

Northumbria Research Link

Citation: Ward, Tony (2016) Commentary: Between Kant and Al-Shabaab. In: Beyond Responsibility to Protect. International Law . Intersentia, Cambridge, pp. 71-78. ISBN 9781780682648

Published by: Intersentia

URL:

This version was downloaded from Northumbria Research Link:
<http://nrl.northumbria.ac.uk/27798/>

Northumbria University has developed Northumbria Research Link (NRL) to enable users to access the University's research output. Copyright © and moral rights for items on NRL are retained by the individual author(s) and/or other copyright owners. Single copies of full items can be reproduced, displayed or performed, and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided the authors, title and full bibliographic details are given, as well as a hyperlink and/or URL to the original metadata page. The content must not be changed in any way. Full items must not be sold commercially in any format or medium without formal permission of the copyright holder. The full policy is available online: <http://nrl.northumbria.ac.uk/policies.html>

This document may differ from the final, published version of the research and has been made available online in accordance with publisher policies. To read and/or cite from the published version of the research, please visit the publisher's website (a subscription may be required.)

www.northumbria.ac.uk/nrl





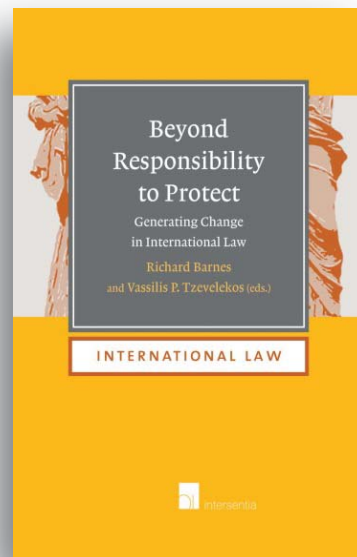
This contribution was originally published in:

Beyond Responsibility to Protect

Richard Barnes and Vassilis P. Tzevelekos (eds.)

International Law, vol. 16

Published in March 2016 by Intersentia www.intersentia.co.uk



For more information on the book or to purchase

<http://intersentia.com/en/beyond-responsibility-to-protect.html>

This contribution is made available under the terms of the Creative Commons Attribution, NonCommercial, ShareAlike Creative Commons Licence (<https://creativecommons.org/licenses/by-nc-sa/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited and derived works are published under the same licence.

For any queries, or for commercial re-use, please contact Intersentia at mail@intersentia.co.uk or on +44 (0) 1223 370170.

Featured Recommendations

Armed Conflicts and the Law

Jan Wouters, Philip De Man and Nele Verlinden (eds.)

International Law, vol. 17

March 2016

ISBN 978-1-78068-315-7

lxxii + 572 pp.

Cyber Warfare

Military Cross-Border Computer Network Operations under International Law

Johann-Christoph Woltag

International Law, vol. 14

May 2015

ISBN 978-1-78068-226-6

xviii + 314 pp.

The Right not to be Displaced in International Law

Michèle Morel

International Law, vol. 13

March 2014

ISBN 978-1-78068-205-1

xxxiv + 320 pp.

National Human Rights Institutions in Europe

Comparative, European and International Perspectives

Jan Wouters and Katrien Meuwissen (eds.)

International Law, vol. 10

June 2013

ISBN 978-1-78068-114-6

xx + 330 pp.

BEYOND RESPONSIBILITY
TO PROTECT

Generating Change in International Law

Richard BARNES
Vassilis P. TZEVELEKOS
(eds.)



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:
NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7 PP
United Kingdom
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe and all other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21
Email: mail@intersentia.be

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave, Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832
Email: info@isbs.com

Beyond Responsibility to Protect. Generating Change in International Law
© The editors and contributors severally 2016

The editors and contributors have asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as authors of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

ISBN 978-1-78068-264-8
D/2016/7849/43
NUR 828



British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

CONTENTS

<i>Foreword</i>	vii
<i>Acknowledgements</i>	ix
<i>Table of Cases</i>	xxi
<i>List of Authors</i>	xxxii

INTRODUCTION

Beyond Responsibility to Protect: *Ceci n'est pas une pipe*

Richard A. BARNES and Vassilis P. TZEVELEKOS	3
1. What Does <i>Beyond</i> R2P Mean?	3
2. The R2P of Sovereigns: How Innovative Is This?	7
2.1. R2P at a Glance	8
2.2. R2P as a Novelty for the Sovereign Premises of International Law ..	9
3. R2P's Transformative Power	16
3.1. R2P as a Sign of Transition: from Bilateralism to Community Interests – from Abstention to Protection	17
3.2. R2P as a Catalyst for Change in Positive International Law	19
4. The Book's Architecture and Approach	20
5. Concluding Remarks	26

PART I.

