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Humanity as the A and Ω of Sovereignty: A Rejoinder to Emily Kidd White, Catherine E. Sweetser, Emma Dunlop and Amrita Kapur

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'Humanity as the A and Ω of Sovereignty' is not primarily an article about the responsibility to protect (R2P), although R2P may seem to be one of the most obvious manifestations of the humanization of sovereignty. It is an article about the shifting normative foundation of international law which it seeks to describe empirically, to conceptualize doctrinally, and to assess normatively.

1 International Law, Legal Scholarship, and Politics

The objection of my critics is that a Security Council veto can hardly be illegal, because it is a genuinely political act (Emily Kidd White). A related point is that my 'purely legal analysis' consists in a 'failure to address political obstacles' 'without analysing the inter-relationship between international law and politics' (Amrita Kapur).

My reply is that it is the job of lawyers to make legal and especially doctrinal arguments because law is a distinct scheme of social order which needs to be elaborated and explained by experts who use a specific technique of reasoning and argument. That is not to say that law and politics are two neatly distinct spheres. Quite the contrary, as mentioned in a footnote to my article, law and politics are mutually constitutive, and sovereignty is a borderline concept. Both a resolution of the Security Council and the non-adoption of a resolution are obviously political acts with political reasons, but have a legal significance within the framework of the United Nations Charter and international law in general.

The fact that it may be 'unlikely' for the ICJ to review a resolution of the Security Council (Amrita Kapur) does not devalue the legal analysis. It is the task

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of the lawyer to point out whether such proceedings would be legally admissible. Whether the political actors make use of this option is their choice.

However, scholarly arguments may have political consequences, and it is the responsibility of the scholar to take those into account. This observation runs counter to Emma Dunlop's ironic remark that it is 'difficult simultaneously to diagnose and to bolster' a movement. Indeed, if description and creation of the law were strictly separable, such a duality would be impossible in logical terms, and flawed in terms of scientific neutrality. However, the object of both the legal process and legal scholarship is the law. Therefore the observer standpoint (description) and the participant standpoint (creation) are easily confounded, and the not uncommon changes of professional roles (from law professor to a judge, a diplomat, or a government official and vice versa) facilitate this. In international law, this confusion is acknowledged as legitimate by Article 38(1)(d) of the ICJ Statute, which admits 'the teachings of the most highly qualified publicists' as a 'subsidiary means for the determination of the rules of law'. But despite the overlap and interaction of law creation (i.e., legal politics) and legal analysis, the main objective and potential of legal scholarship are not to shape the political landscape and to take decisions, but to generate knowledge and to contribute to a better understanding of the law, including a better understanding of the law's functions in politics.

So although Emma Dunlop reproaches me for being 'a standard-bearer of the humanization of sovereignty rather than an impartial observer of a developing trend', I submit that my article is 'value-neutral' to the extent that it does not generate norms, but only a theory about norms. The suggestion to conceive of humanity as the A and Ω of sovereignty seeks a coherent and parsimonious reconstruction of the current international law of sovereignty, and is in that sense a theory which is open to scholarly scrutiny.

2 The Illegality of (Security Council) Inaction

Another good question, raised by Emily Kidd White, is: Why is intervention appropriate only in clear instances of genocide and crimes against humanity, when sovereignty is premised upon the principle of humanity? If sovereignty is indeed humanized, the category of legitimate military intervention would have to be broader, says the critique. In that vein, Amrita Kapur asserts that in our context the 'distinction between a positive action and a . . . failure to act' is particularly important.

My reply is that the moral assessment of inaction as opposed to action is in philosophical terms very controversial. The world's legal systems normally acknowledge some juridical responsibility for inaction wherever a person or institution is not just a bystander, for instance due to a special (legal) relationship to victims or due to a special institutional role. The Security Council is in a special position to intervene and prevent or terminate massive human rights abuses because the Member States of the United Nations have conferred on that body the 'primary responsibility for the maintenance of international peace and security' (Article

24 of the UN Charter), and because widespread human rights violations constitute a breach to the peace in terms of Article 39 of the UN Charter.

However, as Emily Kidd White rightly observes, any legal obligation to intervene requires the definition of a threshold. Stating a presumption in favour of humanity, as I did in my article, implies that this presumption is reversible. The point of reversal constitutes the threshold below which the Security Council need not intervene in order to prevent inhumanity. It is difficult to define this threshold in an abstract and general fashion. In the case law of the European Court of Human Rights, the member states' positive duty to protect human rights is quite limited so as not to place an impossible or disproportionate burden upon the authorities. The Court avoids imposing a 'rigid standard', but respects the fact that the governmental authorities must make (political) choices in terms of priorities and resources.[1] In a similar manner, domestic courts have found violations of fundamental rights through inaction and omission by governments only in the event of complete passivity or evidently insufficient protection.[2] Courts thereby grant deference to the political branches (which in the domestic realm is notably the parliamentary legislature).

To conclude, it is not inconsistent to claim that sovereignty is from the outset determined and qualified by humanity, while limiting the Security Council's obligation to intervene in clear cases of genocide, war crimes, and crimes against humanity.

