought about any wider changes in the country's culture of impunity. And it is clearly the case that the dramatically raised expectations that the ICC would galvanize accountability efforts in Kenya, not least by former ICC Prosecutor Moreno Ocampo, were not met. Still, in this regard, the book mentions, but does not elaborate on, the ICC's effects on domestic debates (beyond elite concerns as expressed by and in the Kenyan government and parliament), and particularly the scope for ongoing civil society mobilisation around human rights accountability. In particular, it would have been interesting to see some further reflections on the extent to which, if any, the ICC acted, or could have acted, as a catalyst of domestic accountability politics and as a push in a civic education campaign for example. More broadly, there are regular references in the book to domestic politics, but no systematic treatment of the politics underpinning the negotiations between the parties, and indeed in Kenya more broadly. The analysis remains overwhelmingly formal and process-oriented, and the reader gets a fairly limited sense of the actors' preferences and of the Kenyan political dynamics more generally (for an important exception see the discussion of political preferences of key domestic actors on p.64).

These limitations notwithstanding, the book provides a very detailed analysis of R2P and the ICC in Kenya, and it offers a valuable process-tracing of events in the aftermath of the 2007 post-electoral violence. It is true that it would have been interesting to see the author develop a more sustained analysis of the relationship between R2P and ICC. In particular, Sharma recognises tensions between the ICC and R2P (e.g. on p.12), and suggests (e.g. on p.11) that protection efforts may have undermined prosecution efforts in Kenya. However, at the same time, Sharma claims that the 2013 election illustrated the potential mutual reinforcement between protection and prosecution efforts (p.110). Overall, however, there is a somewhat disjointed treatment of R2P and ICC in the book, and there are few places where the analysis comes together.

These quibbles aside, the broader issue at stake here is with regards to the future: whither R2P and ICC? In relation to R2P, Sharma highlights that Kenya emerged as the first R2P test case since the 2005 UN World Summit; a moment which she refers to as a 'shift in consciousness' (p.45). With the benefit of hindsight, and from the vantage point of 2017 – following the military intervention in Libya, the ongoing Syrian conflict, a resurgent Russia, an increasingly confident China, a fraying Europe, and a Trumpian take-over of the United States – this assessment seems admirably, yet unjustifiably, optimistic. More generally, the demise of R2P is foreshadowed in the strengthening of competing understandings of sovereignty that emphasize sovereign equality, and that pose existential challenges to the demands and expectations of R2P advocates. In other words, the normative pushback is palpable and it has certainly engulfed the ICC as well, with a series of declared withdrawals over the course of 2016 by several African states (South Africa and Burundi, most notably, as well as The Gambia), and with quite possibly more states to follow, including, according to some observers, Kenya. These trends offer an important reminder that normative change is not unidirectional. And yet, while the global human rights regime, underpinning R2P and the ICC, may indeed be facing existential challenges, it is likely to prove far more resilient than its many detractors currently predict.

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