THE MORAL UNDERPINNINGS AND POLITICAL ENDS OF R2P

The Kantian Defence of Murder

Henry JONES	33
1. Introduction	33
2. Kantian Theories of Intervention	36
2.1. Habermas: A Legal Argument	36
2.1.1. Foucault vs Habermas	40
2.1.2. Schmitt vs Habermas	42
2.2. Tesón: A Moral Argument	44
2.2.1. Tesón vs Orford	48
3. Conclusions	51

A ‘Responsibility to Democratise’? The ‘Responsibility to Protect’ in Light of Regime Change and the ‘Pro-Democratic’ Intervention Discourse	
Markus P. BEHAM and Ralph R.A. JANIK	53
1. Outline	53
2. Foundations	54
2.1. Kant and the ‘Wilsonian World Order’	54
2.2. Democracy in International Law	59
3. A ‘Responsibility to Democratise’?	64
4. Conclusion	69
Commentary: Between Kant and Al-Shabaab	
Tony WARD	71
PART II.	
INTERNATIONAL INSTITUTIONS AND THEIR ROLE IN R2P	
The Institutionalisation of the Responsibility to Protect	
Nabil HAJJAMI	81
1. Introduction	81
2. The Institutionalisation of the R2P within the United Nations	82
2.1. The Special Adviser on the Responsibility to Protect	83
2.2. R2P and the Security Council Reform – the So-Called ‘Responsibility Not to Veto’	91
3. The Institutionalisation of the R2P within the African Union	95
4. The Institutionalisation of the R2P within International Civil Society	98
5. Conclusion	101
The Responsibility Not to Veto Revisited. How the Duty to Prevent Genocide as a <i>Jus Cogens</i> Norm Imposes a Legal Duty Not to Veto on the Five Permanent Members of the Security Council	
John HEIECK	103
1. Introduction	103
2. Positing the Peremptory Nature of Genocide Prevention	107
2.1. <i>Jus Cogens</i> Norms in General	107
2.2. The Duty to Prevent Genocide as a <i>Jus Cogens</i> Norm	109
2.3. The Scope of the Duty: Due Diligence and its Breach	110
2.3.1. The Due Diligence Standard in General	111
2.3.2. The Due Diligence Standard in the <i>Genocide</i> Case	115
2.3.3. Breach of the Due Diligence Standard in the <i>Genocide</i> Case	118

3. From RN2V to DN2V.....	119
4. Conclusion.....	121

**The EU and the Responsibility to Protect: The Case of Libya,
Mali and Syria**

Julia SCHMIDT	123
1. Introduction.....	123
2. The Development of R2P and the Role of Regional Actors	128
2.1. The International Commission on Intervention and State Sovereignty.....	128
2.2. The United Nations and R2P: A Narrow and Deep Approach	129
3. The EU within the R2P Framework.....	133
4. The EU and its Engagement in Libya, Mali and Syria.....	137
4.1. Libya	138
4.2. Mali.....	141
4.3. Syria.....	142
5. Conclusion.....	144

Commentary: International Institutions and their Role in R2P

Nigel D. WHITE	147
----------------------	-----

PART III.

DE FACTO REGIMES AND NON-STATE ACTORS WITHIN A STATE
AND AS A STATE

***De Facto* Regimes and the Responsibility to Protect**

Antal BERKES.....	155
1. <i>De Facto</i> Regimes as Subjects under the First Pillar of the R2P	158
1.1. Obligations of <i>De Facto</i> Regimes under Positive Law.....	158
1.1.1. Customary International Law Obligations.....	160
1.1.2. UN Security Council Resolutions	164
1.2. The Question of the Analogy with State Sovereignty	166
2. <i>De Facto</i> Regimes as Objects under the Second and Third Pillars	168
2.1. The International Community's Action under the Second Pillar ..	169
2.2. The International Community's Action under the Third Pillar ...	171
3. Conclusions	172

‘Guilty’ Governments and ‘Legitimate’ Leadership: The Concept of ‘National Authorities’ under the R2P

Jennifer Dee HALBERT	175
1. Introduction.....	175
2. The Scope of the R2P’s ‘National Authorities’ Concept	178
2.1. Case Studies	178
2.1.1. The Côte d’Ivoire	178
2.1.2. Libya and Syria	179
3. Substance of the R2P’s ‘National Authorities’ Concept	181
4. Significance of the R2P’s ‘National Authorities’ Concept	182
4.1. Specific Pillars of the R2P	182
4.1.1. Pillar One: The Classification of ‘National Authorities’ in R2P Contexts May Coincide with the Recognition of New Governments	182
4.1.2. Pillar One Responsibilities May be Owed Concurrently by Two ‘National Authorities’ in One State	184
4.1.3. Pillar Two: the Identification of ‘National Authorities’ May Influence Decisions Regarding to whom Assistance Should be Provided.....	185
4.1.4. Pillar Three: a Finding of ‘Manifest Failure’ May be Coupled with the Identification of ‘Legitimate’ National Authorities.....	188
4.2. The Character of the R2P: Transformative Trends or Trivialities?	189
4.2.1. The ‘Revive’ Dimension of the R2P	189
4.2.2. The ‘Refine’ Dimension of the R2P	190
4.2.3. The ‘Reform’ Dimension of the R2P	190
5. Conclusion	190

