Original Article

Inhumanity's law: Crimes against humanity, RtoP and South Sudan

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Abstract This article addresses the question whether the Responsibility to Protect (RtoP) promotes a 'common humanity'. It observes how overt references to common humanity have receded from the RtoP discourse with the World Summit Outcome (WSO) in 2005. Nonetheless, the WSO prompted greater attention to crimes against humanity, which might conceivably strengthen a minimalist conception of humanity through the prosecution of its opposite number, inhumanity. This article tests Teitel's argument that 'humanity law' is reshaping the discourse of international politics by looking at the UN Security Council debates over RtoP in South Sudan. It concludes that the Council's failure to refer South Sudan to the International Criminal Court for crimes against humanity further weakens RtoP's potential to communicate a solidarist norm.
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> Humanity can assert itself by law.
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> – Justice Robert H. Jackson (quoted in Teitel, 2011, p. 9)
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> By its very nature, the community of states cannot properly accommodate the interests of humanity.
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> – David Luban (2004, p. 131)

Introduction

The norm of Responsibility to Protect (RtoP) was initially justified with an explicit appeal to our common humanity. The International Commission on Intervention and

State Sovereignty (ICISS) twice quotes UN Secretary General Kofi Annan's profound query:

> If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity? (ICISS, 2001, p. vii, 2)

The answer for both Annan (2000) and the ICISS was to redefine sovereignty and make it congruent with common humanity. The ICISS report makes clear that sovereignty does not permit states to engage in acts that shock the conscience of humanity (ICISS, 2001, paras 4.20, 4.23, 6.37, 6.39, 8.6, 8.25, 8.34).

Annan again invoked humanity when he called on heads of state to commit to RtoP at the 2005 World Summit (UNGA, 2005, para. 125). They heeded his call: UN member states unanimously endorsed RtoP though not in the form that he or the ICISS had envisioned. What also got lost in translation was any appeal to common humanity (UNGA, 2005, paras 138–139; UNGA, 2009). Annan's successor, Ban Ki-Moon, makes virtually no reference to common humanity in his speeches and reports on implementing RtoP.

Common humanity is a cosmopolitan sentiment. So, its disappearance from the UN's RtoP discourse is striking. It suggests the World Summit's embrace of RtoP was not the 'victory of common humanity' that some thought it heralded (see Wheeler, 2005). It also underscores the World Summit's shift from a solidarist to a pluralist formulation of RtoP, one built more on sovereign states than on common humanity.

Common humanity has not completely vanished from RtoP discourse. It is still there, in muted and legalistic form, in the crimes against humanity that trigger RtoP. Although the World Summit Outcome (WSO) never mentions common humanity, it refers to crimes against humanity five times in two paragraphs. It can be argued that RtoP generates a minimalist conception of humanity in response to inhumanity. On this reading, 'humanity is less about a claim to global connection … and more about the identification of universal threats' (Feldman and Ticktin, 2010, p. 5). Although the Security Council has been willing to identify possible crimes against humanity in Syria and South Sudan, it has so far been unwilling to refer those states to the International Criminal Court (ICC). This makes clear that common humanity is no match for state sovereignty and thereby weakens RtoP's potential to promote solidarism.

This article begins by looking at Teitel's notion of 'humanity law'. It next explores crimes against humanity, which are a critical nexus between RtoP and the ICC. Finally, it examines how RtoP, the ICC and crimes against humanity have figured in the Security Council's debates over South Sudan.[15] This article only discusses events up to August 2014 when it was written. South Sudan was selected as a case study because it has characteristics that are sadly typical of RtoP situations (civil war, state-supported ethnic massacres, humanitarian emergencies and peacekeepers) but without the close links to a P5 member that can affect the potential for rapid military assistance (as in Central African Republic, Cote d'Ivoire, Mali and Syria).

Humanity's Law?

In *Humanity's Law*, Teitel (2011, p. 4) identifies a paradigm shift from state security to human security in the international legal order.[1] State sovereignty is 'in no way disappearing' but is now more likely to be contested by legal norms of human protection (Teitel, 2011, pp. 9–10). She traces the emergence and development of this legal framework, which draws together elements from international humanitarian law, international human rights law and international criminal law into what she terms 'humanity law'.[2] According to Teitel (2011, p. 203), '[t]he preeminent norm of humanity law … is aimed at the recognition and preservation of *humankind* in global politics' (emphasis added). This offers a universal and 'minimalist political morality' (Teitel, 2011, p. 52).

