

**RADICALIZING “THE RESPONSIBILITY TO PROTECT:” THE PROBLEM  
OF A(N) (UNMEDIATED) MORALIZATION OF POLITICS IN A POST-9/11  
WORLD**

by

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## ABSTRACT

In a post-9/11 world, the greatest challenges to the relevance of *The Responsibility to Protect* are not merely its perversion when left in the hands of self-interested agents but its own complicity in the reproduction of a moralization of politics. The problem of a moralization of politics has been variously defined by Carl Schmitt and Jürgen Habermas but generally denotes the abuse of moral justifications by those seeking to legitimate largely strategic political actions. *The Responsibility to Protect* remains relevant today if we relocate our evaluation of its productive possibilities from an analytic terrain divided by ‘statism’ and ‘cosmopolitanism’ to a radical, democratic political terrain. The ‘radical’ potential of the report is found in its ability to ground discourses in a counterhegemonic direction—one that contests the dominant liberal-conservative discourse of international peace and security on a logic of relational, popular and contingent sovereignty.

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## INTRODUCTION

The primary threat to international peace and security in a post-9/11 world is empire.<sup>1</sup> The threat of American imperialism has been evidenced in the ‘War against Terror.’ To date, the American-led ‘War against Terror’ has been fought primarily in two theatres: Afghanistan (2001) and Iraq (2003). Its reach threatens to extend to the remaining members of the “Axis-of-Evil:” Iran and North Korea. The terrorist attacks in Madrid, Spain (2004) and most recently, London, U.K. (2005) can be understood as concrete acts of resistance to a kind of imperialism that imposes the Western values of democracy, free markets, and human rights on foreign populations. The recent eruption of American military activities has not only been justified in terms of more conventional claims to a ‘right of self-defence’ but also as humanitarian interventions undertaken to halt or avert gross violations of basic human rights. The latter justification has only recently crystallized in the past decade of state practice.

The 1990s were marked by state interventions aimed at halting gross and systematic violations of human rights. The military interventions in Northern Iraq, Somalia, Rwanda and Kosovo occupied prominent places within the international security discourse. A decade of experience in humanitarian intervention culminated with the International Commission on Intervention and State Sovereignty’s (ICISS) report, *The Responsibility to Protect*, in December 2001. The purpose of the report was to build

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<sup>1</sup> Michael Ignatieff discusses empire in terms of imperialism. The nation-state and the boundary it delimits still play a central role in empire (2003). In contrast, Michael Hardt and Antonio Negri discuss a concept of empire, which is defined by an absence of boundaries. Empire is a regime that 1. rules over the entire

international consensus on the principles and practices of humanitarian intervention. Indeed, the broad contours of a new paradigm of humanitarian intervention were sketched within *The Responsibility to Protect* but the establishment of a clear, coherent norm on its bases has been curtailed. In a post-9/11 international political landscape, humanitarian intervention has been relegated to the periphery of international security concerns (Weiss 2004, 136). Against this backdrop, the productive possibilities of such a document have been drastically narrowed.

That a responsibility to protect has yet to reach a level of development sufficient to compel meaningful multilateral state action to humanitarian crises is evident in the international community's response to Darfur. For the past two years, ethnic conflict has raged in Darfur, Sudan. There have been allegations of war crimes, ethnic cleansing, and even genocide in the Southern region of Sudan. These human rights atrocities have been allegedly perpetrated on the black population by the Arab Janjaweed militia. There have been some international efforts to broker a ceasefire between the warring groups: the African Union has deployed 3000 troops to the area; the West has pledged logistical and financial support; and the UN, though it has declined to name the killing in Darfur 'genocide,' has taken some steps to impose non-military sanctions (BBC News 2004). In the latter respect, travel bans and asset freezes have been placed on those who commit atrocities in Darfur and the names of top war crimes suspects have been passed onto the International Criminal Court (BBC News 2004). Yet, the crisis has not shown signs of abatement. Although the rhetoric of a responsibility to protect has been endorsed and mobilized by United Nations Secretary-General Kofi Annan and many other leaders in

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civilized world; 2. rules with no temporal boundaries; 3. rules social life in its entirety; and 4. is dedicated to perpetual or universal peace (2000, xiv).

the developed world, the emergence of a clear norm of humanitarian intervention continues to face many obstacles.

In a post-9/11 world, the greatest challenges to the relevance of *The Responsibility to Protect* are not found merely in its perversion when left in the hands of self-interested agents but in its own complicity in the reproduction of a moralization of politics. The problem of a moralization of politics is found in the abuse of humanitarian justifications by state actors seeking to legitimate largely strategic political actions. One need look no further than the wars in Afghanistan and Iraq to understand this threat. The success of the war in Afghanistan (2001) was partially identified in terms of its ostensibly favourable human rights outcomes: the political rights of the Afghani people and women's rights to free expression and education have been tenuously restored through democratic elections. Moreover, one of the justifications that the United States advanced for its invasion of Iraq (2003) was the liberation of the Iraqi people from Saddam Hussein's murderous regime. Indeed, this humanitarian justification has become an important *post-hoc* rationalization for the war since weapons of mass destruction have yet to surface in Iraq and the link between Saddam and the terrorists remains weak. The possibility of covering all legitimate justifications for an international use of force under the umbrella of the 'War on Terror' further threatens the coherence of an independent justification for humanitarian intervention free from the difficulties attending a moralization of politics.

In all of the preceding examples, the protection of human rights has been mobilized as a cover for strategic state action; a moralization of politics has been instrumentalized as part of a wider project of empire. Even if we qualify this project of

American imperialism as ‘empire-lite,’<sup>2</sup> the threat of a moralization of politics remains—the good intentions of the imperial power may, in reality, be used to justify the most inhumane of actions against a foreign population.

In the aftermath of September 11, 2001, a moralization of politics is one of the greatest obstacles to the emergence of a fully-crystallized norm of a responsibility to protect. The instrumentalized use of a responsibility to protect by self-interested state actors threatens to reduce its meaning to mere rhetoric or worse, a perverse tool of destruction. In light of this threat, we will attempt to recuperate a space for a political discourse of humanitarian intervention based on *The Responsibility to Protect*. What potential role will *The Responsibility to Protect* have in a post-9/11 world that has a) relegated the issue of humanitarian intervention to a lower level of concern within the international security agenda; and b) escalated the threat of a moralization of politics to a high level?

The first two chapters of this thesis lay the conceptual foundations for an analysis of *The Responsibility to Protect* through the lens of one of its greatest current threats: a moralization of politics. We will examine two formulations of a moralization of politics: Carl Schmitt’s moralization of politics thesis and Jürgen Habermas’s reformulation of it to emphasize the importance of ‘mediating’ intersections between politics and morality. Through the distillation of Schmitt’s and Habermas’s respective constellations of law, morality and politics, we will bring into focus their broader political orientations. Schmitt’s statism and Habermas’s cosmopolitanism constitute the divided terrain of

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<sup>2</sup> Michael Ignatieff has coined the term ‘empire-lite’ to describe a global hegemony characterized by free markets, human rights and democracy, enforced by great military power (2003). This project is qualified as ‘lite’ to the extent that imperial activities from regime change to nation-building can be classified as products of benevolent intentions or the work of a reluctant, unwitting hegemon (Ignatieff 2003).

politics within which our subsequent analysis of a current instance of a moralization of politics—military intervention for human protection purposes—will take place.

In chapter three, we briefly chart the evolution of humanitarian intervention in thought and state practice to understand how the dilemma has changed in meaning over time. By exposing the constructed nature of the dilemma as it has been traditionally framed in terms of an opposition between sovereignty and intervention, we open the possibility of challenging the existing parameters of the debate.

In chapter four, we examine one of the most recent challenges to the humanitarian intervention dilemma in a post-9/11 world—*The Responsibility to Protect* (2001). Specifically, our evaluation of the report will consist in uncovering the constellation of law, morality and politics it constructs within a political terrain divided between Schmitt's statism and Habermas's cosmopolitanism. The extent to which a political terrain divided between these two constructions of statism and cosmopolitanism adequately aids in our understandings of whether and how a responsibility to protect can remain relevant in a world fraught with the dangers of a moralization of politics is a larger theoretical question this study aims to answer.

If *The Responsibility to Protect* does not adequately address or safeguard against a moralization of politics within this frame of analysis, are we resigned to accepting that the report will have little or worse, a negative effect on a discourse of humanitarian intervention? If there is to be a positive role for the report in a post-9/11 world, on what political terrain of analysis will its strengths be most productively mobilized? Chapter five attempts to answer these questions and proposes a direction that secures a relevant place for *The Responsibility to Protect* in a post-9/11 world. It will be argued that *The*

*Responsibility to Protect* remains relevant today if we relocate our evaluation of its productive possibilities from an analytic terrain divided by ‘statism’ and ‘cosmopolitanism’ to a radical, democratic political terrain as imagined by Ernesto Laclau and Chantal Mouffe. The ‘radical’ potential of the report is found in its ability to ground discourses in a counterhegemonic direction—one that contests the dominant liberal-conservative discourse of international peace and security on a logic of relational, popular and contingent sovereignty.

## CHAPTER 1

### CARL SCHMITT AND THE PROBLEM OF A MORALIZATION OF POLITICS

Carl Schmitt's concern with a moralization of politics grew out of his efforts to advance a theory of state authority sufficient to reconstruct a strong German State in the aftermath of World War I. As a leading German jurist in the Weimar Republic, Schmitt argued that the infection of legal and political forms of reasoning with moral evaluative categories threatens to intensify political relations to immoderate levels. Schmitt's moralization of politics thesis developed out of his broader critiques of liberalism and morality. His ideas concerning the appropriate form of sovereign state authority and the nature of the 'political' were overshadowed by his association with the Nazi regime's policies. Despite the mire of controversies that have surrounded Schmitt's ideas, his conceptions of the 'political' and state sovereignty continue to challenge our current understandings of state responsibility and the constellation of law, morality and politics appropriate to the realm of international relations.

Crucial to our understanding of a moralization of politics is a broader theoretical question: How do particular constellations of law, morality and politics within international relations frame our constructions of international threats and shape the strategies for their resolution? The fundamentally different premises from which Carl Schmitt and Jürgen Habermas proceed in their formulations of a moralization of politics illustrate the competing paradigms of international relations at stake. On the one hand, the constellation of law, morality and politics that Schmitt constructs betrays what has

been broadly classified as a statist paradigm of international relations.<sup>3</sup> Schmitt's response to a moralization of politics follows from his interpretation of the threat through an absolute statist lens. On the other hand, Habermas constructs a constellation of law, morality and politics that fits loosely within a cosmopolitan paradigm of international relations.<sup>4</sup> Habermas arrives at a distinctively different solution to a moralization of politics because he interprets the threat through a cosmopolitan lens. Schmitt and Habermas agree that a moralization of politics is problematic insofar as it threatens international peace and security; both agree that moral language used to justify ostensibly political actions raises the stakes in political life to dangerous levels. They disagree profoundly on where the threat of a moralization of politics lies and what the proper means are for mitigating its detrimental effects.

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<sup>3</sup> Fundamental to the statist paradigm is the principle of state sovereignty. Sovereignty is a legal principle that guarantees the rights of states to political independence and territorial integrity. Non-intervention in the domestic affairs of a sovereign state is therefore, a corollary of sovereignty. States can use force to protect their sovereign independence when a threat to their borders is 'imminent.' On a statist paradigm, the nation-state is the primary unit of analysis. An individual state's borders define the relevant rights and duties at stake; a strong principle of communitarianism narrows our focus to the rights of and obligations owed to plural members of a community. Consistent with a strong emphasis on citizenship, human rights obligations are owed to fellow citizens. Legally, human rights obligations are constructed as obligations of the state. As such, states are the key guarantors of human rights; they have the administrative and coercive power to fulfil human rights obligations. Symmetrically, states are also largely implicated in human rights violations. At stake here is the question of whether a state's political infrastructure is adequate to ensure that basic human rights are protected.

<sup>4</sup> The meaning and scope of cosmopolitanism is widely contested. Some have argued that cosmopolitanism includes a world government. Others have contested that cosmopolitanism requires democracy. For further reading on the idea of cosmopolitan democracy, see: Daniele Archibugi and David Held. Ed. 1995. *Cosmopolitan Democracy: An Agenda for a New World Order*, Cambridge; David Held. 1995. *Democracy and the Global Order: from the Modern State to Cosmopolitan Governance*, Cambridge; Richard Falk. 1995. *On Humane Governance: Towards a New Global Politics*, University Park, PA. Generally, a cosmopolitan paradigm of international relations can be understood in two ways. An ethical cosmopolitanism focuses on the duties that are owed to citizens of the world beyond state borders. In contrast to the statist paradigm, the rights claims of those within our own borders do not receive priority of consideration. Rather, every individual is worthy of moral concern. Legal cosmopolitanism focuses on the growing body of international human rights law as enshrined in the following: the International Bill of Rights (Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966)); the UN Convention on the Prevention and Punishment of the Crime of Genocide (1948); the Four Geneva "Red Cross" Conventions of 1949; and the Rome Statute (1998) of the International Criminal Court.

In this chapter, we will examine Schmitt's moralization of politics thesis. The constellation of law, morality and politics that emerges from a dissection of Schmitt's thesis sketches the broad contours of his absolute statism. Schmitt's problematization of a moralization of politics and his solution to it becomes an exercise in reifying a particular model of 'political' relations between states and a classical conception of international law.

### SCHMITT'S MORALIZATION OF POLITICS THESIS

At its most general level, Schmitt's moralization of politics thesis claims that the introduction of moral universalistic reasoning into justifications for political action negatively alters the nature and scope of that action. In particular, the infection of international law with moral considerations permits the perpetration of the gravest acts of inhumanity in war (Habermas 1997, 147). Those who advocate legal pacifism falsely promise that an international legal order infected with moral categorizations can effectively moderate state behaviour in war.

According to Habermas, Schmitt's moralization of politics thesis relies on two propositions. First, Schmitt claims that a politics of human rights implements norms that are part of a universalistic morality (Habermas 1997, 136-7). Second, the implementation of a universalistic morality results in the moral judgement of others as either good or evil. This moralization, in turn, destroys the legally institutionalized limitations placed on military conflict and removes all moderation in the conduct of war (Habermas 1997, 136-7). The moral delimitation of a war as just or unjust translates into a legal discrimination between just wars of self-defence and unjust wars of aggression

under classical international law. Schmitt argued that this conflation between moral and legal reasoning has political consequences. Our perceptions of what war is and how it ought to be fought become dangerously skewed. When political decisions are moralized through the introduction of universalistic concepts such as humanity and human rights, we are deceived into believing that the number and intensity of wars will be minimized. Rather, the diametric opposite occurs. It is precisely the moral denouncement of one's opponent as an 'unjust enemy' that strips war of its formal, 'political' qualities. The enemy becomes a criminal—one that must be eliminated at all costs (Schmitt 2003, 124). For Schmitt, these are conflations of the modern criminal with *justus hostis* and war with crime (2003, 124). Schmitt clarifies the consequences of a moralization of politics in these terms:

In the modern, discriminatory concept of war, the distinction between the justice and injustice of war makes the enemy a felon, who no longer is treated as a *justus hostis*, but as a criminal. Consequently, war ceases to be a matter of international law, even if the killing, plundering, and annihilation continue and intensify with new, modern means of destruction (2003, 124).

Modern discussions of just war resurrect moral-theological<sup>5</sup> concepts of the enemy and war that were rendered obsolete with the emergence of classical European international law. State wars were logical consequences of an international legal system constructed around the principle of state sovereignty and not punitive actions; enemies ceased to be 'outlaws of humanity' and acquired the status of legal subjects with rights and duties

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<sup>5</sup> The moral-theological standpoint to which Schmitt refers is that of Francisco de Vitoria. According to Schmitt, Vitoria took up the question of a right of conquest and the just cause of war (*justa causa belli*) from an "entirely unpolitical objectivity and neutrality" (2003, 111). Modern scholars who misappropriate Vitoria's arguments in current discussions favourable to just war ignore the crucial link between moral and legal legitimacy in the Christian Middle Ages. Vitoria's arguments for just war appear general and neutral but they obtained their decisive legal force from a papal missionary mandate: "The papal missionary mandate has the legal foundation of a conquest" (Schmitt 2003, 111). Schmitt emphasizes this point to

(Schmitt 2003, 123). The reversal of these modern international legal advances in the conceptualization of just war form the deceptive core of a moralization of politics: “Humanity, Bestiality; whoever invokes humanity wants to cheat” (Schmitt, 1996, 54).

A deeper understanding of Schmitt’s moralization of politics thesis requires its contextualization within his broader political thought. An exposition of Schmitt’s conceptions of the ‘political’ and state sovereignty will also uncover the particular constellation of moral, legal and political forms of reasoning sufficient to resist a moralization of politics.

#### LOCATING SCHMITT’S CONCEPT OF THE ‘POLITICAL’ WITHIN A MORALIZATION OF POLITICS

For Schmitt, a moralization of politics is problematic precisely because the meanings of the ‘political’ and ‘humanity’ are conflated in its formulation. In particular, Schmitt is concerned about the political stability of an emergent cosmopolitan world order that has, at its center, a politics of human rights. According to Schmitt, the international implementation of universal human rights is possible only if the category of the ‘political,’ as he conceives of it, is eliminated.

Schmitt defines the ‘political’ as that which can be distinguished according to friend and enemy (1996, 26). The possibility of political action arises when the most intense and extreme of all antagonisms can be identified—that between friend and enemy. Schmitt’s categorization of the friend/enemy antagonism as the most intense suggests that it is located at one end of a scale on which multiple antitheses are situated. Schmitt clarified that the friend/enemy distinction can correspond to other antitheses but

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caution against an ahistorical reading of Vitoria’s arguments for just war, which would otherwise result in a

cannot be reduced to them (1996, 26). The ‘political’ comprises an autonomous sphere separate and distinct from any meaning found in other autonomous spheres such as morality, law, economics and religion (Schmitt 1996, 26). A politics of human rights represents a moralization of politics because the political antithesis of friend/enemy and the moral antithesis of good/evil are conjoined in a necessary relationship that subordinates the independent meanings of each category to the other. The moral discrimination between enemies has consequences for the conduct of war.