Commentary: Who Cares?: The Primary Bearer of the Responsibility to Protect

Hitoshi NASU	193
1. The Principle of Non-Intervention.....	194
2. The Right to Self-Determination	197
3. Concluding Remarks	199

PART IV.
R2P AND DUE DILLIGENCE REGARDING THE CONDUCT
OF CORPORATIONS

On the Responsibility to Protect and the Business and Human Rights

Agenda

Humberto Cantú RIVERA	203
1. Introduction	203
2. The R2P, International Human Rights Law and Due Diligence	204
2.1. An Individual Responsibility to Protect	207
2.2. A Collective Responsibility to Protect	210
3. An Overlap between the R2P and the UN Business and Human Rights Project?	212
3.1. Are the UN Guiding Principles on Business and Human Rights and R2P Compatible?	214
3.2. A Corporate Responsibility to Respect <i>and Protect</i> ?	215
4. Concluding Thoughts	217

Tides of Change – The State, Business and the Human

Kasey L. McCall-Smith	219
1. Introduction	219
2. The Role of States in Protecting Human Rights	221
2.1. The Evolving Nature of States' Duties	222
3. Business and Human Rights	223
4. The Legal Framework for Putting Business Right	226
4.1. International Soft Law	227
4.1.1. The UN Protect, Respect and Remedy Framework on Business and Human Rights	227
4.1.2. Further Soft Law Mechanisms	229
4.2. States' Responses to International Soft Law	230
4.2.1. The Responsibility to Prevent: Educating Business	230
4.2.2. The Responsibility to React: Taking Business to Court	233
5. Closing the Gaps: Business as Duty-Bearers	234
5.1. Moving the Law Forward	235
5.2. Small Advances in Domestic Courts: US Cases	236
6. Final Reflections	239

Commentary: The Responsibility to Protect and Non-State (Corporate) Actors – More of the Same?	
Lucas LIXINSKI	241
1. Introduction	241
2. The Problem with R2P in a Corporate Context	242
3. What Does Due Diligence Add to the Equation?	242
4. What Does R2P Contribute to Due Diligence and Human Rights Obligations of Non-State Actors?	247
5. Responsibility of Non-State Actors Beyond Sovereignty	248
6. Concluding Remarks	248
PART V.	
THE INTERACTION BETWEEN R2P AND HUMANITARIAN LAW OBLIGATIONS TO PROTECT CIVILIAN POPULATIONS	
The Responsibility to Protect Doctrine, and the Duty of the International Community to Reinforce International Humanitarian Law and its Protective Value for Civilian Populations	
Sophie RONDEAU	251
1. Introduction: International Humanitarian Law and R2P as Necessary Allies	251
2. Positive Effect of IHL and its Rapport with Non-State Armed Groups: a Plea in Favour of a Broad Definition of R2P	256
3. States' Obligations under the 1949 Geneva Conventions: the Nucleus of a System of Collective Responsibility	261
3.1. Responsibility for Grave Breaches	261
3.2. Obligation to 'Respect and Ensure Respect'	263
4. Conclusion	266
The Responsibility to Protect in Armed Conflict: A Step Forward for the Protection of Civilians?	
Raphaël VAN STEENBERGHE	269
1. Introduction	269
2. Common and Distinct Features	271
2.1. The Objectives of R2P and POC	271
2.2. Continuum of Actions	273
2.3. Continuum of Responsibilities	275
2.4. Scope of Application	277

3.	Normative Impacts on IHL	278
3.1.	Potential Beneficial Impacts	279
3.2.	Potential Negative Impacts	280
4.	Conclusion	285

Commentary: On the Intersection of the Responsibility to Protect, the Protection of Civilians and International Humanitarian Law in Contemporary Armed Conflicts

David TURNS 287

1.	General Remarks	287
2.	The Conflict in Eastern Ukraine	289
3.	The Interventions in Iraq and Syria	291
4.	Concluding Observations: from <i>Jus ad Bellum</i> to <i>Jus in Bello</i> and Back Again	293

PART VI.

R2P AND INTERNATIONAL CRIMINAL LAW BEYOND THE FOUR R2P CRIMES

The Place of Aggression in the Responsibility to Protect Doctrine

Vito TODESCHINI 299

1.	Introduction	299
2.	The Crime of Aggression in International Law	301
2.1.	Aggression: Definition and Legal Nature of the Obligation	301
2.2.	Aggression as an International Crime	303
3.	Acts of Aggression and R2P	306
3.1.	The Doctrine of R2P: Enlarging the Semantic Field	306
3.1.1.	Purpose of R2P	307
3.1.2.	Scope of R2P	308
3.1.3.	The Circle of the Subjects Involved in R2P	309
3.2.	Implementing R2P against Acts of Aggression	310
3.2.1.	Decentralised Responses to Acts of Aggression under International Law	311
3.2.1.1.	The Law of State Responsibility	311
3.2.1.2.	Collective Self-Defence	313
3.2.2.	R2P as a Framework to Respond to Aggression	314
4.	Conclusion	319