Teitel (2011, p. 4) contends that humanity law 'reshapes the discourse of international relations' in two fundamental ways. It transforms a state's treatment of its own populations within its borders into a matter for international concern. It also promotes the legalization and judicialization of international politics. Humanity law 'gives "justice talk" a bigger role in contemporary foreign policy making' by applying it to internal political conflicts (Teitel, 2002, p. 360). The big question, of course, is whether humanity law and 'justice talk' translate into the preservation and protection of humanity. Writing before the advent of RtoP, Meron (2000, p. 276) pessimistically concluded that 'Humanization may have triumphed, but mostly rhetorically'. Eleven years later, and 6 years after the WSO, Teitel (2011, p. 7) acknowledges that 'the extent to which [humanity law] is actually altering states' perceptions of their interests and changing the underlying determinants of state behavior is a matter for further social-scientific investigation and debate'.

So far, I am mostly in agreement with Teitel. Where we part company is when she makes increasingly bold and unsubstantiated pronouncements that humanity law is 'constitutive' of 'global politics' (Teitel, 2011, p. 15), 'international society' (Teitel, 2011, p. 37) and 'an emergent global human society' (Teitel, 2011, p. 225). At the end of her book, she claims that humanity law is leading to 'the emergence of transnational rights' (Teitel, 2011, p. 225). These assertions do not square with her earlier statements that humanity law is a minimalist and non-teleological morality. They are also contradicted by her recognition that humanity law may not even be altering states' interests.

Crimes against Humanity: The Nexus between RtoP and the ICC

A weak version of humanity law clearly animates RtoP and the ICC. Both are expressions of global legalism. Both focus on protecting humanity from the same set of atrocity crimes. Yet, both are also deferential to state sovereignty: the international community can only step in as a last resort when states do not meet their

responsibilities to protect or prosecute. Still, there are important differences between them. Where RtoP emphasizes state responsibility, the ICC stresses individual responsibility. Where RtoP is soft law, the ICC is hard law. Where RtoP is more deferential to sovereignty (states have to be 'manifestly failing'), the ICC is less deferential (states need only be 'unwilling or unable'). Despite these differences, there has been increasing convergence between RtoP and the ICC with both the UN Secretary General and ICC Prosecutor stating that the ICC is part of the RtoP toolbox (UNSG, 2012; Kersten, 2013). This reached a high point when the Security Council referred Libya to the ICC in 2011 as part of its collective responsibility to protect populations from crimes against humanity.[3] What drives this convergence is that crimes against humanity are the trigger for the international community's responsibility to protect, and punish through RtoP interventions and ICC trials.

Understanding humanity

Paradoxically, crimes against humanity appeal to a common humanity even as they elude a shared understanding. As Macleod (2010, p. 283) observes, 'The principal difficulty in interpreting the term "crime against humanity" is the ambiguity of the word "humanity" '. Humanity can refer to humanness or humankind (Luban, 2004). In the first sense, crimes against humanity are contrary to human nature. In the second sense, they harm humankind in the aggregate. Some endorse the first meaning (May, 2006), others the second (Macleod, 2010) and still others both (Luban, 2004; Renzo, 2012).

By contrast, Altman and Wellman (2004, p. 42) reject an appeal to humanity, writing that '[h]arm to humanity is a convenient but ultimately unpersuasive fiction'. There are two parts to their argument, both of which are unconvincing. First, they state that 'many humans … were left quite unaffected' by Nazi atrocity crimes (Altman and Wellman, 2004, p. 42). This is too literal a reading. There are ways of thinking that humanity may be harmed without insisting that each and every human on the planet be directly harmed. In addition, Altman and Wellman argue for a view of state sovereignty that eliminates the need to invoke humanity:

> It is not necessary to struggle – as mainstream theorists have done – to develop a reasonably persuasive account of how certain egregious crimes harm humanity or the international community: the Westphalian conception of sovereignty that demands such harm as a precondition of international criminal jurisdiction *has been jettisoned*. If one adopts, instead, the functional account of state sovereignty recommended here, then states that do not sufficiently protect the basic rights of their people have no legitimate objection to the imposition of international criminal law on them. (Altman and Wellman, 2004, p. 51; emphasis added)

Obliquely referencing RtoP (Altman and Wellman, 2004, p. 45), they claim 'the international community is gradually but decidedly coming around to [this] view of state sovereignty' (Altman and Wellman, 2004, p. 46).[4] This account of sovereignty is even more fictional and less persuasive than the notion of harming humanity they want to replace. When they wrote their article in 2004, there was no international consensus on RtoP. A year later, the World Summit agreed that sovereignty is only relinquished where a state is manifestly failing to protect its populations from crimes against humanity (and other atrocity crimes). The collapse of Altman and Wellman's argument leaves common humanity at the core of efforts to conceptualize crimes against humanity.

