

## BOOK REVIEW

Sinja Graf, *The Humanity of Universal Crime. Inclusion, Inequality, and Intervention in International Political Thought*, Oxford University Press, 2021, 256pp, £47.99  
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The concept of humanity occupies a central place in international (criminal) law. It can be found in legal documents, policy statements, and NGO publications. One telling example regards the preamble of the Rome Statute of the International Criminal Court (ICC) that mentions humanity in direct relation with the bleakest pages of the history of the twentieth century:

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity . . . Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.<sup>1</sup>

Its central place notwithstanding, the meaning of the concept of humanity remains far from clear, sparking a wide-ranging scholarly debate. Some scholars point to the increasing role of ‘human(e)’ considerations in international law,<sup>2</sup> and even present humanity as a founding principle of the international legal order.<sup>3</sup> Others greet these references to humanity within international law with scepticism, reminding us of the political origins of all universal claims.<sup>4</sup> Many have also taken a wider look, linking the discourse on humanity within international (criminal) law to other legal fields,<sup>5</sup> or other sciences.<sup>6</sup>

Sinja Graf enters this debate by taking her cue from the notion of universal crime. In her introduction, Graf sketches the central aims and methodology of the book. The starting point is the notion of crime against humanity, not in its ethical or legal but rather in its profoundly political sense. From this perspective, a crime against humanity may be understood as the paradigmatic example of universal crime: a crime that presupposes humanity as a collective concept or subject. Importantly, all are included within humanity. However, Graff stresses, what is crucial is the capacity in which all are included, namely as potential offenders against humankind. The notion of universal crime thus has ‘injured humanity’ at its core. Universal crime typically distinguishes

<sup>1</sup>Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001, and 16 January 2002, preamble.

<sup>2</sup>See T. Meron, *The Humanization of International Law* (2006); R. Coupland, ‘Humanity. What Is It and How Does It Influence International Law?’, (2001) 83(844) *International Review of the Red Cross* 969.

<sup>3</sup>See, e.g., R. Teitel, *Humanity’s Law* (2011); A. Peters, ‘Humanity as the A and Ω of Sovereignty’, (2009) 20(3) *European Journal of International Law* 513. For a recent study of this literature see U. Soirila, *The Law of Humanity Project: A Story of International Law Reform and State-making* (2021).

<sup>4</sup>See C. Douzinas, ‘Humanity, Military Humanism and the New Moral Order’, (2003) 32(2) *Economy and Society* 159.

<sup>5</sup>For an overview of legal references see B. van Beers, L. Corrias and W. Werner (eds.), *Humanity Across International Law and Biolaw* (2014).

<sup>6</sup>I. Feldman and M. Ticktin, *In the Name of Humanity: The Government of Threat and Care* (2010).

between two groups, as Graf explains. On the one hand, we have the non-Europeans as the offenders or criminals against humanity. On the other hand, there are the Europeans who act as guardians of humanity. Hence, through the notion of universal crime colonial violence was made possible and legitimized, Graf shows. Taking humanity or humankind as a collective notion, Graf argues against the liberal reduction of humankind to individual human rights and against the typical liberal argument that regards only exclusion as problematic. By stressing how criminality actually entails inclusion into humanity, Graf also rejects the well-known argument of Carl Schmitt regarding ‘the enemy of mankind’.<sup>7</sup> For Graf, humanity is not only a collective but also a normative, hierarchical, and transcendent subject. It is normative in that it posits who/what ‘ought’ to count as part of humanity. It is hierarchical because the inclusion into humanity goes hand in hand with a strict dichotomy between Europeans and non-Europeans, making military interventions of the former into the latter’s states possible. Mapping and critically assessing these stratifications *within* humanity is a central aim of the book. Humanity is transcendent, finally, as its invocation has the discursive power of a kind of secular religion. When it comes to methodology, Graf’s book is a critical historiography of the notion of universal crime, paying special attention to its political productivity, i.e., the way in which it establishes agency, authority, and subjectivity.