For Schmitt, the ever-present possibility of conflict and struggle is the *sine qua non* of politics (1996, 34). Schmitt explained: “The politics of avoiding war terminates, as does all politics, whenever the possibility of fighting disappears. What always matters is the possibility of the extreme case taking place, the real war, and the decision whether this situation has arrived or not” (1996, 35). The possibility of real war represents the extreme case insofar as the most intense antagonism can be expressed: the political distinction between friend and enemy. The nature of this distinction between friend and enemy is not determined prior to a sovereign’s decision. The potentially destructive effects of such a political decision are tempered by a non-discriminatory conception of war and the juridical concept of *justus hostis*.

Although Schmitt understood war to be a permanent feature of international political life, the nature of war did not necessarily have to be ‘total’ on his view. Wars fought between formally equal enemies are inherently limited. Intrinsic to a non-discriminatory concept of war is the notion of a “war in form” wherein both belligerents mutually recognize their equal political statuses and their equal rights, particularly to wage war (Schmitt 2003, 142). A mutual recognition of the equality between enemies in

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moralization of politics that cannot be easily corrected.

war entitles the belligerent parties to a decent minimum of treatment. This includes the possibility of peace treaties with the vanquished party (Schmitt 2003, 142). Coupled with the legal concept of the enemy as *justus hostis*, total wars aimed at the annihilation of a morally inferior enemy were effectively bracketed in classical European international law (Schmitt 2003, 142). We will now move into a more detailed discussion of the particular constellation of law, morality and politics Schmitt perceives as necessary for the prevention of a moralization of politics.

#### SCHMITT'S CONSTELLATION OF LAW, MORALITY AND POLITICS

On Schmitt's view, law, morality and politics are all distinct and separate spheres defined by their own antitheses: legal/illegal, good/evil and friend/enemy respectively; none of these categories can be traced to any other category (1996, 26). The friend/enemy distinction characteristic of the 'political' is, however, distinctive because it denotes the "utmost of intensity of a union or separation, of an association or dissociation" (Schmitt 1996, 26). The legal and moral antitheses dissolve when they are subsumed within the most intense of all antitheses—the 'political' (Schmitt 1996, 26). To the extent that legal and moral categories are subsumed within the political antithesis, law and morality enter into politics. Politics, however, remains the primary category; law and morality are subordinate to politics.

Primarily, the intersection of *politics and morality* gives rise to Schmitt's concern about a moralization of politics. The introduction of normative considerations into politics substantively undermines the ability of a sovereign authority to make decisions especially in moments of the exception. Moreover, the formal quality of political

opponents is removed when they are morally distinguished as good or evil. Normatively unequal enemies are also treated unequally in concrete political practice; those who claim to wage just wars imply that the opponent wages an unjust war. The unjust side is thereby denied mutual recognition as an equal political adversary. A moralization of politics assumes a discriminatory concept of the enemy that justifies immoderate behaviour in war and renders ineffective, a sovereign's ability to decide in the exception. For these reasons, politics and morality must remain separate spheres of thought and action on Schmitt's view.

The proper relationship between *law and morality* follows a logic similar to that which separates politics and morality. The infection of law with morality has the effect of removing non-discriminatory concepts of war and enemy from the purview of politics. Aggressive war in itself becomes criminalized by reason of a state's 'just cause.' Furthermore, the moral discrimination between just and unjust enemies implicit in a discriminatory concept of war demonizes the enemy as an 'outlaw of humanity,' necessarily outside of the law and therefore, subject to total annihilation. The notion of a criminalized enemy implicit in modern references to just war subverts the distinction that modern international law has drawn between the moral-theological question of *justa causa* and the juridical-formal political question of *justus hostis* (Schmitt 2003, 121). War was juridically formalized in post-medieval European international law from the sixteenth to twentieth centuries with the consequence of legitimizing wars between equal sovereigns. The juridical-formalizations of war and the enemy in modern international law effectively divorced the problem of just war from the question of just cause (*justa causa*). A moralization of politics threatens to reverse this advancement in modern

international law and reintroduce the question of *justa causa* in the determination of a just war.

In contrast to the preceding relationships, Schmitt envisioned a complementarity between *law and politics*. The core of this complementarity is found in the legal principle of state sovereignty. The legal equality that states have in the abstract translates into the equal, political treatment of adversaries engaged in war. More generally, law and politics are mutually interdependent. Law requires normal conditions for its function and politics guarantees the possibility of a normal state of affairs (Schmitt 1985, 13). Moreover, the law does not exhaust every possible contingency that may arise in political practice. When the law ‘runs out’ and fails to adequately address the exception, the sovereign’s political decision is the default source of legitimacy (Schmitt 1985, 13, 32). Although the exception is necessarily outside of the law, a sovereign’s decision at that moment should be made with a view to reinstating the normal conditions in which a rule of law can flourish once more (Schmitt 1985, 13). The concept of state sovereignty preserves the legal and political equalities of international actors crucial to the prevention of a moralization of politics.

### *Politics and Morality*

According to Schmitt, politics must be kept free from morality if the problems endemic to a moralization of politics are to be successfully averted. Politics becomes an unlimited enterprise when substantive moral considerations distort political decision-making. We will begin by elaborating Schmitt’s concept of the ‘political’ through a discussion of the interrelationship between domestic and foreign state policies. This

discussion will broach Schmitt's more general critique of liberalism. We will then return to Schmitt's formulation of a moralization of politics and examine his claim that a politics of human rights serves to implement norms that are part of a universalistic morality.

Schmitt argued that peace and order in domestic politics could only be achieved through a bellicose foreign policy. Habermas illuminates Schmitt's logic lucidly:

According to [Schmitt's theory of the political], legally pacified domestic politics must be supplemented by a bellicose foreign policy licensed by international law; with its monopoly over the means of violence, the state can maintain law and order against the virulent subversive power of domestic enemies only if it preserves and regenerates its political substance in struggle against its foreign foes (1997, 144).

The relationship between domestic and international politics can be complementary if politics reaches its most intense form in relations between states. Internal order is preserved when the distinction between friend and enemy is driven from the domestic sphere and relocated in the international sphere. Schmitt posits an inverse relationship between the internal and external affairs of states as a necessary corollary to the emergence of a modern state-form characterized by plural relations.

In response to the realities of pluralism in modern states, a parliamentary (party) system became the dominant form of democratic politics after World War I. On this model of liberal democracy, government power was won through open competition between plural political factions. This threatened the coherence of a strong, authoritarian state capable of making decisive and binding decisions (Schwab 1996, 13-4). The failed reconstruction of Germany under the Weimar Republic's rule forms the historical context of Schmitt's more general critique of liberalism:

In his endeavour to strengthen the Weimar state, Schmitt challenged a basic liberal assumption then widely held either for philosophical or tactical reasons, namely, that every political party, no matter how antirepublican, must be permitted to freely compete for parliamentary representation and for government power. [...] Cognizant that the political left and right utilized bourgeois legality as a weapon in the quest for power and fearful of a victory by one of the extremist movements with the ideological subversion of the state to follow, Schmitt saw little hope in the ability of the Weimar state to survive unless its leadership was immediately prepared to distinguish friend from enemy and to act accordingly (Schwab 1996, 13-4).

Schmitt advocated the centralization of state power in the form of authoritarian governments rather than an open, plural, liberal parliamentary system because his primary concern was the preservation of a strong domestic order. At the time when Schmitt wrote, the strength of the Weimar state was subject to constant erosion through constitutional challenges to the state's authority. Consequently, the ability of a state's President to make final and binding political decisions was severely constrained. The 'constitutionalization' of politics in the modern liberal state rendered the concept of the 'political' meaningless; the sovereign's decision became synonymous with a positive legal norm. As a means of recuperating the concept of the 'political,' Schmitt advocated a commissarial system of rule. In this system, power was concentrated in the sovereign seat of the President. By identifying the people's will with the President's will and reducing democratic politics to plebiscitary voting, Schmitt articulated a formulation of state authority robust enough to withstand future political assaults on the state (Schwab 1996, 15).

Schmitt criticized liberal ideology because of its incompatibility with the conduct of politics. He argued that the state was constantly undermined as the highest and final authority in a liberal constitutional democracy precisely because the 'liberal' individual perceived the state as one of many potential associations to which he/she can choose to belong (Schwab 1996, 12). The privileging of pluralism as the *sine qua non* of modern

liberal constitutional democracies had the effect of subverting order both inside and outside of states: “Internal political dissent caused states to immerse themselves in internal political struggles and this weakened the state in relation to other states and undermined internal sovereignty in general. When the inverse is true, the state is strong” (Schwab 1996, 12). The internal strength of a state was directly linked to the power it exerted in its foreign affairs. Paradoxically then, the protection of the state as both the decisive political actor in its domestic and foreign affairs requires relegating pluralism and politics to the international sphere. The security of the international order is threatened and the possibilities for a moralization of politics multiplied when the domestic political conditions of individual states are weakened by internal dissent. The equality of enemies as *justi hostes* depends on strong, independent, sovereign states.

As one of the leading intellectuals of the Weimar period, Schmitt was specifically concerned with the weaknesses of the Weimar constitution, a modern liberal, parliamentary document (Strong 1996, ix). Broadly, he was interested in the consequences of adopting the liberal parliamentary state as *the* modern form of political organization (Strong 1996, ix). In the aftermath of the First World War, Germany confronted the daunting task of rebuilding itself as a Republic. Severely crippled by the physical destruction of war and the punitive measures imposed by the Treaty of Versailles, the German nation sought to rebuild itself militarily, economically and psychologically. In spite of its rich resources, relatively advanced level of industrialization and central geographic location in Europe, Germany was unable to recover from the highly punitive measures of the Treaty of Versailles. Schmitt attributed

Germany's failure to reassert itself as a dominant world actor to its internal domestic economic and political situation (Schwab 1996, 11).

The weakened position of post-World War I Germany in the world was a direct consequence of modern liberal-individualistic doctrines. Specifically, liberalism subjugated the primacy of the state's authority and political decision-making to the profoundly unpolitical spheres of economics and morality:

Thus the political concept of battle in liberal thought becomes competition in the domain of economics and discussion in the intellectual realm. Instead of a clear distinction between the two different states, that of war and that of peace, there appears the dynamic of perpetual competition and perpetual discussion. The state turns into society: on the ethical-intellectual side into an ideological humanitarian conception of humanity and on the other into an economic-technical system of production and traffic. The self-understood will to repel the enemy in a given battle situation turns into a rationally constructed social ideal or program, a tendency or an economic calculation (Schmitt 1996, 72).

War and conflict between plural states in the international arena was replaced by economic competition and political debate within parliamentary democracies. Modern liberal states were depoliticized because their prioritizations of individual negative liberties prevented national governments from demanding the sacrifice of individual lives in a war against a foreign enemy (Schmitt 1996, 71). Schmitt argued:

[A state's political] substance is renewed in the willingness of members of a nation to kill and be killed, since it is of the essence of the political to be related to "the real possibility of physical death." What is "political" is the capacity and will of a people to recognize its foes and to assert itself against "the negation of its existence through the otherness of the foreign" (Habermas 1997, 144).

The requirement of personal sacrifice in cases where the state is engaged in a life-and-death struggle with an enemy is antithetical to the liberal guarantee of maximum individual freedom.

The primary places that economics and morality occupy in the modern liberal parliamentary state subverts the establishment of a strong state authority and thereby, a logic of the 'political.' Schmitt argued:

The negation of the political, which is inherent in every consistent individualism, leads necessarily to a political practice of distrust toward all conceivable political forces and forms of state and government but never produces on its own a positive theory of state, government, and politics. As a result, there exists a liberal policy in the form of a polemical antithesis against state, church or other institutions which restrict individual freedom. There exists a liberal policy of trade, church, and education, but absolutely no liberal politics, only a liberal critique of politics (1996, 70).

Liberalism is defined by its opposition to a strong theory of state, government and politics; liberal rights are primarily negative rights to a sphere of private non-interference free from state encroachments. Schmitt observes: "What this liberalism still admits of state, government and politics is confined to securing the conditions for liberty and eliminating infringements on freedom" (Schmitt 1996, 71). Moreover, the individualizing logic of liberalism subordinates politics first to a logic of economics and second, to a logic of morality (Schmitt 1996, 70).

In the first instance, the decentralizing forces of economic power reinforce the primacy of possessive individualism while eroding the concrete political abilities of national governments to order their internal affairs. On a logic of economics, national problems are systematically addressed through the self-correcting mechanisms of a free market rather than by any concrete political decision or sovereign act of will. In this respect, economics is not a substitute for politics; the economic sphere cannot be described as sovereign. The essence of sovereignty is found in an authority's monopoly over political decision-making (Schmitt 1985, 13). The centrality of a state authority's

personal decision to Schmitt's definition of sovereignty endows states with the political power to assert its own identity against an enemy in war.

In the second instance, the moral-universalistic logic enshrined within liberal-individualistic doctrines precludes the real possibility of war and thereby, the possibility of distinguishing between friend and enemy. A moralization of politics occurs when the universalistic concept of human rights at the core of liberal logic clashes with the exclusionary logic of plural competition between states preserved within the principle of external sovereignty—the foundation of modern international relations (Schmitt 1996, 57).

Schmitt rejected attempts to use the concept of 'humanity' politically. He argued that its universal aspect prevents the political distinction between friend and enemy from being made. The universalism of humanity presumes that pluralistic societies can be ordered in virtue of the moral equality that all individuals share as human beings. 'Humanity' is dangerous to invoke in the context of political action because its scope is, by definition, all-inclusive. As such, humanity requires the elimination of all forms of exclusion, the most intense of which is the friend/enemy distinction that characterizes the 'political.' The equal right of all sovereign states to a sphere of external non-interference (*par in parem non habet imperium*) as it is enshrined in international law is, however, exclusive: the internal sovereignty of a state equally implies the exclusion of all other forms of external authority in its domestic affairs. For Schmitt, the possibility of exclusive relations is central to a concept of the 'political.' It must be possible to distinguish between those who belong and those who do not. The universal aspect of

humanity bars the kind of exclusion on which, interstate relations constructed around the legal principle of sovereignty are premised.

The problem for Schmitt becomes one of tempering the divisive potential in a political and plural international sphere without opening the floodgates to a moralization of politics. Schmitt claims that domestic order is best preserved when the distinction between friend and enemy is driven outward but the task remains to specify how the grouping of enemies in interstate wars will preserve pluralism and safeguard against the total annihilation of the 'other.' Schmitt's strategy is to free the definition of the enemy from moral assumptions of good and evil and to adopt in its place, a political definition of enemy as "negated otherness" (Schmitt 1996, 62). The mutual recognition of enemies as 'negated others' acknowledges that the concept of enemy is undifferentiated and freed from all particular personality (Schmitt 1996, 62). Relations of enmity are driven, in this sense, by a certain equality—an equality of enemies as negated identities. The apolitical concept of humanity is removed as a reference point for distinguishing enemies; the equality of enemies is emphasized rather than the equality of human beings. In this way, Schmitt refuses the distinction between a just and unjust enemy in the modern concept of just war. He thereby, rejects a discriminatory concept of war. For Schmitt, the concepts of war and enemy must remain non-discriminatory: "[...][T]he new non-discriminatory concept of war [...] made it possible for belligerent states to have equal rights in international law, to treat one another as *justi hostes*, both legally and morally on the same level, and to distinguish between the concepts of enemy and criminal (Schmitt 2003, 141). The emergence of a new European international law, which legally enshrined the sovereign equality of states, created the conditions in which formal

concepts of war and enemy, so crucial to the prevention of a moralization of politics, were made possible. We will now turn to an examination of how this new European international law emerged to change the nature of warfare and the definition of the enemy. The enshrinement of “state war” or a “war in form” and a concept of *justus hostis* in European international law also changed the meaning of justice in interstate wars.

### *Law and Morality*

Schmitt attributes the emergence of a “new European” international law among states to the appearance of vast free spaces and the land appropriation of a New World (Schmitt 2003, 140). The appearance of free spaces in the New World and the solidification of a balance of power system on the European continent created a new spatial order with Europe at its center (Schmitt 2003, 140). Europe’s central role as ‘balancer’ in this new spatial order further entrenched the Westphalian principle of state sovereignty. Within a states system, European wars were limited and bracketed through the secularization of national public life and the international renunciation of religious civil wars. The detheologization of war removed the power of political decision from ecclesiastical officials and placed it in the hands of national governments. War, thereby, took on a formal quality that also changed the context in which an enemy was to be understood:

The purely state war of the new European international law sought to neutralize and thereby, to overcome the conflicts between religious factions; it sought to end both religious and civil wars. War now became a “war in form,” *une guerre en forme*. Only in this way, only by limiting war to conflicts between territorially defined European states, could a conflict between these spatially defined units be conceived of as *personae publicae* [public persons] living on common European soil and belonging to the same

European “family.” Thus, it was possible for each side to recognize the other as *justi hostes* (Schmitt 2003, 141-2).

For Schmitt then, the equality of territorially-defined European states conferred upon them a common legal character and a shared set of rights (Schmitt 2003, 142). The meaning of enemy took on a public, formal equality:

The enemy is not merely any competitor or just any partner of a conflict in general. He is also not the private adversary whom one hates. An enemy exists only when, at least potentially, one fighting collectivity of people confronts a similar collectivity. The enemy is solely the public enemy, because everything that has a relationship to such a collectivity of men, particularly to a whole nation, becomes public by virtue of such a relationship (Schmitt 1996, 28).