Defining crimes against humanity

First defined by the Nuremberg Tribunal, crimes against humanity have become part of customary international law. The prohibition on crimes against humanity is now generally considered a peremptory norm (*jus cogens*) alongside prohibitions on genocide, torture and slavery (Glanville, 2012, pp. 26–27). A peremptory norm is one 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted' according to the Vienna Convention on the Law of Treaties (UN 1969, art. 53). These norms give rise to obligations *erga omnes*; that is, those owed to the international community as a whole. Hence, there is a legal duty on all states to repress and punish crimes against humanity. In theory, at least, this should give rise to universal jurisdiction.

Even as crimes against humanity have become part of customary international law, they have been redefined by treaties, international tribunals and soft law. One legal scholar counts 12 different legal definitions in various international instruments (Bassiouni, 2013, p. 58). Another observes that their 'scope is quite obviously vague' (Schabas, quoted in Macleod 2010, p. 288). This vagueness and diversity is because of the fact that crimes against humanity lack the equivalent of the Genocide Convention or Geneva Conventions. To remedy this, a group of legal scholars recently drafted a 'Proposed International Convention on the Prevention and Punishment of Crimes against Humanity' (Sadat, 2013; Sadat and Pivnichny, 2014).[5]

For the moment, though, the most agreed-upon legal definition of crimes against humanity is found in the ICC's Rome Statute, which had been ratified by 122 states as of August 2014.[6] The Statute's preamble sets out two rationales for why these crimes are international crimes meriting prosecution by an international court. The moral justification comes first: 'during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'. The instrumental, political justification follows: 'such grave crimes threaten the peace, security and well-being of the world'. There is a tension between the solidarism of the former and the pluralism of the latter. The preamble glosses that

with an unspoken assumption that international crimes are *both* conscience-shocking and threatening to international peace, but clearly this need not be the case. This tension has carried over into the Court's efforts to define these crimes and assert jurisdiction over states.

Under the Rome Statute, crimes against humanity consist of several enumerated crimes (ranging from murder to forced pregnancy)[7] committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack' (art. 7). The Statute adds that such attack must be 'pursuant to or in furtherance of a State or organizational policy to commit such attack' (art. 7).[8] This policy element is in marked contrast to the statutes and jurisprudence of the other international and hybrid tribunals (Mettraux, 2013, pp. 166–175; Sadat, 2013, pp. 352–353), and has generated legal disputes (compare Mettraux, 2013 with Ambos, 2013).

These disputes came to a head when the ICC had to rule whether Kenya's post-election violence met the definition of crimes against humanity. In a 2010 majority decision, two judges reject the view that only state-like organizations could carry out a policy, arguing that it is enough if 'a group has the capability to perform acts which infringe on *basic human values*' (ICC, 2010a, para. 90; emphasis added).[9] In a powerful dissent, Judge Hans-Peter Kaul takes the position that only states or state-like organizations can carry out a policy of widespread or systematic attacks that harms *humankind*, which would justify infringing state sovereignty (ICC, 2010b, paras 52, 59, 61, 64, 66). He argues in a subsequent dissent in the same case that 'the planning and coordination of violence in a series of meetings … does not transform an ethnically-based gathering of perpetrators into a State-like organization' (ICC, 2012, para. 12). Thus, Kaul's interpretation would align the legal definition with what social scientists have demonstrated: crimes against humanity arise from rational, modern politics rather than from irrational, primordial hatreds (see, for example, Straus, 2006).

What first appears to be a narrow argument over the contextual element of crimes against humanity reveals itself as a broad debate over three issues. The first is how hard it should be to make a showing of crimes against humanity to trigger ICC jurisdiction and eventually to win convictions. The second is how to distinguish international crimes that need to be tried at the ICC from ordinary crimes that can be tried in Kenyan courts. The final issue is whether humanity means human values or humankind.

Sadat (2013, p. 376), who is spearheading the campaign for a new convention, wants to make it easier to hold individuals responsible for crimes against humanity. She worries that a focus on the policy element could make crimes against humanity as difficult to prove as genocide.[10] Schabas (2012, pp. 150–151), who is also involved in the campaign for a new convention, takes the opposite view:

> Concerns that requiring a state plan or policy will leave an impunity gap are misplaced. Most so-called non-state actors find themselves more than adequately challenged by various national justice systems. … Mainly it is when

> perpetrators commit heinous acts precisely because they are acting on behalf of a state, and in pursuit of its policies, that we require international justice to step in.

Schabas is right to emphasize the policy requirement in order to distinguish international crimes from ordinary crimes. This is what the Rome Statute does and what the dissenting judge in the Kenya case wanted the ICC to do.