In the first chapter of the book, Graf takes up the normative inclusion via criminal law in more detail. She holds that the criminal against humanity, unlike the enemy of humanity, has a status *internal* to the law’s symbolic universe. Graf points out that casting someone as a criminal is an act of juridical recognition or legal inclusion. In the case of a universal crime, this inclusion goes together with a hierarchical notion of humanity, thus inscribing inequality *within* humanity. More precisely, while the claim of humanity was an assertion of legitimacy for Europeans, it made it possible for them to act punitively and apply coercion in the colonies. Graf flags how inclusion – pace a liberal view – is not the solution but the problem here: for inclusion means that the law is applicable to all, in this way casting some as law enforcers, others as criminals against humanity. In this respect, Graf speaks of a ‘corrective inclusion’:<sup>8</sup> since as a human being everyone falls under the law of humanity. Everyone may also be punished when infringing this natural law. Vitoria’s famous argument that the Indigenous peoples of the Americas were subject to this natural law is a good example of ‘inclusion via liability’.<sup>9</sup> This then is a key point in the book: how infringement of the law of humanity could be found outside of Europe, giving Europeans the authority to punish non-Europeans.

In a short discussion of the legal cases against IRA and RAF prisoners Graf shows that some of these issues return. In their respective cases against the UK and German governments, both groups claimed POW-status for this implied casting their struggle against the state as a war between equals, in which each side has an equal right to use violence. Unsurprisingly, state institutions rejected this claim and painted these groups as common criminal organizations. Consequently, no special political powers were needed to deal with them and no room were to be allowed for political arguments in the courtroom. These examples also show the internal relation between crime and a collective, according to Graf. By naming an act a crime, making the criminal law applicable, one also asserts the authority to enforce the law on behalf of a community. This is remarkably different from a discourse of individual rights. It involves, as Graf puts it, ‘the performative claim to humanity’.<sup>10</sup>

<sup>7</sup>On this concept see D. Luban, ‘The Enemy of All Humanity’, (2018) 2 *Netherlands Journal of Legal Philosophy* 112; L. Corrias and W. Veraart, ‘The Hostis Generis Humani: A Challenge to International Law’, (2018) 2 *Netherlands Journal of Legal Philosophy* 107.

<sup>8</sup>S. Graf, *The Humanity of Universal Crime. Inclusion, Inequality, and Intervention in International Political Thought* (2021), at 36.

<sup>9</sup>*Ibid.*, at 37.

<sup>10</sup>*Ibid.*, at 47.

The second chapter is a close reading of John Locke's *Second Treatise of Government*, focusing on his notion of a 'trespass against the whole species'. Here, Graf unfolds the relationship between universal crime, common property, natural law and, ultimately, the transition to a civil condition. Since humanity is the subject of natural law, Native Americans are included. Graf speaks here of 'inclusive Eurocentrism', i.e., the inclusion of both Europeans and non-Europeans within the collective subject of humanity but with Europeans at its centre. Indeed, the prize of this 'inclusive Eurocentrism' is that Native Americans are seen as universal criminals. Locke, in short, makes use of a concept of 'asymmetrical inclusion':<sup>11</sup> while both Europeans and non-Europeans are included within humanity, their relationship is not symmetrical but based on a strict hierarchy.

Graf's discussion of Locke starts with an evaluation of his use of natural law. Since natural law is constitutive of humanity, the assault of this law is one on a normative order. And since we are dealing here with *natural* law, there is a common right to punish. Here, again, we witness the hierarchical nature of humanity. Locke starts from the hypothesis that mankind is the collective owner of the Earth, something Graf refers to as 'original communism'.<sup>12</sup> This hypothesis is crucial in order to represent an offense as a universal crime. This very same 'original communism' also denies Indigenous property claims. Subsequently, Locke introduced the prohibition to waste the potential of the Earth. This, in turn, activated the duty to labour and via Locke's famous labour theory of property gave rise to private property and the figure of the labourer who can pose as the rational preserver of mankind. Since acquiring property and realizing human reason have become two sides of the same coin, the trespasser is a universal criminal quitting human nature itself. So, humanity and the earth depend on acquiring property and both entities that were once held in common become split. The point of view requiring the punishment of this criminal is, Graf argues, a political perspective on humanity. While the Native Americans are included within the natural law and humanity, they had unequal standing for they were included as liable offender. For this explicitly colonial move, the line between agriculture and property is pivotal, stresses Graf. Because Native Americans did not, or this is what Locke implies, cultivate the land, they did not own it and became universal criminals.