Once the concept of the enemy assumed a legal form, belligerent parties were given an equal right of war. Since enemies were recognized as having equal political characters, military methods of annihilation were no longer justifiable:

Both belligerents had the same political character and the same rights; both recognized each other as states. As a result, it was possible to distinguish an enemy from a criminal. Not only was the concept of enemy able to assume a legal form but the enemy ceased to be someone “who must be annihilated.” [...] An international legal order, based on the liquidation of civil war and on the bracketing of war, actually had legitimated a realm of relative reason. The equality of sovereigns made them equally legal partners in war and prevented military methods of annihilation (Schmitt 2003, 142).

The moral qualification of an enemy as good or evil violates the principle of equality enshrined in a juridical concept of just enemy (*justus hostis*). According to Schmitt, “the ability to recognize a *justus hostis* is the beginning of all international law” (Schmitt 2003, 52). *Justi hostes* are equal sovereigns that reciprocally recognize each other as belligerent agents of just war; equal sovereigns pursue war against each other, each invoking a right of war (Schmitt 2003, 143). The legal equality of sovereigns at the foundation of an international legal order replaced the moral categorization of one’s

enemy as a traitor or a criminal subject to punishment (Schmitt 2003, 143). The detheologization of the international legal order not only placed states as political entities on a level playing field but also “rationalized” and “humanized” war (Schmitt 2003, 142).

State war replaced religious and civil wars in modern international law. As such, war came to be defined by its formal characteristics rather than by its destructive consequences. Schmitt drew the analogy between a “war in form” and a duel to illustrate the ‘new’ kind of justice at stake in interstate conflicts:

Where a duel as an institution is recognized, the justice of it is based similarly on the sharp distinction between *justa causa* and the form, between abstract norms of justice and the concrete *ordo*. In other words, a duel is not “just” because the just side always wins, but because there are certain guarantees in the preservation of the *form* – in the quality of the parties to the conflict as agents, in the adherence to a specific procedure (effected by bracketing the struggle), and especially, in the inclusion of witnesses on an equal footing. Here, right (law) has become a completely institutionalized form [...] Thus, a challenge to a duel was neither aggression nor a crime, any more than was a declaration of war (Schmitt 2003, 143).

The relevant kind of ‘justice’ in wars and duels alike is formal in nature; similar to a duel, war became a “conflict of arms between territorially distinct *personae morales* [moral persons], who contended with each other on the basis of the *jus publicum Europaeum*, because European soil had been divided under their aegis” (Schmitt 2003, 141-2). The non-European lands of the New World became the objects of mediated competition among European states through European public law; the creation of a balance of power system in Europe introduced a measure of moderation to the imperial activities of European powers in the New World (Schmitt 2003, 142).

The justice of war is further guaranteed in international law through the concept of state sovereignty. It is a feature of the principle of sovereignty that states with formally equal powers and capabilities can wage war against each other (Schmitt 2003,

143). Similar to Hobbes's theorization of an international state of nature as a perpetual state of war, Schmitt claimed that interstate wars retain a formally just quality insofar as all states equally have the right to wage war (*jus ad bellum*). Using the analogy of a duel, Schmitt showed that retaining a concept of war in international law does not necessarily lead to a proliferation of interstate wars. European international law simultaneously conferred upon states an equal right to wage state wars and a legal procedure with which to enforce such a right. At stake was not whether a state had a just cause to wage war but whether that state treated its enemy as an equal in war.

For Schmitt, the justice of a war was not to be evaluated substantively by reference to the guilt or innocence of a belligerent state but by the war's legal and procedurally just form. To do otherwise would be to revert to a moral-theological, rather than a juridical-political justification for war (Schmitt 2003, 121). Effectively, the concept of "war in form" would revert to the destructive 'total' wars of the Medieval period:

It is sufficient (but obviously also necessary for restoration of the true image of Vitoria) to note that the turn to the modern age in the history of international law was accomplished by a *dual division* of two lines of thought that were inseparable in the Middle Ages. These were the definitive separation of moral theological from juridical-political arguments, and the equally important separation of the question of *justa causa*, grounded in moral arguments and natural law, from the typically juridical-formal question of *justus hostis*, distinguished from the criminal, i.e., from becoming the object of punitive action (Schmitt 2003, 120-121).

The transition to a modern international legal order was characterized by the separation of moral-theological and juridical-political justifications for war. With this shift came the reconceptualization of religious and civil wars aimed at destroying the enemy to state wars characterized by the moderate treatment of one's enemy as an equal. Consequently, the question of justice in interstate wars shifted from the problem of just cause (*justa*

*causa*) to the problem of just conduct in war (*jus in bello*). The latter problem is premised on the mutual recognition of enemies as *justi hostes* (Schmitt 2003, 122).

Schmitt explained the importance of separating the problem of just war from the problem of *justa causa*:

[I]f the justness of a war could be determined according to *justa causa*, there always was a latent tendency to discriminate against the unjust opponent and, thus, to eliminate war as a legal institution. War quickly became a mere punitive action; it acquired a punitive character. [...] The enemy became a criminal, and the rest—the deprivation of rights and the plundering of the opponent, i.e., the destruction of the concept of the enemy (still formally presupposing a *justus hostis*)—followed as a matter of course. [...] The judiciary and the police in the modern state eliminated precisely this type of self-defence and transformed it into criminal offenses such as high treason, sedition, and disturbance of the peace (Schmitt 2003, 123).

The movement away from a determination of whether a just cause (*justa causa*) existed for war was also a recognition that questions of guilt in matters of foreign policy were irrelevant to the legally equal rights of sovereign states to wage war (Schmitt 2003, 120).

The most significant advance of modern international law was its separation of the problem of just war from the question of *justa causa* and the ability of sovereign states to recognize a *justus hostis* (Schmitt 2003, 52, 122). Both of these movements signify a general separation of morality from law and politics. In this respect, modern international law effectively shielded interstate relations from a moralization of politics. Through a formal recognition of each state's equal right to wage war, there was also a tacit understanding that each party in the conflict legitimately believed justice to be on its own side. In other words, a war could be just on both sides. Since every state had an equally legitimate right to use force, the focus in war shifted from the question of just cause to the question of fair treatment in war.

The concept of just war also applied indiscriminately in the Christian Middle Ages (Schmitt 2003, 119). Francisco de Vitoria challenged existing humanistic conventions in the justification of war by recognizing that the concept of humanity used to justify war had an ‘outside;’ there were gradations within humanity: human/inhuman, superhuman/subhuman (Schmitt 2003, 103-104). Humanity ranged from the inhuman or subhuman (slaves and barbarians) to the human or superhuman (conquerors of the “New World”) (Schmitt 2003, 104). In recognizing the inherent inequality within a concept of humanity, Vitoria rejected a concept of international law that morally distinguishes between types of enemies and wars. Instead, he argued that Christians and non-Christians were legal equals. Vitoria’s affirmation of the general equality of humankind was significant insofar as it also removed a discriminatory conception of the enemy and war in international relations. In this respect, Vitoria’s thought approached that of Schmitt:

In Vitoria’s thinking, as in medieval doctrine, war remains war on both sides, despite its “punitive character.” Vitoria does not deny that a just war waged by Christian princes *against non-Christian* princes and peoples is a real war, and he thus regarded the opponent in such a war as a *justus hostis* (Schmitt 2003, 124).

Rather, it has been the misappropriation of Vitoria’s concept of just war by modern jurists that has resulted in the re-emergence of a discriminatory concept of war:

Vitoria’s ahistorical method generalizes many European historical concepts specific to the *jus gentium* of the Middle Ages (such as people, prince and war), and thereby strips them of their historical particularity. This allowed theology to become a moral doctrine and, in turn (with the aid of an equally generalizing *ius gentium*), a “natural” moral doctrine in the modern sense and a merely rational law. Following in the footsteps of Vitoria and Suarez, 17<sup>th</sup> and 18<sup>th</sup> century philosophers and jurists, from Grotius to Christian Wolff, consistently developed this moral doctrine of late scholasticism into a still more general, more neutral and purely human *jus naturale et gentium* [natural and international law] (Schmitt 2003, 114-115).

The kind of moralization of politics that Schmitt fears stems not from the inseparability of law and morality as it existed in the Christian Middle Ages but from the criminalization of war itself as an act of aggression.

An enemy stripped of formal juridical qualities makes possible the criminalization of a war:

In the modern discriminatory concept of war, the distinction between the justice and injustice of war makes the enemy a felon, who no longer is treated as a *justus hostis*, but as a criminal. Consequently, war ceases to be a matter of international law, even if the killing, plundering, and annihilation continue and intensify with new, modern means of destruction (Schmitt 2003, 124).

Here, Schmitt understands criminalization in the sense of one who is an object of punitive measures (Schmitt 2003, 121). As his formulation of a moralization of politics further suggests, punishment refers not to the violation of laws by legal subjects with rights and duties in particular, but to the treatment of one's enemy as an 'outlaw of humanity'—one who is, therefore, subject to unlimited and immoderate treatment. In the latter scenario, international law is being used to outlaw war not because of its form but because of the aggressive intent behind the act. We will, however, recall that the great achievement of modern international law is its separation of the moral-theological question of *justa causa* from the juridical-formal question of *justus hostis* (Schmitt 2003, 120-1). By criminalizing aggressive wars as unjust, the moral-theological question of guilt or innocence characteristic of just war determinations in the Middle Ages is reintroduced (Schmitt 2003, 142-3).

The effect of reintroducing the question of just cause into a determination of just war is also to introduce a distinction between a just and unjust enemy; this is antithetical to the formal equality enshrined in a concept of *justus hostis*. Since a claim to *justa*

*causa* can only legitimately belong to one side, the harms suffered by the unjust party in an aggressive war ceases to be a valid legal consideration. The initial crime of waging an unjust war invalidates any legal protections that the enemy may have had. A moral evaluation of the just war problem transforms war into a zero-sum game. For Schmitt, a moralization of politics can be averted if the question of *justa causa* disappears in both its moral and legal forms. In its place, the possibility of war must be reasserted; the formal, juridical nature of war and the enemy is rooted in politics—the ability of a sovereign to decide the exception and distinguish friend from enemy. We will now turn to an examination of how law functions within sovereign states—the primary agents of international politics.

#### *Law and Politics*

The complementarity of international law and politics is rooted in the dual function of the principle of state sovereignty. The principle guarantees both the equality of sovereign states under international law and enables their political actions. Classical European international law was based on the legal recognition of each state as sovereign in its internal affairs: *par in parem non habet jurisdictionem*. The recognition of a state's internal sovereignty also meant that it was externally sovereign; there is no higher authority outside of the state. In theory then, the legal equality of states logically requires the formally equal treatment of states in the international system; in this way, an enemy is treated as a *justus hostis* and the justice of a war is measured by its form. Implicit in the meaning of state sovereignty is, therefore, the possibility of political action.

A balance of power politics successfully bracketed war in Europe and created a lasting peace because belligerent states recognized the equal right of every other state to wage war (*ius ad bellum*). Each party recognized the enemy as an equal—an opponent sovereign in its own internal affairs with a legitimate right to use force to protect its territory. A respect for the principle of sovereign equality among members of the international system had the effect of moderating those political decisions that fell outside the scope of law. Classical European international law did not outlaw state war but accepted it as a logical extension of the right of every sovereign state to wage war. Justice in war was entailed by the legal equality of sovereign states to wage war. In this respect, state war was decriminalized in international law. In this space outside the formal regulation of international law, the sovereign state's ability to make political decisions is paramount. The ability of a state to act as a true sovereign depends on whether it can act with political decisiveness in the regulation of its internal affairs. Schmitt's conception of sovereignty and its relation to the exception in national political affairs has implications for the relationship between law and politics internationally.

Schmitt defined sovereignty as “he who decides the exception” (Schmitt 1985, 5). Consequently, a state loses its sovereign title when it loses the power to decide the exception (Schmitt 1985, 11). Schmitt's conceptualization of sovereignty is not, however, new. Jean Bodin was the first to recognize that the concept of sovereignty relates to the exception. According to Bodin, the Prince is bound to fulfil the interests of the citizens in normal conditions, rather than in conditions of urgent necessity (Schmitt 1985, 8). Similarly, Thomas Hobbes observed that although the sovereign was not above

the law, he did retain the prerogative powers to decide outside of the domestic constitution in extraordinary cases.

Schmitt understood the exception as a case of extreme peril or danger to the existence of the state, which is not codified in the existing legal order (Schmitt 1985,6). For Schmitt then, sovereignty is crucially linked to a state's ability to decide politically at the moment of the exception. Schmitt argued that the state possesses a monopoly on political action because it is the only entity that has the means to actualize its decision of who is friend or enemy. The state can demand of its citizens a readiness to sacrifice their lives for its advancement (Schmitt 1996, 71). The temporary suspension of law by the sovereign in the exception brings to the fore the decisionist and personal aspects of any political act.

Schmitt located the genesis of a rule of law in a sovereign's political decision rather than in a norm (Schmitt 1985, 12). According to Schmitt, the distinctive quality of a juridical or legal norm is to be found in a sovereign authority's personal decision<sup>6</sup> (Schmitt 1985, 35). A legal idea is effectively realized by a person or entity that has the competence to apply the law (Schmitt 1985, 31). The norm that governs a decision or a legal prescription only designates how decisions should be made but not who should decide (Schmitt 1985, 32). This reasoning compelled Schmitt to proclaim: "Normatively, the decision emanates from nothingness" (Schmitt 1985, 32). Schmitt reinserts the decision-maker into the legal order but the significance of this move does not become fully apparent until a state of exception arises. In ordinary times, a sovereign's decision abides by legal norms (Schmitt 1985, 12). Under normal conditions, the sovereign's

identity is equated with its valid legal authority (Schwab 1985, xvii-xviii). Schmitt observed: “For a legal order to make sense, a normal situation must exist and he is sovereign who definitely decides whether this normal situation actually exists” (Schmitt 1985, 13). At the moment of the exception, the sovereign decides how to eliminate the exceptional circumstances and determines when a state of normality is restored.

Schmitt’s efforts to reinstate the personalism of the sovereign’s decision in modern liberal constitutional states stood in direct opposition to the prevailing current of thought that tended to privilege law and subordinate politics. Liberal constitutional theorists sought to de-politicize the sphere of decision-making by emphasizing the central role of law. Most notably, Hans Kelsen advanced a monistic theory of law that identified the state with the legal order itself. By taking the sovereign’s personal decision out of the legal order, law became insulated from the uncertainties of the exceptional case. Kelsen traced the validity of a legal norm to one *Grundnorm* – a final uniform basic norm to which all other norms can be reduced (Schmitt 1985, 19). The existence of a *Grundnorm* presupposes a system of law comprised of interrelated norms. Significantly, Kelsen traced a state’s political decisions to an objectively valid, overarching norm rather than the subjective command of the sovereign (Schmitt 1985, 29). In this way, a state’s decisions could not be extricated from its legal constitution (Schmitt 1985, 19).

Broadly, Schmitt disagreed with Kelsen’s method of subordinating politics to law; the personal element of a sovereign’s decision was rendered invisible behind a veil of sovereign objectivity. In response, Schmitt attempted to achieve the desired conceptual indivisibility of personalism and sovereign decisionism by denying that politics could be

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<sup>6</sup> Schmitt outlines three types of legal thinking: 1. Normativist; 2. Decisionist; and 3. Institutionalist (Schmitt 1985, 2). Decisionist legal thinking emphasizes the personal decision as a source of law and as

subordinated to law. To this end, Schmitt interpreted one of the central features of modern liberal, constitutional states ‘politically’— democracy. Schmitt accedes to a modern form of state ruled by a legal constitution and populated by a plurality of individuals. He rejects, however, the notion that democratic politics in a modern liberal constitutional state always defers to a rule of law. For Schmitt, it is possible to preserve the personal element of a sovereign authority’s decision even in a modern, democratic state form.

Schmitt’s concept of plebiscitary democracy posits an essentially acclamatory presidential system in which the will of the people is synonymous with the will of the President. Consequently, democratic politics is reduced to a plebiscitary voting system in which the people’s political participation is limited to their acclamation rather than their deliberation:

The meaning of plebiscitary expression of will is, however, not *norm establishment* but *decision through one will*, as the word ‘referendum’ or popular decision aptly expresses. [...] The people can only respond yes or no. They cannot advise, deliberate or discuss. They cannot govern or administer. They also cannot set norms, but can only sanction norms by consenting to a draft set of norms laid before them. Above all, they also cannot pose a question, but can only answer with yes or no to a question placed before them (emphasis added) (Schmitt 2004, 89)

Schmitt’s designation of a plebiscite or referendum as the appropriate form of democratic participation is designed to produce one legitimate, homogeneous, unitary voice. The people cannot dictate the terms of the referendum but can only answer the question that is presented to them. In the case of a plebiscite or referendum, a decision is legitimate in virtue of the voluntary nature of the people’s participation in the political process rather than the legality of a legislative state’s decision (Schmitt 2004, 62).

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such, is epitomized by the moment in which a sovereign’s decision is above the law (Schmitt 1985, 2).

In response to criticisms that the ultimate investment of political power in the sole person of the President could lead to tyranny, Schmitt reasons that plebiscitary, non-representative democracies actually demonstrate a leader's dependence on the people rather than his/her power over the latter (McCormick 2004, xli). Since the will of the President is merely the will of the people, the democratic nature of the government is preserved. Furthermore, the internal relation Schmitt conceives between law and politics limits the potential for state abuse. For Schmitt, law cannot rule without the freedom of the sovereign to make political decisions in the exception and politics in the exception must be aimed at restoring the order necessary for a rule of law. By definition, the exception is extra-legal; it is precisely one of those contingent moments that the law has not anticipated in advance. At the moment of the exception, the sovereign decision-maker must temporarily suspend the existing rule of law because the normal conditions on which it relies no longer obtain. In this legal vacuum, the sovereign must act with political decisiveness to re-establish the conditions necessary for an effective rule of law. Though the law is temporarily suspended at the moment of the exception, a sovereign's decision still presupposes a legal order; the sovereign's decision takes temporary precedence in order to reinstate the norm's rule (Schmitt 1985, 13). While the state of exception cannot be subsumed within law, the actions of the sovereign within the state must still be lawful; the sovereign's decision must be guided by a prudent concern for social order (Schmitt 1985, 13). This prudence limits the potential abuse of state power (Schwab 1985, xxv). For these reasons, Schmitt understood the exception not as a threat to the existing constitutional order but as the very condition of its existence:

The sovereign is a definite agency capable of making a decision, not a legitimating category (the people) or a purely formal definition (plenitude of power). Sovereignty is

outside the law, since the actions of the sovereign cannot be bound by laws. To claim that this is anti-legal is to ignore the fact that all laws have an outside that they exist because of a substantiated claim of the part of some sort of agency to be the dominant source of binding rules within a territory. The sovereign determines the possibility of the rule of law by deciding on the exception (Hirst 1999, 11-12)

A rule of law within nation-states is made possible and sustained by a sovereign's decision.