Prosecuting crimes against humanity

Crimes against humanity demand prosecution. To understand why, it is necessary to look at the purposes served by international criminal justice. International justice largely borrows its rationales from domestic justice, but these make an awkward fit. Deterrence only works where punishment is likely, but international justice has weak, selective coverage. Also, there is little evidence that international justice deters international crimes (see Rodman, 2008). Retribution depends on matching the punishment to the crime but, as Hannah Arendt recognized, 'no punishment is severe enough for these crimes' (Kohler and Saner, 1992, p. 54). In fact, the punishments handed down for atrocity crimes are typically no more severe than those for serious domestic crimes (Drumbl, 2007, pp. 154–163).

Expressivism offers a more convincing rationale than either deterrence or retribution. As Luban (2010, p. 575) recognizes, the central feature of international criminal justice is the trial (not the punishment). International trials serve 'a kind of universal moral interest in condemning the great crimes' (2010, p. 579). Luban writes:

> Trials are expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes and not merely politics by other means. … The decision not to stage criminal trials is no less an expressive act … and the expressive contents associated with impunity … are unacceptable: [it is an] assertion[] that political crime lies outside the law. (Luban, 2010, p. 576)

Once acts are credibly labeled as crimes against humanity, expressivism requires an international trial (or, at a minimum, a domestic trial of these international crimes). To do otherwise is to undermine the message that law can punish the worst political crimes. It also undermines the tenuous notion of common humanity activated by recognizing crimes against humanity. As Ralph (2007, pp. 108–109) points out, international criminal justice 'can reaffirm a common consciousness based on humanity; yet if it is selective, it can simultaneously weaken that consciousness'.

Responsibility to protect from crimes against humanity

The WSO adopted a higher just cause threshold than the ICISS: crimes against humanity, genocide, war crimes and ethnic cleansing.[11] This shifts the focus from

moral judgments about what shocks the conscience of humanity (ICISS, 2001) to legal determinations about what violates international criminal law. That replaces subjective moral judgments (and selective political decisions) with something more consensual and more consistent: international criminal law, which reflects an overlapping normative consensus or a moral minimalism. As the UN Secretary General (2009, para. 20) observes, 'no community, society, or culture publicly and officially condones genocide, war crimes, ethnic cleansing or crimes against humanity as acceptable behavior'.

Crimes against humanity are the paradigmatic case for RtoP interventions. These crimes most clearly represent the 'moral inversion' (Vernon, 2002, p. 233) of a state's responsibility to protect its populations. Luban (2004, p. 117) describes crimes against humanity as 'crimes of politics gone cancerous'. They harm humanity in two senses: they violate 'our nature as political animals' and they harm humankind because 'all human beings share an interest in ensuring that people are not killed by their neighbors solely because of their group affiliation; for all of us have neighbors whose group is not our own' (Luban, 2004, p. 139). Crimes against humanity better capture what the World Summit Outcome's RtoP was meant to protect: collectivities (not individuals), populations (not just civilians) and all groups (not just the racial, ethnical, national and religious groups protected by the Genocide Convention).

There are also pragmatic reasons for RtoP to focus on crimes against humanity. Genocides are too rare and war crimes too common. In any event, crimes against humanity encompass genocide and ethnic cleansing while overlapping with some of the worst war crimes. Furthermore, crimes against humanity do not require the showing of special intent that makes genocide so hard to prove. As Evans (2006, p. 330) has noted, 'Over and again we find the lawyers' issue of "genocide or not genocide" becoming the issue, when the real issue is the need to act to protect people when atrocity crimes of any kind are being committed'. Consequently, he writes that 'now it is time … to make "crimes against humanity" the dominant, resonating legal concept … and not just a kind of after-thought category – what one is reduced to when genocide for one technical reason or another is ruled out' (2013, p. 3).

Linking RtoP and the ICC

Both RtoP and the ICC are primarily triggered by crimes against humanity. The UN Security Council has cited the apparent commission of crimes against humanity in justifying collective protection measures in Darfur, Libya, Cote d'Ivoire, Central African Republic and South Sudan. The ICC is mostly 'a "crimes against humanity" court' (Sadat, 2013, p. 377): as of August 2014, it had charged crimes against humanity in all but one of the eight country situations before it.[12] Furthermore, all the country situations investigated by the ICC from the World Summit to August 2014 involved states where RtoP was invoked: Kenya, Libya, Cote d'Ivoire and Mali.[13]

Evans celebrates this convergence between RtoP and the ICC. He views the ICC as an important element in the RtoP response toolbox (Kersten, 2013, p. 2). He also sees advocacy around a new crimes against humanity convention and efforts to operationalize RtoP as 'wholly complementary exercises – in essence, the legal and political faces of the same coin' (Evans, 2013, p. 4). By contrast, Megret (2012, p. 14) worries this convergence will make military interventions more likely, partly because 'international involvement on the basis of R2P is presented as a fundamental moral or legal duty as opposed to a difficult and inherently contestable political choice'. Megret (2012, p. 17) also argues that RtoP and the ICC have been instrumentalized and so have lost their 'cosmopolitan outlook' (see Kersten, 2013).