Graf, subsequently, points out how the introduction of money complicates Locke's argument. Since money depends on the consent of human beings and has an imaginative quality, the relation between property and the demands of natural law becomes more obscure, giving rise to problems in its enforcement. This is the moment that a state is needed to reinstitute a free and orderly social and commercial life. With the transition from the state of nature to the civil condition, humanity gives way to 'the people', natural law to civil law. From this, civil or property relations and public authority follow, with political power being wielded for the preservation of the new collective, 'the people'. English sovereignty over America may now be established, since lacking property of the land, Native Americans cannot claim jurisdiction over it, either. The discussion of Locke's work has shown, Graf concludes, that humanity is a subject of law, yet an internally divided and normative subject, that universally makes sovereign coercion necessary. In other words, the discussion has shown how the inclusion within liberal universalism makes empire possible.

Moving towards the nineteenth century, Graf shows how the becoming mature of international law as a discipline goes hand in hand with a decline in the use of the notion of universal crime. In this century of European imperialism, abolitionists make use of the concept of crime against humanity to denounce slavery. Graf indicates that this is done, however, by painting their own country as civilized, thereby making slavery shameful for their position in the world. Moreover, national concerns were linked not with the end but rather with the '*proper conduct* of imperial rule'.<sup>13</sup> National identity and continued imperialism are accordingly the drivers of the abolitionist argument, as Graf shows by examples in the writings of John Stuart Mill and

<sup>11</sup>*Ibid.*, at 52.

<sup>12</sup>*Ibid.*, at 51–2, 55–61.

<sup>13</sup>*Ibid.*, at 85.

Alexis de Tocqueville. What is at work here is what Graf calls ‘external Eurocentrism’; the idea that only European countries are part of the ‘international society of civilized nations’ excluding the non-Europeans as barbarian. In this picture, there was no room for *universal* crime, since there was simply no law common to civilized and uncivilized countries. On this dichotomy, the discipline of international law matured; international law was supposed to become a serious social science, not the study of a set of moral norms. With Jeremy Bentham, this meant that the sovereign state took the place of humanity as the subject of international law. Combined with the idea of a shared civilization, sovereignty also replaced the claim to reason. In this way, Graf points out, civilization became a task and European civilization the global, legal standard: the infamous *mission civilisatrice*, with humanity as its end goal only attainable in a projected future. As a consequence, no treaties could be made between the civilized European and the uncivilized non-European. The idea of a European international law with a family of civilized nations thus went together with a discourse on racial hierarchy, Graf maintains. Until the twentieth century, the concept of a crime against humanity was named in connection with a reference to civilization. Only in 1946, when crimes against humanity became part of the Nuremberg Charter, was the language of civilization dismissed.

In the fourth chapter, Graf investigates the role of crimes against humanity in the cosmopolitan writings of Jürgen Habermas. The focus lies on his different appreciations of the 1999 NATO air strikes on Kosovo on the one hand, and the 2003 US military operation in Iraq on the other hand. Graf introduces this discussion by pointing out how crimes against humanity have become a central notion legitimizing cosmopolitan interventions. According to Graf, Seyla Benhabib, a proponent of cosmopolitanism, treats both norms of international criminal law and human rights as examples of cosmopolitan norms. Cosmopolitan norms are, according to Benhabib, individualistic and have a universalist focus. Benhabib calls upon cosmopolitan norms in order to authorize and empower certain states to enforce international criminal law by military means abroad. Criticizing this argument, Graf stresses that domestic democratic legitimacy does not give the normative basis for foreign coercion. Crucially, these military interventions are framed as instances of global policing and rest on the illusion of protecting without killing. In the two cases that Graf discusses in this chapter, the earlier argument regarding the RAF applies by analogy. Since the *jus in bello* is equal for both parties, regardless who violated the *jus ad bellum*, cosmopolitan thinkers resort to the category of crimes against humanity, which does not necessarily need a war context. The category of crimes against humanity gives central stage to one party – the intervener – acting for an injured party and using violence to enforce cosmopolitan norms. In this way, Graf maintains, cosmopolitan theorists delegitimize their opponent and legitimize their own plea for police violence in enforcing cosmopolitan ideals, in one fell swoop.