The primacy of a sovereign authority's ability to act with political decisiveness inside its territorial boundaries has implications for its external relations. A state's sovereign authority remains final and absolute within its borders. Symmetrically, a sovereign state remains free from the external encroachments of foreign powers. In an anarchic international system, state war emerges as a logical consequence of state sovereignty. Of international significance are the political implications of each state's legal right to internal and external sovereignty. Schmitt argues that the relevant feature of any sovereign state's claim to wage war on the basis of a *justa causa* is political rather than legal. The force of an international legal norm is not at stake. Rather, the question of "Who decides?" is important for Schmitt (Schmitt 2003, 156-7). In response to this latter question, Schmitt answers "each sovereign state-person decides autonomously concerning *justa causa*" (Schmitt 2003, 157). Schmitt claimed that an emphasis on the personality behind a particular sovereign decision actually minimized the potential danger flowing from a claim of just cause in waging war: sovereign states agreed to "end such murderous assertions of right and questions of guilt" (Schmitt 2003, 157). This, according to Schmitt, was the "historical and intellectual achievement of the sovereign decision" (Schmitt 2003, 157).

In sum, law and politics exist in a mutually reinforcing relationship. Political decisions made in cases that fall outside of the law's scope reaffirm a rule of law. Political equality, enshrined in the principle of sovereignty, is the source of legal equality in international relations. In exceptional cases not covered by international law, action based on a mutual recognition and respect for the enemy's political equality must prevail in order to return the international state to a condition of normalcy. This depends on the internal stability of states which in turn, facilitates political action by national governments in their external affairs with other sovereign states.

Schmitt's insistence on the separation of law and politics from morality is premised on the complementarity he envisioned between law and politics and the threat that moral considerations are perceived to pose to the coherence of such a relationship. The extent to which Schmitt's solution to a moralization of politics is compelling depends, however, on whether his particular formulation of the problem is accepted and his constellation of law, morality and politics, is shared. Jürgen Habermas has rejected Schmitt's constellation of law, morality and politics by pointing to the mistaken assumption in his articulation of a moralization of politics: "[S]uch a moralization is hindered only by keeping international law free of law and the law free of morality" (1997, 146). Habermas rejects the main tenets of Schmitt's moralization of politics thesis, which he concedes is fused with a correct insight but premised on the faulty assumption of the political friend/foe distinction (1997, 146). We will now turn to an examination of Habermas's cosmopolitan rejection and revision of Schmitt's moralization of politics thesis.

## CHAPTER 2

### JÜRGEN HABERMAS AND THE PROBLEM OF AN UNMEDIATED MORALIZATION OF POLITICS

Habermas's reformulation of Schmitt's thesis localizes the danger of moralization specifically in the 'unmediated' relations between politics and morality. This approach rests on a particular cosmopolitan strategy that extends rights and duties beyond borders in a postnational constellation<sup>7</sup> through multi-level politics mediated by cosmopolitan law. It is the purpose of this chapter to reconstruct the constellation of law, morality and politics Habermas advances as a counterpoint to the interrelationships Schmitt presupposes in his formulation of a moralization of politics. We will then show how this constellation forms the basis of Habermas's cosmopolitanism, which differs significantly from more conventional cosmopolitan proposals.<sup>8</sup> The broad contours of Habermas's

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<sup>7</sup> The postnational constellation broadly refers to a terrain of political action in which statist assumptions regarding national identity and sovereignty are contested (Shaw 2002, 8). Habermas discusses the possibility of understanding the European Union (EU) as a model for postnational democracy in this context (2001). Shaw argues that a postnational understanding of the EU's constitutionalism requires a "dialogic and procedural conceptualization of constitutionalism" (2002: 8). She clarifies that the postnational context in which the EU operates indicates not that it is after the nation-state in either legal or political terms but captures the "open-ended, indeterminate, discursive, *sui generis* and contested nature of the project" (Shaw 2002: 8). As such, Shaw has defined postnationalism as the "open-textured concept used to express many dynamic and *sui generis* elements of the EU as an integration concept involving the process of policy formation and in particular, constitutional processes" (2002, 8). Consequently, postnationalism reinforces a constitutional politics that is "non-teleological and accepts contestation and non-fixity as a way of life" (Shaw 2002, 7). Others understand postnationalism as a framework for the study of interactions between national identities and the prospects of a European identity (Rambour 2005). Postnationalism theoretically proposes that an identity can emerge beyond "references and traditions determined by a particular national history" (Rambour 2005). On this definition, postnationalism becomes closely linked with Habermas's concept of constitutional patriotism, which proposes to ground the formulation of political identities on the values of democracy and fundamental human rights (Rambour 2005).

<sup>8</sup> These cosmopolitan approaches are conventional insofar as they are "oriented to the organizational components of national constitutions" (Habermas 1997, 135). In other words, the structures of world organizations would mirror the structures of national constitutional governments that include executive, judicial and legislative branches. For example, advocates of 'cosmopolitan democracy' argue that the United Nations should be institutionally reformed along the following lines: a) a world parliament should be established; b) a more complete world court system should be developed; and c) the Security Council should be reorganized (Habermas 1997: 135). Habermas does not oppose the development of these cosmopolitan institutions *per se* but rejects the hierarchical order of authority they presuppose.

cosmopolitanism can be discerned in his problematization of Schmitt's moralization of politics thesis and in the alternative resolution he proposes to the reformulated problem.

#### HABERMAS'S REFORMULATION OF SCHMITT'S 'MORALIZATION OF POLITICS' THESIS

Habermas's response to Schmitt's moralization of politics thesis involves two steps: 1) a rejection of his premises concerning the nature of human rights and morality; and 2) a revision of his thesis to emphasize the problematic core of an *unmediated* moralization of politics. Broadly, Habermas seeks to: articulate the proper relationship between law and morality in a conception of human rights; and highlight the importance of legalization in the reconciliation of morality and politics in international relations. The first step that Habermas takes in resolving the conceptual tension between morality and politics is to deny that the main catalysts of a moralization of politics—human rights—are exclusively moral in nature. Rather, human rights have a double character that renders them both moral and legal rights (Habermas 1997, 137). If Habermas is indeed correct in claiming that human rights share the structures of both moral and juridical rights, then Schmitt's claim that the global implementation of human rights will necessarily follow a universalistic logic is false (Habermas 1997, 136). As legal rights, human rights are by definition, rights enforceable within a particular national legal system. Moreover, it is false that a politics of human rights actually leads to police actions aimed at the annihilation of an enemy (Habermas 1997, 136). If human rights are both moral and legal rights, a politics of human rights can imply that we are all equal legal consociates with rights and responsibilities in a particular location not necessarily delimited by state borders.

## HABERMAS'S CONSTELLATION OF LAW, MORALITY AND POLITICS

Habermas begins his revision of Schmitt's moralization of politics thesis by clarifying that which makes possible the interaction of human rights and politics in a non-moralizing way. Next, Habermas mobilizes the juridical structure of human rights as a means of democratizing the political context in which they operate. A politics that meets the simultaneous requirements of universal validity and procedural equality in law-making and law-enforcement sustains its legitimacy to the extent that the internal relation of human rights and popular sovereignty are guaranteed. Schmitt advanced a narrow definition of both law and morality in order to keep these spheres subservient to politics. On Habermas's account, the legitimacy of politics is threatened when the conditions required to secure the 'co-originality' of human rights and popular sovereignty are not legally institutionalized. Therefore, the greatest challenge to a legitimate politics of human rights stems from a low-level of constitutionalization in international political affairs—a level insufficient to stave off its moralization. Habermas confirms this intuition by restating Schmitt's moralization of politics thesis: "The true thesis at the core of the argument consists in the fact that an *unmediated* moralization of law and politics would break down those protected spheres of legal persons that we have good reasons to want to secure" (1997, 146). To ensure that this constitutionalization of politics does not yield the same totalizing effects as a moralization of politics, Habermas has to advance a sufficiently complex view of law that includes politics and morality. To complete the picture, we will then examine how the constellation of law, morality and politics that Habermas first articulated in the national political context translates in a postnational constellation. This analysis will aid in answering the question of whether a

constitutionalization of international politics is sufficient to withstand the destructive consequences Schmitt predicted would result from a moralization of politics.

### *Law and Morality*

Habermas reveals the proper relationship between law and morality in his rejection of Schmitt's tacit premise that human rights are, by nature, moral rights. On Schmitt's view, the moral universalism of human rights contradicts the exclusive nature of a politics defined by the friend/enemy distinction. Consequently, the concept of enemy takes on a moral quality and 'state war' devolves into 'total war.' Habermas undertakes to show that politics and morality can co-exist in a non-moralizing relationship by first arguing that human rights are not, by nature, moral rights. Rather, human rights are 'Janus-faced:' they are simultaneously oriented towards law and morality (Habermas 1997, 137). For Habermas, human rights have a double character both as legal norms that enjoy positive validity within a particular system of rights and as moral norms that enjoy *suprapositive* validity in something akin to Immanuel Kant's 'kingdom of ends.'<sup>9</sup>

Human rights are moral insofar as their contents universally apply to all individuals as human beings. At first blush then, the *suprapositive* validity of human rights removes them from the strict purview of sovereign states and national constitutions (Habermas 1996a, 137). The universally valid form that human rights share with moral

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<sup>9</sup> According to Kant, a kingdom of ends is constituted by rational agents all subject to universal laws they make themselves. In acting autonomously, rational agents agree to treat each other as ends in themselves in recognition of each person's inherent dignity. The Categorical Imperative as formulated in terms of a kingdom of ends asserts: "So act as if you were through your maxims a law-making member of a kingdom of ends" (Kant 1785 [1964], 71-74). In the kingdom of ends, rational agents are treated as moral agents first and foremost.

rights transcends territorial boundaries insofar as it requires the compatibility of one person's freedom with that of everyone else. Habermas takes this moral conception of human rights and further illuminates its compatibility with national systems of rights in a strict sense. He argues that the universal application of human rights to all persons *qua* human beings also aligns with the form of basic rights enshrined within national constitutions. Consistent with the moral structure of human rights, the juridical structure of basic rights also appeals to principles of egalitarian universalism that apply to all as human beings: "Basic rights regulate matters of such generality that moral arguments are sufficient for their justification. These arguments show why the implementation of such rules is in the equal interest of all persons *qua* persons and thus why they are equally good for everybody" (Habermas cited in Flynn 2003, 433). Basic rights enshrined in national constitutions are universally valid in a manner consistent with moral norms in two respects: they share a common mode of justification; and apply to a common pool of addressees. First, human rights, like basic rights, can be justified solely in terms of moral arguments aimed at guaranteeing the equal interest of all irrespective of one's nationality or physical location (Flynn 2003, 433). Second, basic liberal/social rights and human rights are addressed to persons as human beings and not merely as citizens in a state (Flynn 2003, 433). The moral universalism of human rights is evident not only in their application beyond territorial boundaries but also in their application as basic rights enshrined within national constitutions.

The distinctly legal dimension of basic rights also endows human rights with a specifically juridical structure. Basic rights, like legal norms, are enforceable individual rights to an autonomous sphere of action (Habermas 1997, 139). If the preceding

analysis is correct, then human rights can be construed as actionable and enforceable legal rights enshrined within the national constitutions of liberal democracies (Flynn 2003, 436). As constitutional norms, human rights enjoy positive validity; they are legal norms in virtue of their institutionalization by a legitimate government through correct legal procedures. Human rights further presuppose a bearer of duties; national governments have a duty to enforce human rights claims. By arguing that human rights are those very basic rights that ground any modern constitution, Habermas uncovers their juridical structure. Though human rights share a universal form of validity with moral norms and may have specific moral content, they also share the juridical structure of basic rights—the foundation of modern liberal constitutions within particular nation-states.

Habermas introduces the possibility of reconciliation between law and morality more generally in his claim that human rights are both moral and legal norms. In the concrete context of pluralistic modern societies, however, the general structure of moral norms and the specific structure of legal norms remain in tension. In order to adequately harmonize the domains of law and morality, Habermas must resolve a more fundamental political problem: How can rational, self-interested, utility-maximizing individuals legitimately regulate their common life in a society through a system of positive law (Habermas 1996a, 129)? Habermas's basic response to this question is that a system of rights must guarantee the internal relation between human rights and popular sovereignty: the freedom of every member as a human being must be reconciled with the equality of each member as a citizen through a legitimate system of positive law (Habermas 1996a, 94).

The more general reconciliation of law and morality at the level of a system of rights is a matter of political necessity in modern liberal societies comprised of plural publics. The pluralistic quality of modern liberal societies automatically precludes singular appeals to morality as effective responses to the practical realities of social integration (Flynn 2003, 435). In contrast, the structure and form of positive law can compensate for the shortfalls attending strict moral appeals that arise within particular national communities. Jeffrey Flynn summarizes the strengths of law as compared to morality lucidly:

Law is positive, coercive, reflexive and individually actionable. As *positively* enacted, law makes up for the cognitive indeterminacy involved in justifying and applying a morality based on abstract principles. The sanctions of *coercive* law make up for the motivational uncertainty of morality in a way that stabilizes behavioural expectations. The *reflexivity* of law allows it to produce a system of accountabilities by creating institutions and defining the jurisdictional powers. [...] Finally, modern law is also based on *individually actionable* rights, which serve to establish and protect a sphere of individual freedom of choice free from moral obligations (2003, 435).

As Flynn suggests, law and not morality properly grounds a system of rights in modern liberal societies.

Yet, law nevertheless retains a certain moral dimension on Habermas's view. He argues that any attempts to separate law and morality in concrete political practice are unsustainable:

Besides, allocating the jurisdictions of morality and law according to private and public spheres of action is counterintuitive in any event, for the simple reason that the will-formation of the political legislator has to include the moral aspects of the matter in need of regulation. Indeed, in complex societies, morality can become effective beyond the local level only by being translated into the legal code (Habermas 1996a, 110).

Habermas's allusion to the inseparability of law and morality in a system of rights is confirmed in the following statement: "[...][T]he idea of a constitutional state demands

that the coercive violence of the state be channelled both externally and internally through legitimate law; and the democratic legitimation of law is supposed to guarantee that law remain in harmony with recognized moral principles” (Habermas 1997, 146). An internal relation between law and morality is expressed in *legitimate* law. For Habermas, law is legitimate to the extent that any state interference with the public or private autonomy of individuals is mediated through the formal properties of a legal procedure (1997, 148). The legitimacy of law is further secured through democratic procedures that allow moral and other reasons to flow into the justification of political decisions (Habermas 1997, 148). Put differently, law is legitimate to the extent that it secures the ‘co-originality’ of human rights and popular sovereignty:

[P]rivate and public autonomy require each other. The two concepts are interdependent; they are related to each other by material implication. Citizens can make an *appropriate* use of their public autonomy, as guaranteed by political rights, only if they are sufficiently independent in virtue of an equally protected private autonomy in their life conduct. But members of society actually enjoy their equal private autonomy to an equal extent—that is, equally distributed individual liberties have ‘equal value’ for them—only if as citizens they make an appropriate use of their political autonomy (Habermas 1996b, 767).

This internal relation between human rights and popular sovereignty is sustainable to the extent that the universally-valid form of human rights as moral rights is effectively translated into a system of rights. To see this connection, Habermas’s ‘co-originality’ thesis can be expressed in practical terms of an internal relation between a rule of law and democracy:

On the one hand, citizens can make appropriate use of their public autonomy only if, on the basis of their equally protected private autonomy, they are sufficiently independent; on the other hand, they can realize equality in the enjoyment of their private autonomy only if they make appropriate use of their political autonomy as citizens. Consequently, liberal and political basic rights are inseparable. [...] [T]he co-originality of liberty rights and the rights of citizens is essential (Habermas 2002, 202).

This shift in focus from the internal relation between law and morality to the internal relation between law and politics is crucial to Habermas's reconciliation of politics and morality. Habermas's view of the proper relationship between law and politics is first glimpsed in his radical reconceptualization of the role of morality in Kant's account of a system of rights.

### *Law and Politics*

For Kant, a moral conception of human rights as basic rights is the fundamental starting point in the conceptualization of any system of rights. As Habermas explains, Kant identified a "single 'innate' right to equal liberties."<sup>10</sup> This primordial human right is at the foundation of any system of rights more generally oriented towards institutionalizing the *performative* conditions under which rights acquire legitimate validity beyond their regulative function in the private sphere (Habermas 1996a, 93). The most fundamental of all human rights that must be legally institutionalized in a system of rights is the right to be free in a manner compatible with the freedom of every other person (Habermas, 1996a, 93). According to Kant, the genesis of a system of rights was to be found in the positivization of the freedom of every member as a human being and the equality of every member as a legal subject (Habermas 1996a, 94).

Habermas takes Kant's account of the genesis of a system of rights as his starting point but adapts it to plural liberal societies. He achieves this by freeing Kant's account from its strict moral foundations. Kant localizes rights within a system of *general law*

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<sup>10</sup> Habermas elaborates on the meaning of a "single innate right to equal liberties" and describes it as the primordial human right grounded in the autonomous will of moral persons that takes the social perspective of practical reason, which tests laws (1996a, 94).