The Impact of the Responsibility to Protect on the Protection of Peacekeeping Missions under the Rome Statute of the International Criminal Court	
Barbara SONCZYK	321
1. Introduction.....	321
2. Peacekeeping and the Use of Force	324
2.1. The Defence of the Mission/Mandate	326
2.2. The Right to Personal Self-Defence in a Peacekeeping Context ...	328
3. Protection Mandates and R2P	330
3.1. The Emergence of R2P	332
4. Protection of Peacekeeping Missions under IHL and the Rome Statute .	336
5. Conclusions	338
Commentary: R2P and its Consequences for International Criminal Law: Crimes as a Justification for the Use of Force	
Lindsay MOIR.....	341
PART VII.	
R2P AND ITS POSSIBLE IMPACT ON THE LAW OF INTERNATIONAL RESPONSIBILITY	
The ICJ Judgment in the Genocide Convention Case: Is R2P Drawing New Horizons for the Law on State Responsibility?	
Ludovica POLI	351
1. Introduction.....	351
2. The ICJ's Ruling on the Duty to Prevent Genocide and the Development of a New Rule of International Law Inspired by the R2P Rationale	353
3. The Duty to Prevent Genocide in the ICJ's Decision and its Application 'Beyond Borders'	356
4. Definition, Meaning and Role of Fault in the Law of State Responsibility	358
4.1. Fault in Due Diligence Obligations	360
5. The Duty to Prevent Genocide 'Beyond Borders' as a Peculiar Obligation of Due Diligence Requiring a Special Notion of Fault	362
6. Due Diligence and the Implementation of R2P.....	365
7. Concluding Remarks	366

Responsibility to Protect as a Basis for ‘Judicial Humanitarian Intervention’	
Tomoko YAMASHITA	367
1. Introduction: Using ‘Judicial Force’ to Encompass a Means to an End for R2P	367
2. Two Bases for Judicial Humanitarian Intervention.	370
2.1. <i>Obligations Erga Omnes (Partes)</i> Invoked by ‘Non-Injured’ States in Respect of Massive Human Rights Violations	373
2.2. Diplomatic Protection and its Constraints	376
3. Pathways to JHI.	383
3.1. Inter-State Procedures in Human Rights Treaties.	384
3.2. Compromissory Clauses in Universal Human Rights Treaties and Provisional Measures at the ICJ	387
4. Conclusion: Paradigm Shift from State-Oriented to Human- Oriented International Law.	390
Military Commanders as Bystanders to International Crimes: A Responsibility to Protect?	
Lenneke SPRIK	393
1. Introduction.	393
2. Failing to Prevent Genocide and its Legal Aftermath	395
3. Duty to Protect?.	399
4. Criminalising the Commander’s Inaction?	402
4.1. Command Responsibility: a Failure to Fulfil a Duty of Care	403
4.2. Aiding and Abetting by Omission	406
4.3. Aiding and Abetting through Presence.	408
5. Towards a Broader Concept of ‘Responsibility to Protect’?	410
6. Conclusions	412
Commentary: R2P as a Transforming and Transformative Concept in the Context of Responsibility as Liability	
Elena KATSELLI	415
1. Introduction.	415
2. Responsibility to Protect as ‘Third-State Responsibility’	418
3. The Responsibility of Individuals to Protect.	424
4. R2P as Judicial Humanitarian Intervention.	428
5. Conclusion	431

PART VIII.
CONCLUDING OBSERVATIONS

R2P: An Inquiry into its Transformative Potential

Nicholas TSAGOURIAS..... 435

1. Introduction..... 435
2. R2P's Normative Trajectory 436
 - 2.1. R2P's Normative Sources..... 436
 - 2.2. R2P's Normative Formulation 441
 - 2.3. R2P's Normative Implications 442
3. R2P's Authority and Impact 444
4. Conclusion: R2P's Transformative Potential 446

The Transformative Agendas of R2P Discourses in International Law

Jean D'ASPREMONT 449

1. Introduction..... 449
2. R2P's Agendas 452
 - 2.1. The Regulatory Agenda: R2P as a Laboratory for New Rules
of International Law 452
 - 2.2. The Accountability Agenda: R2P as a New Standard
to Evaluate Behaviours..... 453
 - 2.3. The Unity Agenda: R2P as a Kinship-Maker 454
 - 2.4. The Explanatory Agenda: R2P as Maker of Intelligibility 454
 - 2.5. The Epistemological Agenda: R2P as a Tool for Professional
Rehabilitation..... 455
3. The Future of R2P in International Legal Scholarship: Functional
and Methodological Awareness at High Altitude 456

Index..... 459

COMMENTARY: BETWEEN KANT AND AL-SHABAAB

Tony WARD

I have been invited to comment on the two preceding chapters not as an international lawyer but as someone with an interest in both legal philosophy and state violence. Both chapters discuss a supposed ‘responsibility to democratise’ and its possible basis in, *inter alia*, Kant’s philosophy. I make no claim to being a Kant scholar, but the most natural reading of *Perpetual Peace* and the relevant sections of *The Metaphysics of Morals* seems to me to be that all states ought to be republican (with separation of powers, and in some sense representative of the people, though not necessarily with an elected government), but that no state has the right to impose a republican constitution on another, except in very limited circumstances. I am not confident that this was Kant’s view, but if it was then (substituting ‘democratic’ for ‘republican’) I think he was right on both points. As I understand them (and I do not find their argument easy to pin down), Beham and Janik think that acceptance of the first point – the moral illegitimacy of undemocratic regimes – will support the extension of R2P to permit forcible democratisation in some circumstances. Jones I understand to be rejecting both forcible democratisation and universalist arguments for democracy.