Megret's concerns are overstated. First, only two of the eight country situations before the Court (Sudan and Libya) in August 2014 had come via Security Council referral. Second, the ICC was instrumentalized from the start by African states through self-referrals.[14] Third, the Prosecutor's complicity in those self-referrals means the Court is now seen as an African rather than a cosmopolitan court. Fourth, the ICC was always an awkward mix of solidarist goals and pluralist processes, so it should hardly come as a surprise that the latter won out. Fifth, cosmopolitan-minded critics should be arguing for *more* Security Council referrals as those further a more universal jurisdiction – one based on common humanity rather than limited by state consent. Finally, as South Sudan demonstrates, there is too little, not too much, convergence.

South Sudan: RtoP, the ICC and Crimes against Humanity

South Sudan became the UN's newest member state in July 2011. As of August 2014, the country had ratified the Geneva Conventions but not the Genocide Convention or the Rome Statute. In May 2013, the President of South Sudan used the visit by Uhuru Kenyatta, Kenya's President and ICC indictee, to denounce the ICC and proclaim that South Sudan would 'never accept' it (McNeish, 2013).

On 15 December 2013, the ruling party and army, which had led the long independence struggle from Sudan, fractured violently along ethnic lines. President Salva Kiir, who is Dinka, accused his former Vice President Riek Machar, who is Nuer, of an attempted coup (see International Crisis Group, 2014). Although Machar denied the accusations, he quickly became the leader of a breakaway faction. By August 2014, the resulting civil war had killed an estimated 100 000, displaced 1.1 million within the country, made refugees of another 400 000 and put the entire population at risk of famine (UNSG, 2014). It had also drawn in neighboring countries, either as belligerents (Uganda) or mediators. The longstanding UN peacekeeping force, the UN Mission in South Sudan (UNMISS), was caught in the middle. Repeated attacks from the government side have killed peacekeepers as well as civilians under their protection.

RtoP discourse at the UN

Less than 2 weeks after violence broke out, the UN Secretary General's Special Advisers on the Prevention of Genocide and on the RtoP issued a statement expressing concern over ethnic attacks and warning these 'could constitute war crimes or crimes against humanity' (UN, 2013). They also reminded the government it 'has the responsibility to protect all South Sudanese populations, irrespective of their ethnicity or political affiliation' (ibid.). On 24 December, the Security Council issued a resolution condemning an attack on UNMISS that killed two peacekeepers and approving an increase in UNMISS strength from 7700 to 13 500 (UNSC, 2013).

On 2 May 2014, the Security Council held a meeting on South Sudan. The High Commissioner for Human Rights, who had just returned from South Sudan, testified:

> I fear that South Sudan's leaders are locked in a purely personal power struggle, with little or no regard for the appalling suffering that it inflicts on their people. [We] warned them that they will inevitably be the subject of international investigations regarding the extent of their knowledge of war crimes and crimes against humanity committed by subordinates under their authority and their failure to take reasonable steps to prevent such crimes (UNSC, 2014a, p. 3).

The Special Adviser on the Prevention of Genocide told the Council there were 'risk factors of genocide and other atrocity crimes' (UN, 2014, p. 1). He described several massacres, including one that had targeted civilians who had sought shelter with UN peacekeepers:

> In Bor, armed elements reportedly affiliated to the Government forced entry into the UNMISS camp, in which displaced persons have been sheltering. They killed more than 50 civilians, mostly of Nuer ethnicity, and wounded around 100 others. … The UNMISS commander in Bor … informed us that the recent attack was well organized and that attackers included individuals in uniforms of the army of South Sudan. (UNSC, 2014a, p. 4)

The Special Adviser further stated 'the State must acknowledge that it has the primary responsibility to protect all South Sudanese irrespective of nationality, ethnicity or political affiliation and prioritise this responsibility' (UNSC, 2014a, p. 4). He concluded by reminding the Council that 'we must uphold our collective responsibility to protect the populations of South Sudan from genocide, war crimes, ethnic cleansing and crimes against humanity, as well as their incitement' (UNSC, 2014a, p. 6).