(Habermas, 1996a, 93). In Kant's moral and political theory, references to 'general law' can be traced back to his concept of the Categorical Imperative, which in its most general formulation asserts: "Act only on that maxim which you can at the same time will that it should become a universal law" (Kant 1785 [1964], 88). Kant's formulation of the Categorical Imperative in terms of universal law is concerned primarily with the motives guiding moral action (Kant 1785 [1964], 51-52). Morality carries the weight of legitimation in Kant's account of a system of rights and effectively subordinates law to morality (Habermas 1996a, 120). Habermas rejects the Kantian claim that 'general law' carries the weight of legitimation (1996a, 120). Instead, he argues for a principle of democracy that preserves the 'co-originality' of law and morality and binds politics to law.

For Habermas, a system of rights cannot be adequately grounded in morality because of the complexities of modern liberal societies today. Instead, he argues that the roots of a system of rights are to be found in the discourse principle and the legal form itself (Habermas 1996a, 129). The discourse principle asserts: "Just those regulations are legitimate that satisfy the requirement that the rights of each be compatible with the rights of all" (Habermas 1996a, 123). Although the discourse principle shares the universal form of validity characteristic of moral norms, it is not a moral norm *per se*. Habermas explains:

The discourse principle is only intended to explain the point of view from which norms of action can be *impartially justified*; I assume that the principle itself reflects those symmetrical relations of recognition built into communicatively structured forms of life in general. To introduce such a discourse principle already presupposes that practical questions can be judged impartially and decided rationally (1996a, 109).

The discourse principle retains a moral dimension to the extent that it can be used to justify moral norms in general discussions that have humanity or a republic of world citizens as their point of reference. In requiring, however, that equal consideration be given to all those who could possibly be affected by the outcome of a moral discussion,<sup>11</sup> the discourse principle construes the universalist structure of moral norms intersubjectively (Habermas 1996a, 109). Conceiving the moral point of view relationally, the discourse principle lends itself to political action—what all persons in common decide to do as a matter of public practice (Habermas 1996a, 110). The morally intersubjective form of the discourse principle previews its political operationalization when combined with the legal medium in a system of rights.

The second pillar of Habermas's reconstructed system of rights is the legal form or the medium of law itself. The legal form acts as a crucial bridge between the morally valid form of the discourse principle and actual political practice in particular communities. In contrast to moral norms, legal norms cannot be adequately accounted for by reference to general rules and practices that apply to all. Habermas describes this difference in the following way: "Moral rules regulate possible interactions between communicatively competent subjects *in general* while legal rules regulate the interaction contexts of a *concrete society*" (1996a, 124). Legal norms are specifically oriented precisely because they emerge from the decisions of a particular political legislator acting in a certain time and place (Habermas 1996a, 124). Consequently, the establishment of any legal code in a modern liberal society must include not only a general right to equal

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<sup>11</sup> When the discourse principle is applied to moral questions that concern all of humanity or perhaps, a republic of world citizens, it takes the form of the universalization principle: "All affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of

liberties<sup>12</sup> but membership rights that guarantee legal remedies exclusively to citizens (Habermas 1996a, 125). These basic rights to equal liberties remain ‘unsaturated’ until they are interpreted and expressed as specific laws in light of the particular circumstances and experiences of a concrete political association (Habermas 1996a, 125). The specific contents of these basic rights to equal liberties are supplied by citizens in their capacities as authors of the law in modern liberal democracies (Habermas 1996a, 128). In virtue of operating within the legal medium, citizens as authors of the law must abide by the discourse principle, which is itself built into the form of law (Habermas 1996a, 128). Consequently, legitimate laws cannot be given content that violates the relational and intersubjective requirements of the discourse principle. From the point of view of the political theorist who specifies which rights citizens should acknowledge if they are to legitimately regulate their common life through positive law, the logical genesis of a system of rights requires the discourse principle and the legal form (Habermas 1996a, 126). Once the perspective is shifted from the political theorist on the outside to self-legislating individuals who must operationalize the discourse principle from the inside, the internal relation between human rights and popular sovereignty is given concrete expression (Habermas 1996a, 126).

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everyone’s interests (and these consequences are preferred to those of known alternative possibilities)” (Habermas 1990, 65; 1996a, 108).

<sup>12</sup> The basic rights to equal liberty that must be included in a legal code result from the politically autonomous elaboration of: a) a right to the greatest possible measure of equal individual liberties; b) the status of a member in a voluntary association of legal consociates; c) individual legal protections for individually actionable rights (Habermas 1996a, 122). These three basic rights guarantee the private autonomy of legal subjects to the degree that they can reciprocally recognize the other as an addressee of the law (Habermas 1996a, 123). The self-legislation of citizens also requires that the addressees of law simultaneously view themselves as the authors of their legal order and therefore require two further basic rights: d) the basic rights to equal opportunities to participate in processes of opinion-and-will formation in which citizens exercise their *political autonomy* and through which they generate law; and e) the basic rights to the provision of living conditions that are socially, technologically, ecologically safeguarded that in turn, secure the equal opportunities of citizens to utilize their civic rights a) to d) (Habermas 1996a, 123).

From the internal perspective of legal subjects who are self-legislating and politically autonomous, citizens must be capable of applying the discourse principle for themselves as a test of the legitimacy of the laws they make (Habermas 1996a, 126). In order to secure the conditions under which citizens can act as both authors and addressees of the law, the discourse principle must be legally guaranteed (Habermas 1996a, 126-7). At this critical juncture in Habermas's reconstruction of a system of rights, the discourse principle and the legal form are combined to yield the principle of democracy. The principle of democracy states: "Only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted" (Habermas 1996a, 110). The citizens of a particular community give the discourse principle legal and political shape as a principle of democracy by exercising their basic rights to deliberate and act as a constitutional assembly (Habermas 1996a, 127). The legal institutionalization of the discourse principle transforms it into a principle of democracy that in turn influences and steers the legislator's opinion-and-will-formation (Habermas 1996a, 127).

In summary, the logical genesis of a system of rights is a circular process in which the legal form and the discourse principle are co-originally constituted to yield a principle of democracy (Habermas 1996a, 121-122). In turn, the principle of democracy provides a "legally structured deliberative praxis in which the discourse principle is applied" (Habermas 1996a, 127). The interpenetration of the discourse principle and the legal form ensures that the communicative freedoms of all citizens are equally juridified (Habermas 1996a: 127). As a result, the rights of equal political participation for each person are made possible (Habermas 1996a, 127). The exercise of an individual's

political autonomy “*requires* forms of discursive opinion- and will-formation” (Habermas 1996a, 127). The forms of discursive opinion- and will-formation must conform to the basic rights to equal opportunities at the foundation of any modern legal code.

In Habermas’s reconstructed system of rights, the principle of democracy bears the weight of legitimation. Legitimate laws are those laws legislated by the citizens themselves. They also lay down the performative conditions necessary for any act of self-legislation made in light of the discourse principle (Habermas 1996a, 121). The logic of an internal relation between the public and private autonomy of individuals is again evidenced in the principle of democracy. The basic rights to equal political participation in processes of legitimate law-making provide the *necessary enabling conditions* for the exercise of basic rights that protect private autonomy (Habermas 1996a, 128). This is one of the ‘unsaturated’ basic rights to equal liberties that gains specific content through the principle of democracy. A principle of democracy presupposes a legal framework wherein citizens can exercise their political autonomy in deliberations and legitimate law-making. In this respect, the logical genesis of a system of rights comprises a circular process in which the legal code or the legal form and the democratic principle are co-originally constituted (Habermas 1996a, 121-22).

The principle of democracy retains the legitimating force of a morally intersubjective discourse principle mediated through law. The legal medium is, however, itself ambivalent between particular expressions of the democracy principle in different national political communities. The ambivalence of the legal medium is evidenced in its inability to predetermine the particular content of the ‘unsaturated’ basic rights in favour

of its public use (Habermas 1996a, 130). Paradoxically then, law retains its legitimating force only if it remains possible for citizens to forego exercising their public reason in favour of deciding on the basis of naked self-interest or utility calculations (Habermas 1996a, 121). Unlike moral norms, legal norms cannot obligate and compel their addressees to use their individual rights selflessly even if political rights call for this kind of mutual understanding (Habermas 1996a, 130). Since the content of the legal code cannot be determined prior to its situation within a particular political community, the legal form becomes the only appropriate vehicle for mediating the interaction between plural political actors and moral considerations.

### *Politics and Morality*

The relationship between politics and morality crystallizes in the principle of democracy—a product of the discourse principle and the legal form. The political principle of democracy is rooted in the discourse principle, which shares a universally valid form with moral rights. As a result, the democratic principle retains a moral dimension; it forces one to take the moral point of view construed dialogically or intersubjectively. The discursive rules<sup>13</sup> that order any deliberation create the conditions necessary for the political operationalization of the discourse principle, which must, in turn, be legally institutionalized (Habermas 1996a, 126-7).

The validity of arguments presented by those participating in a political discourse is measured according to a standard of moral validity wherein all potentially affected

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<sup>13</sup> The inescapable presuppositions in any discourse are: 1) Every subject with the competence to speak and act is allowed to take part in the discourse; 2) Everyone is allowed to question any assertion whatever; 3) Everyone is allowed to introduce any assertion whatever into a discourse; 4) Everyone is allowed to

persons engaged in public deliberation have an equal opportunity to make claims and to have those claims challenged by others. At the level of justification, moral principles function as rules of argumentation for deciding moral questions rationally (Habermas 1996a, 110). In contrast, the principle of democracy already presupposes the possibility of all types of practical judgements and discourses that supply laws with their legitimacy including but not exclusive to moral discourses (Habermas 1996a, 110). The co-originality of democracy and the rule of law imply that citizens engaged in public deliberation will refer not only to moral reasons but also legal and strategic reasons in the democratic formation of political opinion and will. At the level of the logical genesis of a system of rights, basic rights to equal liberties are not pre-given by a natural law but are constructed through the political principle of democracy: citizens must interpret the system of rights in a manner consistent with the internal relation of public and private autonomy if their common life is to be legitimately regulated through positive law (Habermas 1996a, 129). In modern liberal democracies, legal norms applicable to interactions that take place in the contexts of particular political communities must develop alongside a principle of discourse if the tension between possessive individualism and multicultural collectivism is to be successfully mediated within a system of rights. In reconciling the spheres of politics and morality, Habermas is able to revise Schmitt's moralization of politics thesis. For Habermas, the correct insight in Schmitt's thesis is that a moralization of politics can quickly devolve into human rights fundamentalism (Habermas 1997, 148). The task remains to assess whether, and how

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express his attitudes, desires and needs; and 5) No speaker may be prevented by internal or external coercion from exercising his rights as laid down (Habermas 1990, 89).

effectively, Habermas's reorganization of the law-morality-politics constellation addresses the concerns expressed in Schmitt's moralization of politics thesis.

#### THE PROBLEM OF LEGITIMACY IN NATIONAL LIBERAL DEMOCRATIC PROCESSES OF LAW-MAKING

As the preceding discussion has shown, the constellation of law, morality and politics that Habermas illuminates through his radical reconstruction of a system of rights aims at resolving the tensions between possessive individualism and multicultural collectivism within modern liberal societies. A discourse-theoretic understanding of the system of rights minimizes the strategic potential in any political discourse in virtue of where it places the burden of legitimation. By definition, a discourse-theoretic approach to a system of rights shifts the burden of legitimation away from the personal qualities of citizens themselves to legally institutionalized procedures of discursive opinion and will-formation based on mutual recognition (Habermas 1996a, 130).

The legal institutionalization of procedures of discursive opinion- and will-formation further depends on the juridification of communicative freedom. Significantly, the effect of adopting a discourse-theoretic understanding of the system of rights sidesteps the problems associated with a determination of law's legitimacy self-reflexively—the legitimation of law on the sole basis of its own terms (Habermas 1996a, 130). The legitimacy of law cannot be secured solely by reference to the principles and procedures of the legal system itself but must also be pursued in terms of the political and moral self-legislation of citizens who see themselves simultaneously as addressees and authors of the law. Consequently, the juridification of communicative freedom also means that the law must draw on sources of legitimation outside of itself—from self-

determining citizen populations embedded in a rich history of constitution-making and freedom (Habermas 1996a, 130). The problem of legitimacy in national democratic processes of law-making is conceptually resolved once the mutual dependence of private and public autonomy and the rule of law and democracy are shown. Habermas's response to the problem of legitimacy within national constitutional democracies is at the crux of the solution he proposes to the legitimacy deficits attending a postnational global order.

#### THE PROBLEM OF LEGITIMACY IN POSTNATIONAL POLITICAL PROCESSES OF LAW-MAKING

In a postnational constellation, the primacy of state power is challenged by transnational market forces, non-governmental organizations and other members of global civil society. Consequently, the legitimacy of political decision-making at the global-level acquires an additional layer of complexity. Nation-states must secure the conditions of their own legitimacy in the face of both internal challenges posed by plural, multicultural publics and external challenges posed by transnational market forces (Habermas 2001, 79). The problem of 'democratic deficits' arises in the postnational context because global practices of governance lack the legitimating force of a politically-constituted civil society (Habermas 2001: 71). Legitimate resolutions to global problems ranging from poverty in Africa to climate control are difficult to achieve because the governments and populations of diverse states are not bound by the same degree of solidarity that common national histories construct.

Moreover, globalization forces threaten the civil solidarities developed within nation-states (Habermas 2001: 71). The structure of international law further exacerbates

this situation as it remains voluntary, consent-based and nationally-enforced. 'Legitimation gaps' continue to widen in the absence of comparable structures of legitimacy at the supranational level (Habermas 2001, 71). The lack of functional equivalents of legitimation at the supranational level is increasingly problematic as competencies and jurisdictions are shifted from the national level (Habermas 2001: 71). For example, the competition between multinational corporations and nation-states for power significantly undermines a state's ability to secure its autonomy through taxation and economic interventions (Habermas 2001, 78). Habermas observes: "As markets drive out politics, the nation-state increasingly loses its capacities to raise taxes and stimulate growth, and with them the ability to secure the essential foundations of its own legitimacy" (2001, 79).

More important, the erosion of a national government's political autonomy by market forces suggests that the prospects of applying democratic principles to global governance are significantly curtailed. The replacement of politics with economics as the relevant medium of global action has the following consequence:

This shift in power is better grasped with the concepts of a theory of different steering media than with a theory of power: money replaces power. The regulatory power of collectively binding decisions operates according to a different logic than the regulatory mechanisms of the market. Power can be democratized; money cannot. Thus the possibilities for a democratic self-steering of society slip away as the regulation of social spheres is transferred from one medium to another (Habermas 2001, 78).

According to Habermas, the primary advantage of retaining a political medium of state action is that fair and equal regulation is still possible in spite of the strategic manoeuvrings of states. In contrast, the economic medium cannot be democratized; the complete replacement of politics as the relevant medium of state action by economics would effectively render the question of legitimacy moot in the postnational sphere. Yet,

justification and legitimation are necessary for the proper functioning of international law and the more general maintenance of international peace and security. Consequently, the problem of legitimacy in a postnational constellation can be framed in terms of the subversion and replacement of a political medium of state action by and with an economic medium of action: “The broad renunciation of the power of politics to shape social relations, and the readiness to abandon normative points of view in favour of adaptations to supposedly unavoidable systemic imperatives now dominate the political arenas of the Western world” (Habermas 2001, 79). For Habermas then, the greatest challenge that both state and non-state actors face in a postnational constellation is the “renewed political closure of an economically unmastered world society” (Habermas 2001: 90). A conception of politics capable of rectifying the legitimacy deficits attending international law- and decision-making must be recuperated.

In one sense, the postnational problem of legitimacy can be attributed to the unmediated interpenetrations of globalization and national forces. Unmediated transnational forces corrode the political capacities of national governments and impede efforts to democratize the political autonomies of national and international actors (Habermas 2001, 67). The erosion of a democratic process of opinion- and will-formation at the national-level of politics through transnational economic forces renders the democratization of international political decision-making processes difficult.

Framed another way, the problem of postnational legitimacy can be understood as the need to reconcile two differently-oriented spheres of action: economics and politics. Global networks aim at integrating plural national economies into one global economy. In contrast, national governments aim at socially integrating plural lifeworlds within a

particular political community. Habermas believes that the integrative function of global networks can be reconciled with the social integration of lifeworlds within and across nation-states. A reconciliation of these two spheres is possible if the horizon of each sphere is capable of opening and closing itself to each other (Habermas 2001, 82). Through this process of mutual exchange and interaction between networks and lifeworlds, the horizons of each are certain to change (Habermas 2001, 82).

Applied to the context of a postnational constellation, the nation-state has been forced open by processes of globalization. The exposure of state governments to these external forces has simultaneously reduced their capacities to socially integrate domestic lifeworlds and democratically steer their external political affairs (Habermas 2001, 84). To remedy these legitimacy gaps between the national and international spheres, Habermas argues that the nation-state must allow these transnational forces to expand its internal horizons so that global problems come to be understood as matters of national responsibility (Habermas 2001, 84). It is crucial, however, that the nation-state also closes itself again to avoid the sociopathological side-effects that globalization forces may have on the members of a political community (Habermas 2001, 84). The key to successfully closing the nation-state to transnational economic forces is found in politics: “[...]Politics must catch up with globalized markets and has to do so in institutional forms that do not regress below the legitimacy conditions for democratic self-determination” (Habermas 2001, 84). The question now becomes whether the national standards of legitimate self-determination that Habermas has developed in his theory of deliberative democracy can effectively be translated into a postnational democracy to avoid the dangers of a moralization of politics.

## FROM DELIBERATIVE DEMOCRACY TO POSTNATIONAL DEMOCRACY

Habermas bridges the legitimacy gap between national and international political practices by identifying those forms of democratic process that can be taken beyond the nation-state (2001, 61). Specifically, Habermas examines whether the European Union can be conceived as the “initial form for a postnational democracy” (2001, 89). He then broadens his inquiry from the European- to the global-level in his discussion of a ‘world domestic policy without a world government’ (Habermas 2001, 104). He argues that a postnational federation of European states has a better chance of enacting and enforcing global redistributive policies than a world government based on a cosmopolitan community of world citizens (Habermas 2001, 108-9). This is because a strong equivalent to the civic solidarity found within nation-states does not exist at the level of a world society (Habermas 2001, 108-9). A viable context for the emergence of a world domestic policy is not in a world government but rather, in the organizational forms of an international negotiating system that operates within a common political culture (Habermas 2001, 109).