Before turning to such matters as the interpretation of Kant, and in the spirit of Jones’s plea to understand those we may be tempted to brand as enemies of humanity, let me begin by introducing another voice into the conversation. It is that of the late Sheikh Abubakar Shariff Ahmad, known as Makaburi,¹ a prominent Muslim preacher in Mombasa, Kenya, whom I interviewed in January 2013, three months before he was murdered, almost certainly by a paramilitary unit of the Kenyan police.² Whether or not Makaburi was, as the police alleged,

¹ The interview was conducted by Dr Ian Patel (then of King’s College London) and me as part of the International State Crime Initiative’s ‘State Crime and Resistance: A Comparative Study of Civil Society’, funded by ESRC grant no. ES/I030816/1 (‘the ISCI project’). I would like to acknowledge the courtesy and hospitality shown by Makaburi as well as his willingness to engage in amicable debate.

² See AL-JAZEERA INVESTIGATIVE UNIT, *Inside Kenya’s Death Squads* <<http://interactive.aljazeera.com/aje/KenyaDeathSquads>> accessed 21.12.2014.

a leading recruiter of young Kenyans for the Somali armed group al-Shabaab,³ he strongly defended the right of the al-Shabaab to establish an Islamic state in Somalia and impose a strict interpretation of Sharia law:

‘The Somalis have every right to govern themselves; I am a hundred percent for the Somalis to govern themselves under sharia law. I am a hundred percent for the Afghans to govern themselves under sharia law, if that is their choice. I am a hundred percent for the Iraqis to govern themselves under sharia law. And if the Muslims in those countries don’t want democracy, then they have every right; and the Western governments have no right whatsoever to invade and force governments to govern the way they want.’

There is a paradox in Makaburi’s argument against the ‘responsibility to democratise’. He appeals to the Somalis’ right to choose their own government in order to defend their right to reject that very right, which is a basic principle of democracy. On the other hand there is also a paradox in considering it democratic to impose democracy on people who don’t want it.

Makaburi was probably right to think that al-Shabaab, and the Islamic Courts movement of which it was an offshoot, had won considerable support by imposing a legal code that brought a semblance of order and justice to a chaotic situation.⁴ It is not wholly implausible to argue that had they established a stable regime that was widely accepted as just because it accorded with the beliefs of most of those they governed, the state they created would have been exercising legitimate self-determination (in a political rather than legal sense) even if it was not democratic.⁵ But as Seyla Benhabib has argued, such a position is ultimately untenable.⁶ How can people be said to consent, particularly to such a draconian legal code as al-Shabaab’s, without a freedom to dissent,⁷ and how could that be secured except by an institution independent of the theocratic elite? How could the Somali people be said to exercise self-determination unless the views of all citizens were taken into account, including those who did not subscribe to a Salafist interpretation of Islam? And so on. The sort of position Makaburi defended is perched precariously at the top of what Benhabib calls a ‘slippery slope towards democratic self-governance’.⁸ What put Makaburi on this slope

³ A. QURESHI, ‘Feeding Grievances: The Killing of Makaburi’ <www.aljazeera.com/indepth/opinion/2014/04/feeding-grievances-killing-mak-2014411151431791922.html> accessed 20.12.2014.

⁴ S.J. HANSEN, *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group, 2005–12*, Oxford University Press, Oxford, 2013.

⁵ For an argument that there can be self-determination without democracy see J. COHEN, ‘Is there a Human Right to Democracy?’ in C. SYNOWICH (ed.), *The Egalitarian Conscience: Essays in Honour of G.A. Cohen*, Oxford University Press, Oxford, 2006.

⁶ S. BENHABIB, *Dignity in Adversity: Human Rights in Troubled Times*, Polity Press, Cambridge, 2011, Ch. 5.

⁷ A point stressed by COHEN (n. 5).

⁸ BENHABIB (n. 6), p. 86.

was his commendable willingness to engage in dialogue with people who did not share his religious beliefs. Benhabib's central point is that a genuine dialogue between people from different cultures and religions involves presuppositions that support the recognition of all participants as having an equal right to live under laws that are justified by reasons they can accept, and that mutual recognition provides a universalist basis for human rights and democracy.