This brings Graf to Habermas. The first crucial point to consider, according to Graf, is the role of international criminal law in his understanding of a cosmopolitan order. International law has given way to a legal regime of cosmopolitanism, since individuals are both bearers of international human rights enforceable against states and liable for international crimes even if acting as a state official. Putting international crime so central in his thought, Graf argues that Habermas makes use of a punitive hierarchy with criminal actors on the one hand and global police forces on the other hand. In this way, Habermas is able to juridify world politics through international criminal law. Wars fought as a reaction to international crimes are, for this very reason, legal wars. Second, Graf points out that, given his usual reliance on communicative rationality, discourse and public deliberation, Habermas has a problem how to legitimize foreign intervention in non-democratic states. At this point, crimes against humanity play a pivotal role in his argument, Graf maintains. In the case of massive violation of human rights, so in case of crimes against humanity, Habermas effectively lowers the threshold of legitimacy requiring only moral arguments, instead of political ones that are the result of a free deliberative process. Thus, crimes against humanity provide the minimal normative integration to justify foreign interventions. That is why, according to Graf,

Habermas could support the NATO intervening in Kosovo, while condemning the US invasion in Iraq.

Third, Graf argues that this means that Habermas sees crimes against humanity as a cosmopolitan norm – implying the duty to protect citizens against the violence of their own government – within a still largely international legal order. Hence, in order to support his argument of NATO's legitimacy in Kosovo, Habermas resorts to an additional argument, namely an appeal to cosmopolitan emotions available in a global public sphere. The universal emotion of moral indignation triggered by a crime against humanity gives an extra push to the legitimacy of military intervention abroad. In the absence of collective deliberation, collective reaction can play this role, or so Habermas argues, according to Graf. Finally, Graf points out that in this way the enemy is transformed into the universal criminal and war into cosmopolitan police action. Questioning the principles of sovereign equality and non-intervention, Habermas formulates the normative hierarchy of crimes against humanity where only some states may credibly pose as law enforcers. Graf concludes that humanity works as a sorting mechanism dividing the world between Western, civil states and non-western, uncivilized states. In this process, law does not protect but is rather used to subdue and injure states and individuals.

In a short conclusion, Graf links her central argument to contemporary debates in which humanity is invoked. First, she points out how humanity remains malleable and contested. While the notion of a crime against humanity offers some kind of 'taxonomy of violence', it excludes many forms of slow violence – discrimination, climate change, economic oppression. Yet, she also notes how humanity may be used to oppose violence and oppression. The World Tribunal on Iraq is a case in point, where 'injured humanity' served as an opposition against a war that was, paradoxically, also defended in humanity's name. Coming back to the theme of Eurocentrism, Graf reiterates the point that since what humanity *is* seems to elude us, we should carefully scrutinize what its invocation *does*. Here, Graf maintains that the choice of legal vocabulary matters and norms do not stand uncontaminated by the political project driving them. Finally, when it comes to the debate on climate justice, Graf warns that the very notion of the Anthropocene may obscure the power relations and hierarchies within humanity that have led to our current predicament. In that regard, the notion of Capitalocene might be a better one. It remains crucial, Graf ends her book, to keep in mind that 'humanity' is a claim, albeit a very powerful one, producing divisions and hierarchies internal to it.

There is much to praise in this original and wide-ranging book. Graf gives the reader a clear and sophisticated picture of the political productivity of humanity and universal crime, paying special attention to the colonial and imperial aspects of liberal inclusion. Graf is perhaps at her best when she patiently reads and analyses the notion of universal crime in the writings of Locke, the abolitionists and Habermas. What is also very convincing is how she shows that universal crime presupposes the inclusion in a normative community and how this inclusion is an act of violence. Finally, the lesson that humanity makes hierarchies and (neo)colonial interventions possible because – and not despite – these inclusions is extremely valuable.