### *The ‘Weak’ Domestic Analogy between Constitutional Patriotism and Cosmopolitan Solidarity*

The translation of conditions and structures of legitimacy from a deliberative democracy to a postnational democracy<sup>14</sup> remains inexact because national sources of

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<sup>14</sup> Habermas contemplates the possibility of a postnational democracy in response to the question of “how democracy can survive the nation-state as the form of the [European Union’s] realization” (2001, 88). In order to reasonably meet the challenges of globalization in a postnational constellation, Habermas argues that the basis of legitimation of European institutions must be expanded (2001, 100). To this end, the European Union must be grounded in a Charter—a basic law or constitution that aims toward a common practice of opinion- and will-formation influenced by a European civil society and expanded into a Europe wide political arena (Habermas 2001: 100).

legitimation can only be weakly approximated at the European- and global- levels. Consistent with the closely-interrelated natures of the national and postnational problems of legitimacy that he discerns, Habermas draws a weak domestic analogy between national, postnational and global sources of solidarity. In the context of a discussion of the European Union as an initial form of postnational democracy, Habermas argues that the source of cohesion among actors in a postnational constellation must be rooted in a form of civil solidarity sufficiently abstract to apply beyond particular communities (Habermas 2001, 74). This abstract form of civil solidarity is *constitutional patriotism*. Thomas McCarthy has described Habermas's notion of constitutional patriotism as an "allegiance to a particular constitutional tradition—that is, to a particular, ongoing, historical project of creating and renewing an association of free and equal citizens under the rule of laws they make for themselves" (McCarthy 1999, 194). Habermas describes a democratic order founded upon constitutional patriotism in the following terms:

In complex societies, it is the deliberative opinion- and will-formation of citizens, grounded in the principles of popular sovereignty, that forms the ultimate medium for a form of abstract, legally constructed solidarity that reproduces itself through political participation (2001, 76).

Habermas thereby rejects a democratic order rooted in a 'nation'—a pre-political community of shared descent (2001, 76). Constitutional patriotism decouples the notion of national political culture from the identifiable majority group (Habermas 2001, 74).

Here, the possibility of defining an analogous concept of constitutional patriotism postnationally is opened (Habermas 2001, 74). Although constitutional patriotism successfully relocates the source of civil solidarity away from a 'thick' sense of republican duty that a citizen owes to his/her country, it does retain a commitment to a

particular or common political culture. As a legally-constructed solidarity, constitutional patriotism implies an attachment to a particular political culture: “The universalism of legal principles manifests itself in a procedural consensus, which must be embedded through a kind of constitutional patriotism in the context of a historically specific culture” (Habermas cited in Fine and Smith 2003, 471). That Habermas keeps constitutional patriotism embedded in a ‘historically specific culture’ suggests the actualization of a shared attachment to universalistic principles takes place in particular national institutions (Fine and Smith 2003, 471). This ‘historically specific culture’ can also refer more broadly to the common contexts in which regional organizations develop.

In the context of considering whether the European Union can be considered a nascent form of postnational democracy, Habermas appeals to a “common historical horizon that the citizens of Europe already find themselves in” (2001, 103). The ‘common historical horizon’ creates a context that makes possible the emergence of a common political culture. Habermas argues that a common political culture can be identified in the violent and contested origins from which, many European states were born and therefore, share (2001, 103). These shared experiences of social integration identifiable across all European nation-states have created a normative self-understanding of European modernity in terms of egalitarian universalism<sup>15</sup> (Habermas 2001, 103). European citizens engaged in democratic practices at the postnational level understand themselves and each other as authors and addressees of cosmopolitan law. In this way, something akin to the civic solidarity arising from common ethical-political self-

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<sup>15</sup> Egalitarian universalism requires the decentralization of one’s own perspective. It demands that one relativize one’s own views to the interpretive perspectives of equally situated and equally entitled others (Habermas 2003a: 369).

understandings of citizens in a particular democracy can be identified in a European civil solidarity.

The presence of this ‘common political culture’ in the European context facilitates the actualization of democratic processes through the legal medium of a European Charter:

This legitimation process has to be supported by a European party system that can develop to the degree that existing political parties, at first in their own respective national arenas, initiate a debate on the future of Europe, and in the process articulate interests that cross national borders. And this debate, in turn, has to find a resonance in a pan-European political public sphere that presupposes a European civil society complete with interest groups, non-governmental organizations, citizens’ movements, and so forth (Habermas 2001, 103).

Supranational democratic structures such as a European party system held accountable to a pan-European political public sphere are concrete expressions of a common political culture that aims to meet a “postnational democracy’s demanding contexts of mutual recognition for all of us” (Habermas 2001, 103). The prospects of enacting and enforcing a world domestic policy within a world government with comparable institutional structures or organizational forms is less promising precisely because the cosmopolitan solidarity operative at the level of a world society only weakly approximates a civic solidarity based on constitutional patriotism.

*From a Framework of States to a Framework of a Common Political Culture*

Although Habermas does not offer a clear definition of cosmopolitan solidarity in his own writings, it can be broadly understood as “a transformed self-consciousness on the part of world citizens that orientates thinking away from any association with national interest or identity” (Fine and Smith 2003, 471). Broadly speaking, cosmopolitan

solidarity requires state and non-state actors in a global arena to take the perspectives of others potentially affected by a political decision. Habermas defines the consciousness of a compulsory cosmopolitan solidarity as a “cosmopolitan consciousness” (Habermas 2001, 112).

As suggested earlier, a domestic analogy between constitutional patriotism and cosmopolitan solidarity remains weak. Constitutional patriotism remains embedded in particular collective identities whether national, or more abstract, regional (Habermas 2001, 108). Important to the formation of a ‘collective identity’ is the interpretation and realization of principles in light of a group’s own history and in the context of its own particular form of life (Habermas 2001, 107). Unlike the civic solidarity that internally unifies modern constitutional states, cosmopolitan solidarity is rooted in the moral universalism of human rights alone (Habermas 2001, 108). The moral basis of cosmopolitan solidarity requires the complete inclusion of individuals irrespective of borders (Habermas 2001, 107). By its very nature, complete inclusion excludes the possibility of democracy at the international level (Habermas 2001, 107). Habermas explains: “Any political community that wants to understand itself as a democracy must at least distinguish between members and non-members” (Habermas 2001, 107).

Perhaps, it is for this reason that Pablo De Greiff prefers the term ‘cosmopolitan attitude,’<sup>16</sup> which he defines as taking the *moral* point of view with respect to one’s acts

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<sup>16</sup> De Greiff argues that there is a weak and strong reading of the moral basis of a cosmopolitan attitude. He adduces these two possible readings of the relationship between law and morality from the following passage:

The question that has *priority* in legislative politics is how a matter can be regulated in the equal interest of all. The making of norms is primarily a justice issue subject to principles that state what is equally good for all. Unlike ethical questions, questions of justice are not inherently related to a specific collectivity and its form of life. The law of a concrete community, must, if it is to be legitimate, at least be compatible with moral standards that claim universal validity beyond the legal community (Habermas 1996a, 282).

On a strong reading of this passage, there is a universalistic moral constraint inherent in the notion of legitimacy itself. On a weaker reading, the obligation we have to consider is the effect of our laws on those

(2002, 419). References to a cosmopolitan attitude would necessarily extend the purview of states beyond territorial boundaries but would not legally require that international actors be granted equal rights to have their claims adjudicated and enforced. Here, the asymmetry between constitutional patriotism and cosmopolitan solidarity is exposed. Cosmopolitan solidarity lacks the comparable legal mechanisms that institutionalize the basic rights of public participation in processes of law-making. The rights of ‘world citizens’ understood as merely moral subjects are not guaranteed in an enforceable legal system.

More fundamental than this is the absence of a common ethical-political self-understanding necessary for the formation of a global community within the political culture of a world society (Habermas 2001, 108). For this reason, Habermas declares:

A cosmopolitan community of world citizens can thus offer no adequate basis for a global domestic policy. The institutionalization of procedures for creating, generalizing, and coordinating global interests cannot take place within the organization structure of a world state. Hence any plans for a “cosmopolitan democracy” will have to proceed according to another model (2001, 109).

Unlike advocates of cosmopolitan democracy,<sup>17</sup> Habermas’s main concern is not to argue for radically new global institutions that take the place of existing ones. Elsewhere, Habermas has defended cosmopolitan institutions at the level of European integration. Habermas has argued for “[n]ew political institutions such as a European Parliament with the usual powers, a government formed out of the Commission, a Second Chamber

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beyond our national borders is a moral rather than a legal obligation. According to De Greiff, both readings are sufficient to generate the basis of a cosmopolitan attitude (2002, 425). He argues that the stronger reading is the correct one (De Greiff 2002, 425).

<sup>17</sup> Advocates of cosmopolitan democracy generally support the implementation of national democratic political institutions internationally such as a World Parliament, a Criminal Court of Justice and an Executive branch responsible for the maintenance of international peace and security. See, for example, Archibugi, Daniele and Mathia Koenig-Archibugi. 2003. *Globalization, Democracy and Cosmopolis: A Bibliographical Essay*. In *Debating Cosmopolitics*, ed. Daniele Archibugi, 273-92. London: Verso.

replacing the Council [of Ministers], and a European Court of Justice with expanded competencies” (Habermas cited in De Greiff 2002, 426). He does, however, resist the claim made by some advocates of cosmopolitan democracy that its institutional forms should be hierarchically-arranged within the form of a world state (Habermas 2001, 109).

Crucial to the development of an alternative model for cosmopolitan democracy is the articulation of a basis of legitimacy that is less demanding than that found in nation-states (Habermas 2001, 109). In the place of a world state, Habermas proposes a “diffuse picture—not the stable picture of multilevel politics *within* a world organization, but rather the dynamic picture of interferences and interactions *between* political processes that persist at national, international and global levels” (2001, 110). For Habermas, a world domestic policy can be achieved if the democratic legitimation of decisions is possible outside the hierarchical structures of a world government (2001, 110). In this alternative space, state and global actors at the national and supranational levels can understand themselves as the agents and addressees of a global community ordered by cosmopolitan law (Habermas 2001, 110).

The international negotiating systems that constitute this dynamic space operate within the framework of a common political culture wherein “negotiation partners have recourse to common value orientations and shared conceptions of justice” in reaching compromise (Habermas 2001, 109). The framework of a common political culture thereby places normative restrictions on the kinds of reasons negotiation partners can offer in the justification of a democratic decision and promotes the achievement of *rational* outcomes (Habermas 2001, 109-10). Moreover, Habermas’s supplementation of

democratic processes of opinion- and will-formation with the public use of reason serves an epistemic function:

[...] [T]he democratic procedure no longer draws its legitimizing force only, indeed not even predominantly, from political participation and the expression of political will, but rather from the general accessibility of a deliberative process whose structure grounds an expectation of rationally acceptable results (Habermas 2001, 110).

Habermas's attribution of an epistemic function to the normative framework of international negotiation systems is significant for understanding the democratic standard of legitimation that must be approximated at the global-level. To understand the democratic standard of legitimation relevant in a world domestic policy, it is instructive to return to Habermas's discussion of the two tracks of deliberative democracy within national communities.

The creation of a world domestic policy capable of democratically steering national governments as members of an international society and dispersed citizen publics depends on the extent to which the two tracks of deliberative democracy<sup>18</sup> can be

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<sup>18</sup> A two-track deliberative politics is described as a procedure of deliberation and decision-making from which procedurally correct decisions draw their legitimacy within a constitutionally-organized political system (Habermas 1996a, 305). The two tracks of deliberative democracy are: 1) the formal track of institutionalized will-formation in which decision-oriented deliberations are regulated by democratic procedures; and 2) the informal track of opinion-formation in the public sphere (Habermas 1996a, 307). In the context of a deliberative democracy, Habermas argues that formal processes of democratic will-formation orient deliberations towards the negotiation of fair compromises (Habermas 1996a, 307). Those involved in parliamentary decision-making are concerned with problem-solving and as such, are structured as a context of justification—they are concerned with satisfying the conditions of free and fair deliberations open to all and reaching outcomes of a sufficiently rational quality (Habermas 1996a, 307). The context of justification created by the formal track of deliberative democracy presupposes a context of discovery. This context of discovery relies on the spontaneous interactions between and among procedurally unregulated public spheres comprised of the general public of citizens (Habermas 1996a, 307). In this weak public sphere, opinion-formation is generated within an anarchic complex of open, inclusive and overlapping networks of diverse lifeworlds (Habermas 1996a, 307). Although this sphere is more prone to repression and exclusion, it is also the medium in which communication is most free (Habermas 1996a, 308). Nevertheless, weak public spheres remain unsubverted only if individual and citizenship rights are constitutionally guaranteed (Habermas 1996a, 308). For Habermas then, the two tracks of deliberative democracy reciprocally presuppose one another. The informal public opinions of civil society become grist for the mills of formally organized administrative bodies. The organization of political decision-making

approached at the global-level. At the postnational, European-level, Habermas argues that the two tracks of deliberative democracy can be approached. Viewed from this vantage point, the two questions that Habermas uses to frame his discussion of the European Union<sup>19</sup> take on a clearer purpose: he seeks to ascertain whether the formal and informal tracks of opinion and will-formation can be met postnationally. With respect to the question of whether the European Union can compensate for the lost competence of the nation-state, Habermas realistically concludes that supranational institutions will not exactly replicate the legitimacy conditions found in national institutions bounded by particular historical contexts and shared collective identities. Habermas observes:

Of course, a constitution for a multinational state on the scale of the European Union cannot simply adopt the model of constitutions of national federations such as the Federal Republic of Germany. It is neither possible nor desirable to level out the national identities of member nations, nor melt them down into a 'Nation of Europe' (2001, 99).

What can be replicated are the conditions of democratic legitimacy: the creative interaction between the formal processes of democratic will-formation and the informal processes of opinion-formation in an unsubverted, weak public sphere.

In response to the first question then, Habermas proposes not the model of a European State writ large but the interactions between and among national and supranational institutions that in turn, create interdependent political processes (Habermas 2001, 103). On Habermas's view, the implementation of a European Charter

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through democratic procedures, in turn, provides the forum in which citizens legislate as both authors and addressees of the law.

<sup>19</sup> Habermas assesses the extent to which the European Union can be understood as an initial form of postnational democracy on the bases of answers to four questions. Relevant here are the following questions: Third ( c ) is the question of whether the European Union can even begin to compensate for the lost competencies of the nation-state [...] This question of the competence to act depends on another, analytically distinct question, ( d ) whether political communities form a collective identity beyond national borders, and thus whether they can meet the legitimacy conditions for a postnational democracy (Habermas 2001, 90).

supported by a European party system and a European civil society can give rise to a nascent form of postnational democracy that simultaneously retains and broadens the national identities of particular political communities.

The success of a European Union reconfigured in this way depends on whether Habermas can positively answer the second question: Can political communities form a collective identity beyond national borders? Postnational collective identities are possible if national political communities can agree to work towards the adequate approximation of the two tracks of deliberative democracy. The formal and informal tracks of democratic will- and opinion-formation are approached postnationally on a less-demanding basis of legitimacy than national constitutional democracies have developed:

[...] [T]he European Union must be repositioned from its previous basis of international treaties, to a “Charter” in the form of a basic law. [...] [T]his transition from intergovernmental agreements to a common political existence under a constitution does not just aim for a common procedure of democratic legislation that would supersede nationally defined voting rights and national public spheres; rather it would aim toward a common practice of opinion- and will-formation, nourished by the roots of a European civil society, and expanded into a Europe-wide political arena (Habermas 2001, 100).

The European Union can approximate the democratic legitimation conditions of a formal and informal-track of will- and opinion-formation within a postnational constellation through the institutionalization of a European Charter—the form of basic law that aims at the institutionalization of a common procedure of democratic legislation beyond existing national constitutional structures—and supported by a European civil society (Habermas 2001: 100). Less obvious is whether and how these two tracks of democratic legislation are expressed in the context a world domestic policy.

At the global-level, an international negotiating system that simultaneously preserves and engages existing national, international and global political processes

provides a formal framework of democratic procedures wherein state and non-state actors can reach rational compromise (Habermas 2001, 109). This formal framework further relies on the generation of informal opinions among citizens imbued with a cosmopolitan consciousness. These citizens comprise a weak, internationalized civil society that can influence national actors to adopt transnational problems as matters of common and therefore, domestic concern. The emergence of a cosmopolitan consciousness capable of supporting the informal track of opinion-formation is possible because members of an international negotiation system “have recourse to common value orientations and shared conceptions of justice, which make an understanding beyond instrumental-rational agreements possible” (Habermas 2001, 109). The common value orientations and shared conceptions of justice that ground the informal track of opinion-formation are not limited to specific regions of the world. Certainly, the idea of an informal process of opinion-formation beyond the nation-state is easier to imagine in the contexts of a nation-state or a region of states but the geographical location of a state is no guarantee that value orientations and conceptions of justice are shared. For these reasons, Habermas further clarifies that these common value orientations and shared conceptions of justice take the form of a public use of reason at their most basic level (Habermas 2001, 110).

The democratization of deliberative processes at the global-level implies the public use of reason informed by the opinions of a global civil society. In other words, both the formal and informal tracks of deliberative democracy can be met at the postnational-European and global-levels without the actual political participation of world citizens in global democratic processes of will-formation. Rather, participants in institutional negotiating processes advance formal, public reasons that are also grounded

in the informal opinions of global civil society. By emphasizing the importance of public uses of reason rather than the political participation of world citizens in the ‘rationalization’ of strategic, *suprastate* processes of decision-making, Habermas retains the ‘political’ meaning of democratic participation beyond the nation-state—one that is necessarily ‘exclusive’ (Habermas 2001, 107).