Arguments on these lines suggest that it is possible to develop a universalist account of human rights, including the right to democracy, which is not simply a colonialist extension of the norms of the USA and its allies.⁹ They support Habermas's claim that basic rights 'regulate matters of such generality that moral arguments are *sufficient for their justification*. These arguments show why the guarantee of such rules is in the interest of all persons qua persons, and thus why they are equally good for *everyone*.'¹⁰ But whether there are good arguments for democracy that should in principle be accepted even by the likes of Makaburi is quite a different question from whether democracy should be imposed by military intervention in the guise of 'police actions'. There is much force in Jones's objections to Habermas's attempt to apply abstract philosophical theories to the realities of global power politics. To write about an imaginary world in which states and international organisations act out of disinterested regard for peace and human rights, as if it bore some relation to current political reality, does indeed seem dangerously naïve.

In his essay on Kant's *Perpetual Peace*, Habermas does recognise the danger of allowing states to rely on 'unmediated' moral argument to justify coercive action.¹¹ Even though basic human rights have a universal moral justification, their coercive implementation must be regulated by law. In its emphasis on law Habermas's essay belongs to a later, less clearly utopian phase of his work than that criticised by Foucault. But while this might make Jones's use of Foucault slightly beside the point, Habermas's reliance on law by no means saves him from the charge of utopian naivety. He envisages human rights being enforced by 'the police actions of a democratically legitimate world organization'¹² and by international criminal trials. It is hard enough to regulate the routine policing of petty crime through the domestic criminal courts. To suppose that large-scale military interventions can be 'civilized' by the criminal trials of defeated leaders seems entirely unrealistic.

⁹ I discuss these issues in more detail in T. WARD, 'State Crime and the Sociology of Human Rights' (2013) *Revista Critica Penal y Poder* 77 <revistes.ub.edu/index.php/CriticaPenalPoder/article/viewFile/6230/9955> accessed 21.12.2014.

¹⁰ J. HABERMAS, 'Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight' in J. BOHMAN AND M. LUTZ-BACHMANN (eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, MIT Press, Cambridge, MA, 1997, p. 138.

¹¹ *Ibid.*, p. 140.

¹² *Ibid.*

Though I am sympathetic to this aspect of Jones's critique of Habermas, I find some of his criticisms of Habermas's larger philosophical project less convincing. For one thing, I suspect that one would have to go a very long way indeed to find a society so isolated from modernity that it did not give rise to 'decentred subjects' capable of reflecting on their own culture.¹³ Formerly isolated premodern cultures – in Papua New Guinea, for example¹⁴ – must, simply because they are no longer isolated, find ways of reflecting on and redefining their own values and customs as well as those of postcolonial culture.¹⁵ The language of rights and self-determination serves as a *lingua franca* that can be used to articulate radically different perspectives, as when Papua New Guineans use it to defend their rights under customary law, or when Makaburi used it to defend Islamist authoritarianism. I also think that Jones exaggerates the uniformity of Habermas's vision of cosmopolitan law. Habermas does not envisage 'one world order and one set of rights'.¹⁶ Universal rights in his scheme are merely 'placeholders'¹⁷ to be filled in by what Benhabib calls 'democratic iterations', that is, concrete specifications of these abstract rights that reflect the democratic will of particular peoples.¹⁸ I am not a fan of Habermas's global police, but I don't think they would be sent in to enforce gay rights or reverse headscarf bans, unless gays or headscarf-wearers could be portrayed as potential victims of atrocities. Laudable as both objectives are, they would have to be achieved by democratic political struggle, which would not be banished from a Habermasian world.

Further, I am slightly puzzled by Jones's view of Rwanda. If ever there was a case where bystander states were morally (and, arguably, legally)¹⁹ obliged to intervene, by force if necessary, this was surely it. Although the Rwandan massacres predated the ICJ's clarification of the duty to prevent genocide,²⁰ Hazel Cameron's research shows that UK Foreign Office officials, and in particular the then Foreign Secretary Douglas Hurd, avoided using the word 'genocide'

¹³ JONES, this volume, text to n. 59.

¹⁴ The ISCI project (n. 1 above) includes a study, conducted primarily by Kristian Lasslett of the University of Ulster, of groups working on development-related and human rights issues in Papua New Guinea. The communal discussions organised by the Bismarck Ramu Group (<bismarckramugroup.org>) are especially good examples of the kind of cultural reflection I have in mind.

¹⁵ The danger here is that the (post)colonial regime appropriates and redefines the premodern culture to suit its own purposes: see for example R.J. GORDON AND M.J. MEGGITT, *Law and Order in the New Guinea Highlands*, New England Universities Press, Hanover, NH, 1985, Ch. 7.

¹⁶ JONES, this volume, text to n. 69.

¹⁷ J. HABERMAS, *Between Facts and Norms*, tr. W. Rehg, Polity Press, Cambridge, 1996, p. 126.

¹⁸ BENHABIB (n. 6), p. 126.

¹⁹ See J. HEIECK, this volume, on the duty to prevent genocide as a *jus cogens* norm.