3 The Civilizing Force of Hypocrisy

The suggestion that a Security Council veto could be illegal requires that motives and reasons are known (Emily Kidd White). However, Amrita Kapur points out that 'there has never been a requirement to justify the exercise of the veto'.

I submit that under the rule of law there is an obligation to state the reasons on which legal acts are based (see, e.g., Article 296 of the TFEU (Article 253 EC)), because it forces the decision- or law-maker to rely on arguments which are admissible in that very legal order, thereby enabling other political actors and those subject to the act to criticize it and eventually to attack it if those reasons are legally and politically unpersuasive. If we accept that the Security Council is operating under the rule of law, as the ICTY in the *Tadic* case clearly stated,[3] the obligation to state the reasons for the veto already exists as a matter of (unwritten) legal principle. It is merely not implemented for reasons of political opportunism. A permanent member of the Security Council may for instance justify its veto by pointing out that ongoing civil strife in a state like Sudan does not involve genocide-like mass crimes which would demand Security Council

[1] ECHR, *Osman v. UK*, Reports (1998-VII) 3124, at para. 116.

[2] German Constitutional Court, BVerfGE 92, 26, at 46 (1995); Swiss Federal Tribunal, BGE 126 II 300 (2000), at E.5 (*Liestaler Banntag*).

[3] ICTY, case No IT-94-1-AR72, *Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeals Chamber of 2 Oct. 1995, at paras 26–28.

intervention, and it may even (though less persuasively) rely on its national interest in maintaining good neighbourly relations with the government of Sudan. It can, however, not give the reason that it would like to condone crimes in order to 'cleanse' a region.

Generally speaking, the obligation to give reasons forces law- and decision-makers to base their acts on claims regarding the general interest rather than on selfish appeals. This has been called the 'civilizing force of hypocrisy'.[4] These reasons, even if they may be hypocritical, still have the consequence of generating better outcomes, because the 'bad' arguments are officially banned and have therefore much less power to influence the ultimate decision that has been reached. This applies also to the Security Council. Against this background, the recent proposal, brought forward by a group of small countries, to oblige the permanent members of the UN Security Council to explain their reasons for using the veto,[5] and to which the Council reacted with a 63-point declaration,[6] would not only – if accepted – significantly strengthen the rule of law within the UN, but also improve the functioning of the Council. The obligation to give reasons would leave the exercise of the veto within the realm of political discretion of the permanent member, but would still force the member to rationalize its decision. This would allow other states and the public to criticize these reasons. In the long run, an obligation to justify the veto would rule out those most blatant abuses that can simply not be rationalized.

4 Humans as Agents, and not just as Beneficiaries of International Law

Two critics (Emma Dunlop and Catherine E. Sweetser) point out that the idea of humanization of sovereignty is incomplete as long as individuals remain the mere beneficiaries of it in international law, and are 'oddly passive participants' instead of agents.

My response is that the characterization of individuals as mere passive beneficiaries of international law does not do justice to their current standing in the international legal system. Although it is technically correct that states have created the international legal status (rights and obligations) of natural persons, this status has allowed and continues to allow individuals to emancipate themselves. They have in legal terms become active legal subjects, and in political terms transnational citizens.[7] A first aspect of this emancipation or empowerment is internationally guaranteed rights to participation, mostly through NGOs or through representatives of ethnic minority groups, in the international legal process and in transnational governance. Participatory rights are at least half way between merely having rights and

4 Elster, 'Deliberation and Constitution Making', in J. Elster (ed.), *Deliberative Democracy* (1998), at 97, 111.

5 Proposal by Costa Rica, Jordan, Liechtenstein, Singapore, Switzerland (UN Doc A/60/L.49 of 17 Mar. 2006).

6 In that declaration of 19 July 2006, the members of the Council committed themselves to intensifying their efforts to publicize decisions (Annex to the Note by the President of the Security Council, S/2006/507).

7 Peters, 'Dual Democracy', in J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009, forthcoming), Chap. 6.

making law, and blur the line between law-producers and bystanders. The second vehicle of emancipation is individual standing to initiate judicial or arbitral proceedings, such as under the ECHR or the ICSID. These claims have given rise to case law which progressively develops the corpus of international law in general, and more specifically fortifies and enlarges the rights and obligations of natural persons. Because international judges enjoy independence, this law-making happens without direct state control. Therefore the individual capacity to claim is a limited functional equivalent to the law-making power of states. These two factors have empowered individuals under international law, and are contributing to their gradual, yet merely rudimentary transformation into agents, as opposed to mere recipients or consumers of international legal rules.

The continuation of this trend towards individual empowerment could and should happen first through extending the judicial and quasi-judicial claiming options of individuals before international courts and tribunals against states and against international organizations. Secondly, and more importantly, empowerment should continue in the context of general rule-making. The entitlement of the world's citizens to direct democratic action on a global scale can be bolstered by a broader interpretation of the right to political participation as guaranteed in Article 25 of the ICCPR. I submit that – under conditions of global governance – the right to democratic participation should not only be directed against states, but it should be generally exercisable across borders and also opposable to those international organizations which rule over persons' lives and affect their interests. This move would complete the humanization of sovereignty by transforming it into *popular* sovereignty.