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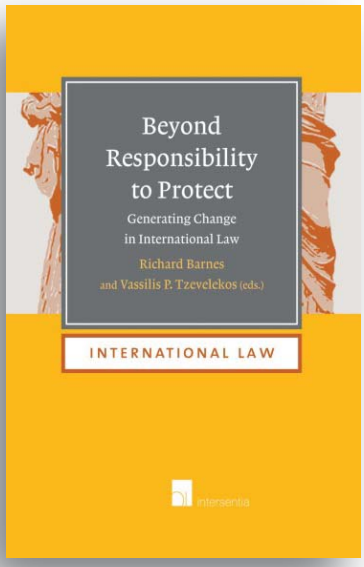

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BEYOND RESPONSIBILITY TO PROTECT

Generating Change in International Law

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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,

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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 Afghanis 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

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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. Sypnowich (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.

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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 example[14] – 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'

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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 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 Franck[25] 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*

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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

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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 2007[34] 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

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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.

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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.