The standard of democratic legitimacy is met at the postnational, European- and global-levels in the general accessibility of a deliberative process capable of producing sufficiently rational outcomes, supported by informal processes of democratic opinion-formation. Here, a functioning public sphere, the quality of discussion, accessibility, and the discursive structure of opinion and will-formation meet with the formal democratic processes of a European party system or international negotiating systems to generate democratic legitimacy (Habermas 2001, 111). Habermas concedes that while these informal moments of democratic opinion-formation are not sufficient to replace formal decision-making procedures and political representation, they do “tip the balance” from ‘thick’ embodiments of democratic legitimacy to ‘thinner’ procedural demands of communicative and decision-making processes (2001, 111).

Fine and Smith suggest that Habermas’s strategy for approaching a world domestic policy without assuming the organizational structures of a world government downplays the role of representative bodies at the supranational level and transforms the two-track process of deliberative democracy into a one-track process of informal opinion-formation (Fine and Smith 2003, 477). They argue that the development of a civil society independent of representative institutions may not be able to “inculcate the general belief in the legitimacy of transnational procedures” (Fine and Smith 2003, 477).

In response to Fine and Smith's concern, Habermas argues that weak forms of global democratic legitimation become strong when they are reconnected with more robust processes of legitimation at all levels of governance: national, international and global. The function of rational compromise-formation performed by the formally-institutionalized track of deliberative democracy is preserved within international negotiating systems that engage with existing democratic institutions at all levels of governance. The formal track of democratic will-formation is actually engaged when national political processes interact with international and global political processes to reciprocally broaden the horizons of each. Non-state actors in a 'global civil society' strengthen the democratic legitimacy of a decision to the extent that their influence is incorporated into the formal democratic processes of international negotiating systems.

Habermas explains:

For example, the institutionalized participation of non-governmental organizations in the deliberations of international negotiating systems would strengthen the legitimacy of the procedure insofar as mid-level transnational decision-making processes could then be rendered transparent for national public spheres, and thus be reconnected with decision-making procedures at the grassroots level. And equipping the world organization with the right to demand that member states carry out referendums on important issues at any time is also an interesting suggestion under discourse-theoretical premises (2001, 111).

Crucial to the success of an international negotiating system is not solely the informal weak public sphere of citizen and citizen-movements but also national actors concerned with democratizing global governance through world domestic policy (Habermas 2001, 111-112). This is why Habermas argues that domestic electorates should reward governments that make political decisions with a cosmopolitan consciousness (Habermas 2001, 112). State and non-state actors imbued with cosmopolitan consciousnesses and cooperating within international negotiating systems are capable of introducing global

problems to national political deliberations. The question remains whether and how a transition from “international relations” to a “world domestic policy” (Habermas 2001, 111) actually resists the dangers attending Schmitt’s moralization of politics thesis.

#### THE PROBLEM OF AN UNMEDIATED MORALIZATION OF POLITICS

Once we understand that the relevant political terrain engaged by a moralization of politics is one in transition from a rule of unmediated political power under international law to a rule of cosmopolitan law, the problem of human rights fundamentalism becomes a problem of an *unmediated* moralization of politics. In the case of an unmediated moralization of politics, the infection of international law with moral considerations is prone to human rights fundamentalism because the interaction between law and morality, and thereby, politics and morality, are not adequately mediated. The nature of this mediation is found in the “cosmopolitan transformation of the state of nature among states into a legal order” (Habermas 1997, 149).

The scope of this cosmopolitan transformation is not predominantly moral. Indeed, Habermas’s main criticism of an international organization like the United Nations is that it operates on a moral principle of complete inclusion rather than a democratic principle aimed at securing the equality of legal subjects and legitimating political decision-making (Habermas 2001, 107). Rather, the cosmopolitan transformation to which Habermas refers is legal in nature: “[M]orally justified appeals threaten to take on human rights fundamentalism when they do not aim at the implementation of a legal procedure for the positivization, application and achievement of human rights” (Habermas 1997, 148). A juridification of an international state of

nature is achieved through the medium of cosmopolitan law: “[In it], symmetry is finally established between the juridification of social and political relations both inside and outside the state’s boundaries” (Habermas 1997, 146). Here, “symmetry” refers to the postnational European- and global- approximations of democratic legitimacy found in national deliberative democracies. The broad contours of this juridification sharpen into focus when Habermas argues: “The correct solution to the problem of the moralization of power and politics is therefore not the *demoralization* of politics but the democratic transformation of morality into a positive system of law with legal procedures of application and implementation” (1997, 149). He suggests that the requirements of a logical genesis of a system of rights within political communities are approached in the postnational, European- and global- contexts through supranational equivalents of the discourse principle, the legal form and the principle of democracy. Put differently, the moral and egalitarian universalism enshrined in the discourse principle and the legal form respectively must combine in the postnational European- and global- contexts to produce principles of democracy. This dialogic and proceduralist conceptualization of constitutionalization opens the possibility of harmonizing the interrelationships between law, morality and politics in a way that Schmitt could only achieve by subordinating law and morality to politics. The mistaken assumption that Schmitt makes in formulating his moralization of politics thesis is that a “moralization of politics is hindered only by keeping international law free of law and the law free of morality” (Habermas 1997, 146). That Habermas seeks to approximate the constellation of law, morality and politics that he develops nationally in the postnational European- and global-orders suggests that his solution to a moralization of politics requires more than the mere legalization of

international relations but more precisely, its constitutionalization—the incorporation of legal legitimation within postnational- and global- political processes.

The transition from a rule of international law to a rule of cosmopolitan law requires more than, and certainly not predominantly, the densification of international law. What is required is not primarily the implementation of more international laws but the supplementation of existing international laws with an institutionalized context of communicative action grounded on public uses of reason. Although the symmetry that Habermas seeks between the juridification of national and international politics cannot be exactly replicated in supranational institutions, it can be approached in the robust standards of legitimation to which any justification for global action must conform (Habermas 2001, 84). These standards of legitimation are the legitimacy conditions for democratic self-determination: conformity to a legal form that enshrines the principle of egalitarian universalism; an adherence to the discourse principle, which enshrines the principle of moral universalism; and the institutionalization of the latter through law to produce a principle of democracy that secures a universalizable concept of political equality. That actors at the postnational European- and global levels are equal moral and legal subjects is implicit in the achievement of democratic legitimacy beyond the nation-state. The conceptual harmonization of law, morality and politics within deliberative democracies supply standards of democratic legitimacy crucial to the creation of a constitutionalized international political sphere capable of repelling human rights fundamentalism.

In his most recent reflections on the war in Iraq (2003), Habermas rejects the unilateral and imperialistic actions of the American administration as an unmediated

moralization of politics. Specifically, he reaffirms the internal relation between democracy and human rights against an unmediated conflation of morality and politics (Habermas 2003a, 369). With respect to the American invasion of Iraq, Habermas argues:

The universal validity claim that commits the West to its ‘basic political values,’ that is, to the procedure of democratic self-determination and the vocabulary of human rights, must not be confused with the imperialist claim that the political form of life and the culture of a particular democracy—even the oldest one—is exemplary for all societies. [...] Modern self-understanding, by contrast, has been shaped by an egalitarian universalism that requires the decentralization of one’s own perspective. It demands that one relativize one’s own views to the interpretive perspectives of equally situated and equally entitled others. [...] The ‘reason’ of modern rational law does not consist of universal ‘values’ that one can own like goods, and distribute and export through the world. ‘Values’—including those that have a chance of winning global recognition—don’t come from thin air. They win their binding force only within normative orders and practices of particular forms of cultural life (2003a, 369).

The moral universalism contained in basic human rights must be legally transformed into an egalitarian universalism that permits the mutual recognition of the other as a political equal. This political equality is premised on the realization that values cannot be imposed from above but rather, must be accepted by citizens who see themselves as authors and addressees of the laws that they make. Here, the general availability of a deliberative process structured to produce rational outcomes is important. In the case of the American invasion of Iraq, the moral universalism of human rights was mobilized in the service of one state’s imperialistic ambitions. This abuse of human rights was made possible by a “low-level of institutionalization of cosmopolitan law” (Habermas 1999). Human rights are still treated as predominantly moral rather than legal rights in international relations. In the absence of a coercive legal system capable of effectively enforcing legitimate actions and rejecting illegitimate justifications, international relations will remain vulnerable to an unmediated moralization of politics.

This reading of Habermas's commentary on the Iraq war can be traced to similar comments made in his discussion of NATO's intervention in Kosovo (1999):

Things look different when human rights not only come into play as a moral orientation for one's own political activity but as rights which have to be implemented in a legal sense. Human rights possess the structural attributes of subjective rights which, irrespective of their purely moral content, by nature are dependent on attaining positive validity within a system of compulsory law. Only when human rights have found their "home" in a global democratic legal order, as have basic rights in our national constitutions, will we be able to work from the assumption that on the global level the addressees of these rights can simultaneously understand themselves as their authors (Habermas 1999, 270).

For Habermas, human rights have both the moral and legal structures capable of grounding postnational European and global equivalents to a national system of rights wherein conscious cosmopolitan actors can participate in both formal and informal processes of democratic opinion- and will-formation. At stake then, is the constitutionalization of international relations and not merely its legalization. Both a postnational democracy and a world domestic policy require an adherence to constitutional principles at the national, postnational and global-levels of political interaction: the co-originality of human rights and popular sovereignty must be preserved and the public use of reason in deliberative processes, promoted. Without a strong commitment to these constitutional principles, global democratic legitimacy cannot be achieved optimally through the interactions of international negotiating systems.

Habermas provides the conceptual tools with which to debunk Schmitt's moralization of politics thesis. On his view, the most pressing problem of international concern is an unmediated moralization of politics marked by insufficiently constitutionalized international relations. On Schmitt's view, the most pressing problem of international concern is a moralization of politics marked by a departure from a rule of classical European international law. The problem of a moralization of politics is

nowhere more evident than in the current dilemma of humanitarian intervention in international relations. To gain a clearer understanding of how a moralization of politics is concretely threatened, we now turn to an examination of the dilemma of humanitarian intervention using the theoretical tools provided by Schmitt and Habermas.

## CHAPTER 3

### CONSTRUCTING A DILEMMA OF HUMANITARIAN INTERVENTION

There are few international examples that demonstrate the threat of a moralization of politics more clearly than armed humanitarian intervention. Although the definition of humanitarian intervention is widely contested, the formulation most vulnerable to a moralization of politics includes the following general features: a use of armed force, the absence of consent from the host state and a humanitarian purpose. By definition, military interventions for human protection purposes link the practice of politics and a rule of international law to moral considerations. The logic of armed humanitarian intervention asserts that systematic, large-scale human rights violations are sufficient justifications for international uses of military force. As the past decade of state practice shows, the legitimacy of a military intervention has been increasingly judged in terms of cosmopolitan law rather than classical international law. Any evidence of crimes against humanity, ethnic cleansing and genocide compels immediate and decisive action on the part of the international community. Yet, it is precisely the legal criminalization and political outlawing of offences against a moral category—‘humanity’—that threatens ‘total war’ on Schmitt’s view. The growing propensity of state actors to mobilize the moral language of humanitarianism has been most recently exemplified in American justifications for war in Iraq. This is but one example that suggests a moralization of politics continues to threaten the international security discourse.

The kinds of concerns raised by Schmitt’s moralization of politics thesis have always surrounded debates concerning the legitimate use of armed force in the international arena. One of the main criticisms of humanitarian intervention has

generally been that military actions aimed at the protection of human rights are actually motivated by strategic, economic and political interests (ICISS 2001b, 17). Writing in the eighteenth century, Emmerich de Vattel rejected the legitimacy of Hugo Grotius's claim to a right to wage war on behalf of the oppressed because it would "open the door to all the passions of zealots and fanatics" (Vattel cited in Chesterman 2001, 38). More recently, the problem of a moralization of politics has been expressed as a 'new imperialism' of the North over the South, of the developed nations of the world over the developing nations. For example, the Asian Values debate demonstrates how the legitimacy of a right of humanitarian intervention can be contested as a form of moral imperialism. Many Asian countries have challenged the assumption that liberal constitutional democracies are the only legitimate forms of state that can survive in a globalized world.<sup>20</sup> Advocates of Asian values contend that states with absolute sovereign authorities in the East are just as legitimate as popular sovereign authorities in the West. This claim assumes that the social, economic and cultural rights privileged in strong communitarian states are just as legitimate as the civil and political rights prioritized in liberal states. More concretely, developing nations with deep-seated colonial pasts cleave to a formal, legal conception of sovereignty as a means of protection against stronger states that might use the humanitarian cause as a pretext for their wider imperial ambitions. In 1999, the President of the Organization of African Unity (OAU), Algerian President Boueteflika declared sovereignty as the final defence of the developing members of the United Nations General Assembly against the rulers of an unjust world (ICISS 2001b, 7).

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<sup>20</sup> For an interesting discussion of the Asian Values Debate, see Jürgen Habermas. 2002. On Legitimation through Human Rights. *Global Justice and Transitional Politics*. Pablo De Greiff and Ciaran Cronin, ed.

The state practice of humanitarian intervention peaked during the 1990s. State actors intervened militarily in the domestic affairs of sovereign states where grave violations of human rights were being perpetrated, without the consent of the government or people and with varying degrees of legitimacy. Some interventions were authorized by the Security Council's expanded definition of Chapter VII 'threats to international peace and security' while others were undertaken unilaterally by regional security organizations or coalitions of the willing. In all cases, the threat of state abuse loomed large in each claim to a 'right of humanitarian intervention.'

In this chapter, we will clarify how a moralization of politics on both Schmitt's and Habermas's formulations is threatened in the conceptualization and state practice of humanitarian intervention. A brief review of the main historical developments in the international thought and practice of humanitarian intervention reveals how the current dilemma has been constructed. From this analysis, it will become clear that the patterns of intersection between law, morality and politics have changed at different points in the historical development of humanitarian intervention. The degree to which humanitarian intervention practices are vulnerable to a moralization of politics shifts with changes in the dominant constellation of law, morality and politics. The constructed meanings that shape the theorization and practice of humanitarian intervention suggest the current dilemma articulated between sovereignty and intervention for human rights protection is not fixed. This point is significant for our subsequent analysis of the most current attempt to disrupt the 'sovereignty-intervention' opposition—the International Commission on Intervention and State Sovereignty (ICISS)'s seminal report *The Responsibility to Protect*.

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Cambridge, MA: The MIT Press: 204-210.

We will now chart the historical evolution of humanitarian intervention in thought and state practice with a view to showing that the tension it presupposes between sovereignty and intervention is, in principle, resolvable. It will be demonstrated that a dilemma of humanitarian intervention as expressed in the sovereignty/intervention dichotomy arises only when an absolute conception of internal and external sovereignty is presupposed. In those cases where state rights are considered in conjunction with state duties to other rights-holders, a relational concept of sovereignty is approached. A relational concept of sovereignty grounds the ICISS's attempt to dissolve the 'sovereignty versus intervention' dilemma in *The Responsibility to Protect*.

#### A FALSE CHOICE: SOVEREIGNTY VERSUS INTERVENTION

The definition of humanitarian intervention has defied any single, unitary articulation. Jennifer Welsh claims that one of the greatest analytic challenges of any attempt to study humanitarian intervention arises from the multiple ways in which it could be defined (2004, 3). Since our study focuses on military, rather than non-military forms of humanitarian intervention, we will narrow the scope of our investigation to consider only those definitions associated with the former instances of humanitarian intervention. In concrete practice, a decision to use force for humanitarian purposes exists on a continuum of action that includes non-military forms of coercion. Economic sanctions usually precede military sanctions and international criminal prosecutions are increasingly a part of post-intervention activities.

Much of the current literature on humanitarian intervention starts from a definition of humanitarian intervention that includes the threat or actual use of military

action. Although there are many variations of this definition, some common strands can be identified. Three features stand out specifically: the use of force or threat thereof; the protection of the human rights of foreign populations; and the absence of consent from the state whose sovereignty is violated. The framers of *The Responsibility to Protect* define intervention as: “[A]ction taken against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective” (ICISS 2001a, 8). The ICISS’s definition of humanitarian intervention can include both military and non-military actions. It further acknowledges the erosion of state immunity in international law; state leaders cannot hide behind the veil of state immunity or the doctrine of an ‘act of state’ when they are responsible for violating the human rights of their own population. Most commentators further narrow this definition by specifying coercive action as armed force (Welsh 2004, 3). Others specify the humanitarian quality of a military intervention in terms of “preventing or ending widespread violations of a foreign population’s fundamental human rights” (Holzgreffe 2003, 18).

Common to all of the preceding definitions is a marked shift away from the requirement that intervening states must obtain consent from the host state in order to act legitimately. This shift is significant because it implicitly rejects an absolute, inviolable concept of sovereignty in concrete political practice and a strict positivistic interpretation of international law. The corollary claim to an assumption of absolute internal sovereignty is the absolute non-intervention of states in the domestic affairs of other sovereign states. By definition, military intervention for human protection purposes firmly rejects the validity of this claim by accounting for those very instances in which the violation of state sovereignty in certain extenuating circumstances may be a moral or

legal requirement. For this reason, the dilemma of humanitarian intervention has been framed in terms of an opposition between the principles of sovereignty and human rights protection. It will be shown, however, that this dichotomy requires an invalid assumption: state sovereignty is inviolable and therefore, incompatible with the universal reach of human rights beyond territorial boundaries. Instead, it will be argued that the dilemma of humanitarian intervention poses a false choice between a respect for state sovereignty and the protection of human rights. The historical construction of state sovereignty and the evolving practice of humanitarian intervention during the Cold War and post-Cold War periods lend support to this claim.