In the ensuing debate, six Council members (Argentina, Australia, Chile, France, Lithuania and Rwanda) explicitly referred to South Sudan's responsibility. Several other members implicitly recognized South Sudan's responsibility. A smaller number (Luxembourg, Rwanda, United Kingdom and United States) evoked the international

community's collective responsibility. States proposed a range of collective measures from reinforcing UNMISS to imposing targeted sanctions. There was also considerable 'justice talk.' Five states (Argentina, Australia, Chile, Lithuania and Luxembourg) expressed the view that crimes against humanity had been committed. All Council members, except China, spoke of the need for criminal accountability. Seven states (Argentina, Australia, Chile, France, Jordan, Lithuania and Luxembourg) invoked the possibility of referring South Sudan to the ICC. Without mentioning the ICC, Samantha Power, the US Ambassador, left open the possibility for an ICC referral:

> No one has the right to target others because of their ethnicity, to incite violence or breach the protective walls of a United Nations base. Those who ignore this warning should have no doubt that the international community will do all within its power to hold those individuals accountable. The culture of impunity must end (UNSC, 2014a).

Although Russia acknowledged the possible commission of war crimes and the need to end impunity, it placed the onus on the warring parties to bring perpetrators to justice. China made no reference to international crimes or justice. (UNSC, 2014a)

South Sudan's Ambassador is none other than Francis Deng, who helped reformulate sovereignty as responsibility and who served as the Secretary-General's first Special Adviser on the Prevention of Genocide. During the debate, he acknowledged South Sudan's responsibility to protect and prosecute: 'It is of course indisputable that the Government must bear the primary responsibility for protecting its citizens without discrimination on ethnic or any other ground and be accountable in that regard' (UNSC, 2014a). But, in the next sentence, he used South Sudan's responsibility as a defense: 'However, that cannot justify placing a democratically elected Government on the same moral, political and legal grounds as a rebel group using violence to overthrow the Government' (UNSC, 2014a). He stated that South Sudan's president had set up a committee to investigate 'gross violations of human rights and hold accountable those found responsible' (UNSC, 2014a).

On 8 May, UNMISS (2014, para. 292) issued a report on the human rights situation that found 'reasonable grounds' for concluding that both sides had committed crimes against humanity. The report provided a detailed legal analysis. It began by stating that crimes against humanity 'entail gross human rights violations of a scale and level of organization that shock the conscience of humanity' (UNMISS, 2014, para. 285). The report then applied the Rome Statute definition and ICC jurisprudence (including the 2010 Kenya decision) to the acts it had investigated. It found the attacks were widespread *and* systematic, and further noted evidence 'suggesting coordination and planning' (UNMISS, 2014). While the report acknowledged the government had set up accountability mechanisms, it raised 'serious questions concerning whether these mechanisms are sufficient to provide real accountability in South Sudan' (UNMISS, 2014).

On 12 May, the Secretary General briefed the Security Council on the situation. He drew attention to the UNMISS report and concluded there were 'reasonable grounds' for believing both sides had committed crimes against humanity (UNSC, 2014b). Interestingly, he called not for an ICC referral but for a national–international tribunal, such as those created in Cambodia, Sierra Leone and Timor-Leste. Ambassador Deng again acknowledged South Sudan's responsibility but appeared to fault the international community for not doing more under Pillar 2 to assist: 'when a State lacks the capacity to discharge that national responsibility, it is incumbent upon the international community to provide the necessary support to enhance State capacity in fulfilling its national responsibility' (UNSC, 2014b).

On 27 May, the Security Council issued Resolution 2155, which quoted UNMISS's findings on crimes against humanity. It also condemned attacks and threats against UNMISS. The Resolution reminded South Sudan that it 'bears the primary responsibility to protect civilians within its territory and subject to its jurisdiction, including from potential crimes against humanity and war crimes' (UNSC, 2014c). The Resolution stressed civilian protection, accountability, humanitarian assistance and ending the hostilities. Since that Resolution, both sides continued to commit what appear to be crimes against humanity.