On a more critical note, one may wonder whether Graf is right in her claim that the only interpretation of humanity important to discussions on universal crime is that of all-inclusive collective subject. While I agree with Graf that as scholars our attention should not primarily be focused on what humanity is, both victims and perpetrators of crimes against humanity seem to pose exactly this question. One could argue that it plays a central role in the writings of Holocaust survivors like Jean Améry and Primo Levi.<sup>14</sup> Moreover, it is – sometimes directly – invoked in proceedings of, or legal discussions on, the cases of perpetrators. Duch, the director of the infamous torture prison of the Khmer Rouge, was both cast as a monster and held that he dehumanized himself by

<sup>14</sup>J. Améry, *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and its Realities* (translated by S. Rosenfeld and S. P. Rosenfeld, 1980); P. Levi, *Survival in Auschwitz: The Nazi Assault on Humanity* (translated by S. Woolf, 1993). Note that the latter's original Italian title – *Se questo è un uomo* – literally translates as 'If this is a man'.

committing acts that amounted to crimes against humanity.<sup>15</sup> Dominic Ongwen, the child who turned into a soldier and ultimately leader of the Lord's Resistance Army, was painted as both vulnerable and cruel, innocent victim and cruel perpetrator.<sup>16</sup> It is with these examples in mind – examples that seem to point to what cannot easily be caught in terms of either inclusion or exclusion – that one may question Graf's sole focus on humanity as a collective subject and inclusion when discussing universal crime.

Furthermore, there is one concept curiously absent from this well-researched and tightly argued book. That is the notion of (political) representation. While Graf offers a blueprint of the political productivity of humanity, she remains mostly silent on the political productivity of *representing* humanity. She only touches upon the issue in Chapter 1, where she discusses how humanity 'cannot take on the robe of authority' but by specific actors assuming this authority.<sup>17</sup> Yet, this is more than just a 'rhetorical device'. The act of representation is necessary, not only because abstract humanity cannot act but through concrete spokespersons. Also, representation is a creative – indeed, productive – act calling into being what is actually represented. The importance of this should not be underestimated. For, international criminal tribunals are among these representatives constitutive of humanity as a collective subject.<sup>18</sup> Graf is completely right if she were to point out that these remain only claims, and therefore contestable. Nevertheless, contestations take, I argue, the form of counter-claims that fall themselves prey to the logic of representation.<sup>19</sup> Graf seems to be aware of this when, in her conclusion, she points out how humanity is also invoked to contest an imperial or hegemonic power. With more attention to this use of humanity as a critical notion and a positive plea for recognition, Graf's argument would have been more balanced. On the other hand, given her specific aim to delve into the political productivity of universal crime, it is understandable that Graf's focus was not on this latter use of humanity.

It is, therefore, only fair to stress that Graf's book is a must-read for anyone who is interested in the contemporary political uses and historical roots of universal crime. It is especially recommended to those scholars in international (criminal) law who are interested in the political background to crimes against humanity. To those, this book will prove to be an invaluable source to grasp what is at stake in invoking humanity as a way to legitimize interventions and punitive measures.

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<sup>15</sup>For an analysis of this case see L. Corrias, 'Crimes Against Humanity, Dehumanization and Rehumanization: Reading the Case of Duch with Hannah Arendt', (2016) 29 *Canadian Journal of Law & Jurisprudence* 351.

<sup>16</sup>For a discussion of some of these dichotomies see T. Bouwknegt and B. Hola, 'Dominic Ongwen: The ICC's Poster and Problem Child', *Justice Info Blog*, 16 March 2020, available at [www.justiceinfo.net/en/44014-dominic-ongwen-icc-poster-and-problem-child.html](http://www.justiceinfo.net/en/44014-dominic-ongwen-icc-poster-and-problem-child.html); J. Stauffer, 'Law, Politics, the Age of Responsibility, and the Problem of Child Soldiers', (2016) 16(1) *Law, Culture and the Humanities* 42; M. A. Drumbl, 'Victims Who Victimise', (2016) 4(2) *London Review of International Law* 217.

<sup>17</sup>See Graf, *supra* note 8, at 200–1, note 41.

<sup>18</sup>Cf. L. D. A. Corrias and G. M. Gordon, 'Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public', (2015) 13(1) *Journal of International Criminal Justice* 97. The opening statements of international prosecutors play a special role in this regard. For a thorough analysis see S. Stolk, *The Opening Statement of the Prosecution in International Criminal Trials: A Solemn Tale of Horror* (2021).

<sup>19</sup>I am indebted to the work of H. Lindahl and B. van Roermund for this understanding of representation, see, e.g., H. Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (2013); H. Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (2018); B. Van Roermund, *Legal Thought and Philosophy: What Legal Scholarship is About* (2013); B. Van Roermund, *Law in the First Person Plural: Roots, Concepts, Topics* (2020).

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