²⁰ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, discussed by L. POLI in this volume.

because they feared that they would have a legal duty to intervene.²¹ Jones is right to point out that the economic policies of global elites helped to create the conditions in which genocide became possible. But that is all the more reason why the major powers should have accepted some responsibility for averting the genocide. If all Jones means to argue is that criticism of the failure to intervene can distract attention from other aspects of genocide prevention then I am happy to agree with him.

Beham and Janik discuss whether there may be a ‘responsibility to democratise’ in international law, and they consider – without reaching any definite conclusion – whether a basis for such a responsibility might be found in the work of Kant. That Kant should be enlisted as a supporter of ‘R2D’ is, on the face of it, surprising, as his position on the matter seems quite unequivocal: ‘No nation shall forcibly interfere with the constitution and government of another.’²² However, there are two situations where forcible democratisation is arguably compatible with Kant’s view, and where it is also defensible today. First, consider the passage where Kant argues that a state should not intervene in a civil war in another state because this would ‘violate the rights of an independent people struggling with its internal ills’.²³ It would be strange for Kant to say that a people has the right to resolve its internal ills by war, since ‘reason absolutely condemns war as a means of determining the right’.²⁴ What does make sense is for Kant to maintain that while only a republican constitution can bring internal strife to a just conclusion, the people in question must be left to arrive for themselves, however painfully, at the position where a constitutional settlement is possible. Only then can the government that eventually emerges truly represent the people’s will. Suppose, however, that a people already has a republican constitution, and a rebel group seeks to overthrow it and install a despotic regime. In these circumstances the republican (or in today’s terms, democratic) government, as the legitimate representative of the people, might be thought to have the right to call on other states for help – even if the would-be despots have seized control of its entire territory. Intervention to *restore* democracy, as in Sierra Leone and the other examples discussed by Franck²⁵ could be justified on this principle.

The one instance where Kant explicitly endorses the imposition of a republican constitution is when, in Part I of *The Metaphysics of Morals*

²¹ H. CAMERON, ‘British State Complicity in Genocide: Rwanda 1994’ (2012) 1 *State Crime* 70. See also H. CAMERON, *Britain’s Hidden Role in the Rwandan Genocide: The Cat’s Paw*, Routledge, Abingdon, 2013, pp. 104–6.

²² I. KANT, *Perpetual Peace and Other Essays*, tr. T. Humphrey, Hackett, Indianapolis, 1983, p. 346.

²³ *Ibid.*

²⁴ *Ibid.*, p. 356.

²⁵ T.M. FRANCK, ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 46, 65 *et seq.*, cited by BEHAM AND JANIK in this volume, n. 35.

(confusingly known in English as either *The Doctrine of Right* or *The Metaphysical Elements of Justice*), he discusses the rights of states that have defeated an ‘unjust enemy’.²⁶ States that have overcome such an enemy, Kant writes, have no right to ‘divide its territory among themselves’ but they do have the right to install a republican government that will be unlikely to launch aggressive wars in future. This foreshadows what was done, rather successfully, in (West) Germany and Japan, and attempted with much less success in Iraq and Afghanistan.

An ‘unjust enemy’ according to Kant is one whose ‘publicly expressed will (whether by word or deed) reveals a maxim’ that would make peace among nations impossible.²⁷ Carl Schmitt, writing during and after the dying days of the Nazi regime he had supported, was understandably anxious at Kant’s evocation of ‘this frightful enemy against whom the law has no limits’ and whose mere ‘verbally expressed will [...] justifies common action in order to maintain the freedom of the one who feels threatened. A preventive war against such an enemy would be considered to be even more than a just war. It would be a crusade’.²⁸ This is what Beham and Janik call the ‘small step toward [...] embracing radical interventionism as a means to overcome the quintessential security dilemma in a world lacking a hegemon endowed with the monopoly on force’.²⁹

Whether Kant’s argument should be read as Schmitt read it is doubtful. An alternative reading, more consistent with Kant’s other remarks on *jus ad bellum*,³⁰ is that mere verbal expressions may reveal a state as unjust, but only deeds (albeit a rather broad category of deeds, including repudiating treaties or upsetting the balance of power) can make it an unjust *enemy*. Kant’s remarks are undeniably ambiguous, however, and a reading according to which refusing to adopt a republican constitution would suffice to brand a state as an ‘unjust enemy’ is not implausible.³¹ Be that as it may, the position Schmitt attributed to Kant has to be taken seriously, if only because it is so close to the coalition’s view of Iraq in 2003. Quite apart from the illegality and immorality of that war, the fate of ‘democratisation’ in Iraq vividly illustrates why intervention to install (as opposed to restoring) democracy is generally such a bad idea. The very existence of the Iraqi state – unquestionably a vile despotism under Saddam Hussein’s rule – was the product Britain and France’s thoroughly un-Kantian conduct in dividing up the territory of the Ottoman Empire without any regard to the

²⁶ I. KANT, *The Metaphysics of Morals*, tr. M. Gregor, Cambridge University Press, Cambridge, 1991, pp. 155–156.

²⁷ *Ibid.*, p. 155.