Just talk

The South Sudan case study reveals several things about the state of RtoP and its relation to common humanity. First, the UN Secretariat is now quicker than it was with Darfur to label gross human rights and humanitarian violations as possible crimes against humanity. The UN Special Advisers perform a key role here along with the High Commissioner for Human Rights. The UN also conducted its own investigations rather than setting up an independent commission (as it did with Darfur). Second, there is no debate in the Security Council over defining or applying crimes against humanity, even though some states (notably China) avoid any mention of the term. Not even South Sudan disputed the crimes against humanity label. Third, there is widespread agreement on the Council that South Sudan has a responsibility to protect its populations from crimes against humanity, though a few states (again China) are noticeably reticent. The state's responsibility is uncontroversial and well-supported by international law – so much so that South Sudan recognizes its responsibility.[15] Fourth, there is virtually no discussion of whether South Sudan is 'manifestly failing' to meet its responsibility to protect its populations from crimes against humanity. Such a threshold finding would permit the Council to take 'timely and decisive' collective action under Chapter VII in accordance with the WSO. There is just a lonely statement from US Ambassador Power: 'It is unconscionable that South Sudan's leaders have failed to take the steps necessary to

restore peace and end the needless suffering of their people' (UNSC, 2014a). If South Sudan's repeated attacks on UN peacekeepers (arguably, a war crime in itself) do not count as a manifest failing, then what does? The Council's failure to set out any criteria for 'manifest failing' is not limited to South Sudan (see Gallagher, 2014). For example, there was no mention of manifest failing in Resolution 1973, which authorized 'all necessary measures' to protect civilians in Libya.[16] Fifth, the Council blurs the distinction between RtoP and Protection of Civilians in the language of its Resolutions as well as its debates. This reflects continuing discomfiture with RtoP, as well as the wider acceptance of Protection of Civilians, within the UN and many member states. This can have practical consequences on the ground such as when the Council confused military intervention and peacekeeping in Cote d'Ivoire (Bellamy and Williams, 2011, pp. 825–838).

The Council debates over South Sudan also make clear that 'justice talk' (Teitel, 2011, p. 360) is mostly just that. That's not to say the discourse of accountability for international crimes is not significant in itself, but it has yet to be translated into concrete action in the obvious form of an ICC referral. There are several possible explanations for this reluctance.[17] For one thing, some states may see a Security Council referral to the ICC as a prelude to regime change in the aftermath of Libya. For another, there is little African Union support for an ICC referral. RtoP places a premium on 'cooperation with relevant regional organizations' (UNGA, 2005, para. 139). Yet, RtoP seems 'politically dead' at the African Union since Libya (Dembinski and Schott, 2014, p. 376). The African Union also has been highly critical of the way that ICC and universal jurisdiction prosecutions have targeted African states. The African Union's Commission of Inquiry on South Sudan has proceeded quite cautiously. Its June 2014 interim report stated that it was 'not yet in a position to pronounce itself definitively on whether some of these [incidents] amount to international crimes' (African Union, 2014, para. 20).[18] Significantly, one of the five Commissioners is Ugandan academic Mamdani (2009, p. 300) who had previously called RtoP the 'right to punish' and international justice 'a slogan that masks a big power agenda to recolonize Africa'. A third possible explanation is that there is surprisingly little advocacy for an ICC referral. In an open letter to the Security Council in August 2014, Human Rights Watch (2014) calls for accountability through either a national–international tribunal or the ICC, but does not request the Council referral that would make the latter possible. A fourth explanation may be that a referral of South Sudan would underscore the Council's consistent inconsistency (Hehir, 2013): why another weak African state and not Syria? Finally, Security Council members may well worry that ICC investigations could make peace in South Sudan even harder to achieve. Neither Darfur nor Libya offer much evidence that the threat of ICC prosecutions changes a head of state's actions for the better.

There are certainly good political reasons then for not making a Security Council referral. But there is a cost as well. The Council's failure to refer a state

that strongly appears to be manifestly failing to protect its populations from crimes against humanity weakens the normative foundations of RtoP and international justice. If justice in such instance can only be done with a state's consent, then it communicates three messages: that crimes against humanity are international rather than universal crimes; that a state's crimes are beyond the law's reach; and that international politics will prevail over common humanity. Just to be clear, this article is not arguing that a Security Council referral will deter atrocities, achieve justice or promote peace. It makes a much more modest claim: a referral will express the valuable norm that crimes against humanity are a universal harm – that they harm not just the international community but also our common humanity. Referral is also an expressive commitment that there should be some attempt at accountability for state and state-like actors who commit such crimes.[19]

Conclusion

As the South Sudan case study reveals, humanity law is indeed 'reshaping the discourse of international relations' (Teitel, 2011, p. 4). The Security Council debates are full of references to RtoP, the ICC and crimes against humanity. But the Council's failure to refer South Sudan to the ICC undermines Teitel's (2011, p. 120) claim that humanity law is 'a counter-force to current politics'. For now, humanity law remains subordinated to state sovereignty. Furthermore, the Council debates over South Sudan challenge Teitel's (2011, p. 225) stronger claim that a universalizing humanity law is constituting 'an emergent global human society'.