²⁸ C. SCHMITT, *The Nomos of the Earth*, tr. G. Ulmen, Telos Press, New York, 2003, p. 169.

²⁹ This volume, text following n. 20.

³⁰ KANT (n. 27), pp. 152–153.

³¹ S. BENHABIB, ‘Carl Schmitt’s Critique of Kant: Sovereignty and International Law’ (2012) 40 *Political Theory* 688.

wishes of its people or any sense of national identity. By shielding Iraqi Kurdistan against a renewal of Saddam Hussein's genocidal violence (but without, it should be noted, at that stage promoting either regime change or full secession),³² the USA and its allies had created the conditions for moderately successful state-building efforts in that region. The population of Iraq as a whole, however, was not remotely a 'people' that was disposed to unite itself under a legitimate constitution. As Charles Tripp wrote in 2000, Iraq was a state in which

'the idea of politics as civility [...] has generally been overwhelmed by people organized according to very different notions of trust, where the community is not one of citizens, but of family and clan members, fellow tribesmen and conspirators. They have tended to see the state as the guarantor of their own privileges [...].'³³

Under the circumstances it is not surprising that the result of the 'democratisation' of Iraq was first the chaos that peaked in 2007³⁴ and then the 'tyranny of the majority' of the al-Maliki regime. Beham and Janik recognise the danger of 'tyranny of the majority' but the lesson they draw from it – that democracy is 'not an end in itself' – does not seem to me to be quite the right one. Rather, democracy *is* an end in itself, but there is more to democracy than majority rule. It involves the coexistence, as Habermas says, of human rights and popular sovereignty. Whether the "end" is democracy or, as Kant thought, a "republican" government that would not necessarily be democratic, the central question here is what means the end can justify.

Beham and Janik argue that when states act in the name of 'R2P' the true objective is invariably regime change or secession, and this ought to be openly acknowledged. There is at least one exception to this generalisation, namely the French 'Operation Turquoise' in Rwanda in 1994. Far from aiming to overthrow the genocidal regime, the French have been suspected of wanting to keep it in power.³⁵ But though certainly too little and too late, the operation did save lives. In any case, I am far from convinced that the use of R2P as a pretext for regime change affords any good reason to legitimise the latter. Humanitarian intervention may be justified in cases of genocide or other mass atrocities by the ordinary moral reasoning that justifies one person in intervening to protect another from unjust attack. The result of such intervention may be the fall of the perpetrator regime. When such an 'unjust enemy' is overthrown, both respect for the right of self-determination and the avoidance of future atrocities afford reasons for the intervening states to encourage the formation of as democratic a successor regime as is realistically possible. But regime change should be a

³² Cf. the penultimate paragraph of BEHAM and JANIK's chapter.

³³ C. TRIPP, *A History of Iraq*, Cambridge University Press, Cambridge, 2000, p. 2.

³⁴ P. GREEN AND T. WARD, 'The Transformation of Violence in Iraq' (2009) 49 *British Journal of Criminology* 609.

³⁵ A. DES FORGES, *Leave None to Tell the Story*, Human Rights Watch, New York, 1999.

by-product of humanitarian intervention, not a reason for it. No doubt ostensibly humanitarian motives are often a cloak for other reasons for intervention, but a licence to wage, in the name of democracy, what Beham and Janik nicely call 'perpetual war for perpetual peace' would be open to even greater abuse.

The whole idea that states have a 'responsibility to democratise' other states should in my view be firmly rejected. The citizens of every state have a moral right to democratic governance but the responsibility to democratise rests with *them*, painful and dangerous as that process may be. If democracy endures in Tunisia, for example, it will be a tribute to the activists, both Islamist and secularist, who created and sustained a civil society in the interstices of Ben Ali's authoritarian rule.³⁶ Civil societies in authoritarian states do not work in isolation, but draw sustenance from their links with a global civil society of pro-democracy, pro-human rights organisations.³⁷ Democratic states should do what they can by peaceful means to assist the spread of democracy and human rights through civil society.³⁸ One way they can do that is by further democratising themselves. It does not help the cause of democracy when the Kenyan state murders opponents on the streets of Mombasa or when the USA tortures with impunity. Democracy, unlike charity, begins at home.

³⁶ Again this point is drawn from the ISCI project (n. 1). See P. GREEN, 'State Crime, Civil Society and Resistance: Lessons from Tunisia' <<https://www.opendemocracy.net/penny-green/state-crime-civil-society-and-resistance-lessons-from-tunisia>> accessed 23.12.2014.

³⁷ T. RISSE, S.C. ROPP and K. SIKKINK (eds.), *The Power of Human Rights: International Norms and Domestic Change*, Cambridge University Press, Cambridge, 1999.

³⁸ Here I endorse the views of BENHABIB (n. 6), and also A. HONNETH's view of how to apply Kant to the present day: 'Is Universalism a Moral Trap? The Presuppositions and Limits of a Politics of Human Rights' in BOHMAN and LUTZ-BACHMANN (n. 10), pp. 174–176.