Instead of humanity's law, we would do better to talk of inhumanity's law. This latter formulation does not come burdened with teleological optimism. It emphasizes a negative conception of common humanity – one defined by its opposite number. It also focuses attention on addressing inhumanity rather than prematurely celebrating humanity. Perhaps most importantly, inhumanity's law reminds us of the limits of the law in actually reducing inhumanity.

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Notes

1 Cançado Trindade (2010) and Meron (2012) similarly observe that international law is being 'humanized' through human rights and humanitarian law.
2 Humanity law is similar to what Welsh and Banda (2010, p. 216) call 'international protection law'.
3 This was not a little ironic given that the preamble to the Rome Statute states: 'nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State'.
4 Consequently, they would redefine international criminal law to reach all 'widespread violations of basic rights' by states, not just the 'super-crimes' of genocide and crimes against humanity (Altman and Wellman, 2004, p. 50).
5 For a friendly critique of this enterprise, see Heller (2012).
6 The Rome Statute makes it harder to maintain a separate and distinct customary international law on crimes against humanity (Clark, 2013, p. 22; Sadat, 2013, p. 373; Sluiter, 2013, p. 141). For a contrary position, see Mettraux (2013, p. 174).
7 Scheffer (2008, pp. 125–126) rightly notes that some of those crimes provide '[more] realistic grounds for action under RtoP' than others.
8 The ICC's Elements of Crimes clarify that '[s]uch a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack' (ICC, 2011, 5 n.6).
9 The majority do not spell out what they mean by 'basic human values'. The phrase was borrowed from an article about whether terrorism constitutes a crime against humanity, but that author does not define those values (Di Filippo, 2008; ICC, 2010b, n. 84). Sadat (2013, p. 375) uncritically embraces the same phrase in arguing against the dissent.
10 This is an overstatement given that it is genocide's special intent requirement which makes it so hard to prove. Sadat (2013, p. 376) also acknowledges that the ICC would still be able to bring war crimes charges in many cases, but argues that 'war crimes may not capture the full horror of a particular situation'.
11 The WSO does not define these four atrocity crimes but the Secretary-General notes that genocide, crimes against humanity and war crimes are 'well-established' in international law and may include ethnic cleansing (UNSG, 2009, para. 3). Scheffer (2008), the former US Ambassador at Large for War Crimes, proposes the all-encompassing term 'atrocity crimes'. The UN Secretary General's 2009, 2013 and 2014 reports on RtoP adopt this terminology. The 2013 report states: 'What distinguishes atrocity crimes is the deliberate targeting of specific groups, communities or populations' (UNSG, 2013, para. 12).
12 Crimes against humanity are the only crimes charged in Cote d'Ivoire, Kenya and Libya 'due to the absence of an armed conflict sufficient to trigger the Court's war crimes jurisdiction and the implausibility of alleging genocide' (Sadat, 2013, p. 356).
13 The UN Security Council referred the situation in Darfur to the ICC several months before the World Summit.
14 The ICC's architects assumed the Court would prod states to undertake genuine, domestic prosecutions to preclude the Court from exercising jurisdiction. They counted on states being jealous guardians of their sovereignty. However, the first ICC Prosecutor, Luis Moreno-Ocampo, turned that thinking on its head: he 'adopted a policy of inviting voluntary referrals from states to increase the likelihood of important cooperation and support on the ground' (ICC, 2006, para. 2). The governments of Uganda, the Democratic Republic of Congo, the Central African Republic, Cote d'Ivoire and Mali proved only too willing to make 'self-referrals' to the ICC. Self-referrals offer states several political advantages: they significantly diminish the likelihood that state officials will be indicted by the ICC; they shift the financial and political costs of investigations and prosecutions to the international community; and, most importantly, they marginalize and pressure their political enemies (that is, former leaders or rebel leaders) through international arrest warrants.

15 Of course, the fact that South Sudan's ambassador is Francis Deng probably plays a role in its willingness to recognize its responsibility to protect.
16 In the accompanying Council debate, Portugal simply mentioned that Libya had 'failed totally to abide' by Resolution 1970 (UNSC, 2011, p. 8). There was no attempt to tie this statement to the WSO's requirement of manifest failing.
17 Further research with various representatives of Security Council members and the UN Secretariat will be needed to clarify this.
18 Despite the African Union's (2014, para. 36) criticism of the ICC, its Commission adopted the Rome Statute's definition of crimes against humanity.
19 A referral does not necessarily lead to indictments as that will depend on how the Prosecutor and judges assess the evidence. In addition, the Security Council can request the ICC to defer any investigation or prosecution in the interests of international peace and security (Rome Statute, art. 16).

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