#### EVOLUTIONARY PATTERNS IN THE CONSTRUCTION OF STATE SOVEREIGNTY

Concrete state practice suggests that the concept of sovereignty has never really been absolute. Indeed, the meaning of sovereignty has been defined and redefined since its inception in the sixteenth century. The meaning of sovereignty has shifted between absolute and relational formulations over the course of its evolution. A strict, legalistic interpretation of sovereignty as the absolute non-intervention of states in the domestic affairs of other states has become the default assumption in international law and politics. It is the adoption of this interpretation that gives rise to a tension between sovereignty and human rights in cases of armed humanitarian intervention. If it can, however, be shown that the meaning of sovereignty has been variously constructed throughout its historical development, then the dilemma of humanitarian intervention as it is currently articulated can be contested and revised.

Jean Bodin first articulated a theory of sovereignty in 1576. Although Bodin was the first to express the absolute quality of sovereign power, the nature of this power was not free to disregard all laws and regulations (Hinsley 1986, 125). He defined sovereignty as “the absolute and perpetual power of a republic” limited by the divine, natural or customary laws of a political community (Hinsley 1986, 122). The absolute nature of sovereignty did not take on an inviolable and illimitable meaning until the seventeenth century.

Thomas Hobbes took Bodin’s theory of sovereignty to its logical and absolute conclusion in the seventeenth century. He claimed: “Sovereignty is unlimited, illimitable, irresponsible and omnipotent, concentrated in a single centre and armed with power” (Hinsley 1986, 143). Hobbes achieved an absolute conception of sovereignty by completely extinguishing the existing personality of the People: “The authority, will and action of the Ruler became the authority, will and action of every individual in a constitutional state” (Hinsley 1986, 142). In this way, positive law became identified with the command of the sovereign: “One could speak of an obligation to obey the law only when it was known to be a command of the civil power for obligation derived from sanction and not from authority” (Hinsley 1986, 144). The meaning of absolute sovereignty was again contested and revised by Jean Jacques Rousseau in the eighteenth century.

Rousseau radicalized Hobbes’s absolute conception of sovereignty in the opposite direction and located a state’s sovereign authority entirely in the People. Absolute sovereignty was reinterpreted to mean “the exclusive and omnipotent sovereignty of the community of people” (Hinsley 1986, 153). F.H. Hinsley has argued that Rousseau’s

conception of popular sovereignty became the dominant theory of state in modern liberal constitutional democracies by the end of the eighteenth century (1986, 155).

Immanuel Kant preserved Rousseau's concept of popular sovereignty but emphasized the constitutional role of Hobbes's sovereign. Both Hobbes and Rousseau advanced abstract and unlimited concepts of sovereign authority that could neither be contained by law nor sufficiently exercised by elected representatives. The only difference is Hobbes located sovereign authority in the executive government of a state while Rousseau located it in the people. In contrast to both thinkers, Kant introduced the "sovereignty of a notional state of people equivalent to law or even the law of reason" (Hinsley 1986, 156). The legitimate form of positive law was also conceptually expanded from the strict command of a sovereign to a system of natural law discoverable by human rationality. The accessions of an absolute conception of popular sovereignty and a rule of law within states resulted in a relational conception of external sovereignty.

Traditionally, the meaning of external sovereignty has been derived from the meaning of internal sovereignty (Hinsley 1986, 158). If internal sovereignty refers to the final and absolute authority within a political community, then external sovereignty means that there is no higher authority outside of that state. The meaning of external sovereignty is simply the mirror reflection of internal sovereignty:

These two assertions [1. Sovereignty is the claim to independence; and 2. There exists no supreme authority above the community] are complementary. They are the inward and outward expressions, the obverse and reverse sides, of the same idea (Hinsley 1986, 158).

If absolute internal sovereignty is, however, understood in its popular form, then the natural sociability of humans also becomes the point of emphasis in a conception of external sovereignty. Richard Tuck has observed that those political theorists wedded to

a more pacific model of human interaction within states advanced more pacific international theories of war and peace (1999, 195-6). Political theorists from Samuel Pufendorf, Christian Wolff and Immanuel Kant shared the common assumption that pre-political states of nature were naturally sociable. They argued that the natural obligations states owe to one another within civil society are analogous to the obligations that peoples owe to one another in an international society (Tuck 1999, 195-6). Pufendorf, for example, placed natural limits on the legitimate use of force in international relations. He argued that a state only has a right of retaliation for any direct or imminent harm threatened by another state (Tuck 1999, 157). Furthermore, he claimed that the right of conquest was limited; foreigners could not claim a natural right to occupy the vacant territory of another state unless they agreed to submit to the political authority of the local people (Tuck 1999, 157). Wolff took Pufendorf's thought one step further and argued that the desire for mutual aid could not be achieved without the formation of a "supreme state that promoted the principles of general human society for common security" (Tuck 1999, 187-8). Wolff's call for a "democracy of equal nations" wherein the sovereignty of each member would be subordinated to the whole was realistically tempered by Kant's call for a pacific federation of states aimed at achieving perpetual peace among nations. By taking a notion of popular sovereignty within states as their conceptual starting points, these political theorists advanced a picture of interstate relations based on mutual cooperation rather than imperial conquest.

The contingent nature of sovereignty has also been captured in the United Nations Charter. Article 2(4) affirms the twin principles of sovereignty and non-intervention: "All members shall refrain in their international relations from the threat or use of force

against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations Charter.” At first blush then, Article 2(4) establishes a presumption against state interventions even if they are intended for the protection of human rights. At the same time, a respect for human rights is enshrined as one of the main purposes of the United Nations. Article one asserts that the United Nations is intended “to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language or religion; [...]”

This tension between a respect for human rights and state sovereignty has been expressed in terms of a dichotomy between national autonomy and international co-existence (Cronin 2002). On the one hand, sovereignty means non-interference; the principle of national autonomy delimits a space in which state governments have full authority over domestic matters. On the other hand, sovereignty gains meaning in the context of states as members of an international community. As voluntary members of the United Nations, states accept duties and obligations in exchange for a guarantee of their rights. In some instances then, the obligation that states have to each other as members of the international community can override the right of states to pursue their own interests unfettered. This trade-off between absolute state sovereignty and membership in the international community is recognized in the UN Charter’s limitation of Article 2(4) by Article 2(7):

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; *but*

*this principle shall not prejudice the application of enforcement measures under Chapter VII [emphasis added].*

In other words, the Security Council may decide to initiate military action in response to those cases that constitute “threat(s) to international peace and security.” A significant feature of the post-Cold war interventions has been the Security Council’s expansion of the meaning of “threats to international peace and security” to include threats to human security. The concept of human security recognizes the inextricable role of a respect for human rights in the maintenance of international peace and security.

As the foregoing discussion has shown, the meaning of sovereignty has always been open to contestation and revision. From this brief historical review of the evolution of state sovereignty, it is clear that the concept’s meaning is neither exhausted by an absolute non-interference in the affairs of another state, nor the absolute impunity of a state in its own domestic affairs. The contested nature of the sovereignty principle suggests that it is conceptually possible to reconcile its meaning with the protection of human rights. Specifically, the meaning of sovereignty does not inevitably exclude armed interventions aimed at the protection of human rights. Evident in the thought and practice of humanitarian intervention itself is the gradual erosion of an absolute, inviolable concept of state sovereignty and its replacement with a relational concept of ‘state rights’ that cannot be extricated from ‘state obligations.’

#### A ‘RIGHT OF HUMANITARIAN INTERVENTION:’ CONCEPTUAL-THEORETICAL ANTECEDENTS AND STATE PRACTICE

Current claims to a ‘right of humanitarian intervention’ can be traced to debates concerning the legitimate use of force in as early as the sixteenth century. Francisco di

Vitoria articulated many of the fundamental ideas that grounded the Scholastic tradition, in particular, the prohibition of wars waged for imperial power and glory. Vitoria was one of the first Scholastic theologians to systematically articulate the permissible causes of just war. Significantly, he enumerated “the defence of the innocent against tyranny” as a just cause of war. Vitoria argued that just causes of war included uses of force by a foreign power aimed at protecting innocent victims of aggression from the “personal tyranny of the barbarians’ masters towards their subjects”(1539 [1991], 288). Similarly, an action justified according to “tyrannical and oppressive laws against the innocent” would not count as a ‘just cause’ of war (Vitoria 1539 [1991], 288).

In contrast, Hugo Grotius, lauded by many as the ‘father of international law,’ argued that states could legitimately wage wars of conquest (Tuck 1999, 89). For Grotius, offensive wars were permissible because states had a right to pursue those things for the satisfaction of their own personal interests; states like individuals possessed a fundamental right to acquire property (Tuck 1999, 89). Although the term ‘humanitarian intervention’ would not appear until the nineteenth century as a possible exception to the rule of non-intervention, the question of whether force can be legitimately used to protect the rights of those in need continued to be a source of extensive debate.

The predominant current of thought in the eighteenth and nineteenth centuries privileged a legal conception of sovereignty that included the right of states to wage war. Scholarly writings in this period fail to confirm a formal legal right of intervention on behalf of an oppressed population although early instantiations of what would now be considered ‘humanitarian intervention’ can be identified. In 1827, France, Russia and England intervened in Greece to end the Turkish massacres (ICISS 2001b, 16). In 1860,

France intervened in Syria to protect the Maronite Christians (ICISS 2001b, 16). The gradual development of international law and state practice away from conceiving war as a legitimate tool of foreign policy rendered any claims to use force outside of self-defence more difficult.

The Covenant of the League of Nations (1924) was one of the first documents to limit the ability of states to make war for any reason. The Covenant aimed to achieve peace through the “acceptance of obligations not to resort to war” (cited in Chesterman 2001, 43). This general goal was facilitated by Article 12,<sup>21</sup> which called for a three-month cooling-off period before hostilities between states could legally commence. Consistent with this trend, The Kellogg-Briand Pact or Pact of Paris (1928) affirmed the shift in international thought away from the right of states to wage war in virtue of their sovereign independence. The Pact marked a significant moment in the journey from the unbridled right of states to wage war to the eventual criminalization of aggressive war, asserting that “all changes in [interstate] relations should be sought only by pacific means” (cited in Chesterman 2001, 43). The Pact further condemned the “recourse to war for the solution of international controversies” and “renounced [war] as an instrument of national policy<sup>22</sup>” (cited in Chesterman 2001, 43).

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<sup>21</sup>Article 12 states: The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators of the judicial decision, or the report of the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute (League of Nations 1924).

<sup>22</sup>Article 1 of the Kellogg-Briand Pact states: “The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another” (Treaty Providing for the Renunciation of War as an Instrument of National Policy, signed August 1928, in force July 1929).

The Nuremberg and Tokyo war crimes tribunals further narrowed the scope of a state's freedom to act without external interference. These *ad hoc* military tribunals marked the beginning of a conscious effort on the part of the international community to hold state officials accountable for human rights atrocities afflicted on innocent civilian populations in wartime. For the first time, war crimes and crimes against humanity committed in war were recognized as international crimes for which there could be no defence of superior orders. Heads of state were no longer granted immunities from atrocities committed as "acts of state." Tacit in the attribution of criminal culpability to individual state actors was the implicit recognition of individuals as subjects of international law with legal rights and duties to respect and protect human rights. In principle, the priority of human rights, understood as legally enforceable international rights, was asserted over a narrow understanding of external state sovereignty as absolute non-intervention. The Nuremberg principles were unanimously approved by the UN General Assembly and are generally accepted by states as customary international law (Shaw 2003, 594). Moreover, the definitions of genocide<sup>23</sup> and crimes against humanity<sup>24</sup> have been formally enshrined in the UN Convention on the Prevention and Punishment of the Crime of Genocide (1948) and the Rome Statute of the International Criminal Court (1998). A respect for the human rights and dignity of every individual to

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<sup>23</sup> The definition of genocide as found in Article 2 of the UN Convention on the Prevention and Punishment of the Crime of Genocide states: "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups such as: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; e) forcibly transferring children of the group to another group."

<sup>24</sup> 'Crimes against humanity' are defined in Article 7(1)(h) in the Rome Statute of the International Criminal Court as including: the persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or other grounds that are universally recognized as impermissible under international law (cited in Schabas 2000, 10).

be free from persecution by these means has also gained the status of a *ius cogens* norm in international law—peremptory norms from which there can be no derogation (Shaw 2003, 117). The landmark *Pinochet* case (1999) rejected a presumption of absolute sovereign immunity for government officials partially by appealing to *ius cogens* norms in international law.

Elements of the early war crimes tribunals in Nuremberg and Tokyo have been recently replicated in the International Criminal Tribunals in Yugoslavia (ICTY) (1993) and Rwanda (ICTR) (1994). The ICTY and ICTR have made significant contributions to international criminal jurisprudence by clearly establishing criminal liability for war crimes during internal armed conflicts (ICISS 2001b, 22). Moreover, it has been established that crimes against humanity extend beyond periods of armed conflict and rape is now considered part of the crime of genocide (ICISS 2001b, 22). The establishment of a permanent International Criminal Court (ICC) further strengthens the enforcement mechanisms for human rights protection. The ICC formalizes many of the principles established in the *ad hoc* military tribunals and has jurisdiction over war crimes, crimes against humanity and genocide. Although the ICC is far from perfect,<sup>25</sup> the statute makes some advances in the enforcement of the prohibition of human rights violations by allowing criminal proceedings not only to be initiated by states and the Security Council but also by an independent ICC prosecutor. All of these developments

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<sup>25</sup> The International Criminal Court takes some progressive steps towards the legal prohibition of crimes against peace, war crimes and crimes against humanity but the scope of its jurisdiction remains constrained by the principle of complementarity and the ratification of the Rome Statute by states. The principle of complementarity holds that the International Criminal Court (ICC) can investigate and potentially prosecute a case only if no country with jurisdiction is willing or able to investigate or prosecute the crime. The ICC is meant to ‘complement’ national judiciaries by providing justice where the alternative is no justice. Furthermore, the ICC can only try crimes committed after the date that the Rome Statute entered into force: July 1, 2002. The ICC’s jurisdiction is limited to those countries that have ratified the Rome Statute nationally. Significantly, the U.S. has yet to ratify the Rome Statute.

in international law and practice mark a significant shift away from a presumption of absolute non-intervention in a sovereign state's domestic affairs at least where the protection of basic human rights are at stake. Changes in the state practice of humanitarian intervention from the Cold War to the post-Cold War periods have consolidated the trend away from an absolute conception of state sovereignty.

## EVOLUTION OF HUMANITARIAN INTERVENTION IN STATE PRACTICE

### *Cold War Military Interventions*

Uses of force aimed at the protection of human rights can be found in state practice dating back to the early 1800s but an independent justification for humanitarian intervention did not fully crystallize in state practice until the 1990s. Specifically, the meaning of that which counts as a 'legitimate' use of force has evolved with changes in the constellation of law, morality and politics from the Cold War to the post-Cold War period. Many of the military interventions that took place during the Cold War had humanitarian effects but were not explicitly justified in terms of human rights protection. Rather, the Eastern and Western blocs made decisions to secure the dominance of their respective ideologies and most important, to prevent nuclear annihilation. Politics in Schmitt's sense of distinguishing between friend and enemy became the dominant and compelling logic in the Cold War period. The logics of law and morality were instrumentalized and placed in service of politics. An international rule of power, force and fear prevailed over a rule of international law and effectively barred any serious efforts to define a 'right of humanitarian intervention.' Three interventions are particularly instructive in demonstrating the relevant constellation of law, morality and

politics at play in the Cold War: India's intervention in East Pakistan (1971), Vietnam's intervention in Cambodia (1978) and Tanzania's intervention in Uganda (1979).

In each case, humanitarian outcomes were the actual by-products of military interventions rather than their primary justifications. India's intervention in East Pakistan resulted in the rescue of ten million refugees and became the crucial catalyst in the formation of a new state—Bangladesh (ICISS 2001b, 55). India's representative to the Security Council claimed force was deployed from the purest of motives and intentions: “the rescue of the people of East Bengal from what they are suffering” (ICISS 2001b, 55). Vietnam's intervention in Cambodia shut down Pol Pot's notorious killing fields. The Vietnamese government claimed its intervention aided in a war of national liberation that the Kampuchean people themselves had initiated against the oppressive ruling regime (ICISS 2001b, 90). Tanzania's intervention in Uganda aided in the liberation of the Ugandan people from the dictatorial rule of Idi Amin. President Julius Nyerere framed Tanzania's military intervention in terms of two wars that were being fought: “First, there are the Ugandans fighting to remove a Facist dictator. Then there are Tanzanians fighting to maintain national security” (ICISS 2001b, 62). In each case, military force effectively ended the widespread violation of fundamental human rights without the consent of the host state or the afflicted population. These interventions thereby approximate what would be considered current instances of humanitarian intervention.

In principle, however, these interventions were motivated by strategic concerns of power and legitimated by means of more conventional legal justifications. India formally claimed that its military action was in self-defence; West Pakistan had bombed ten of its

military airfields (ICISS 2001b, 55). The sincerity of India's claim to have acted with the purest of humanitarian intentions was, however, undercut by its description of the refugee crisis as "refugee aggression"—the ten million Bengali refugees seeking protection within India's borders represented a kind of "constructive attack" on India's sovereignty (ICISS 2001b, 55). Clearly, India was more concerned to protect its own sovereign independence than to rescue the persecuted population of East Pakistan.

Both Vietnam and Tanzania claimed legitimacy for their respective military interventions on the basis of a right to self-defence. The Vietnamese government claimed that the Khmer Rouge had threatened its borders in a series of attacks dating back to 1975. Tanzania launched a counterattack in response to Ugandan threats to annex its northwest region. In addition to exercising their rights of self-defence, Vietnam and Tanzania also claimed they were assisting in a people's war of national self-determination. In this respect, both states maintained that they were fighting to aid political communities engaged in large-scale military struggles for national liberation.

The strategic nature of Vietnam's intervention in Cambodia was, however, glaringly apparent. Vietnam's intervention was viewed by some to be a coercive bid for hegemony in the region (ICISS 2001b, 63). According to others, Vietnam's actions were part of the Soviet Union's wider bid to bring more states into the fold of the Eastern Communist Bloc (ICISS 2001b, 63). Suspicions of Vietnam's ulterior motives were heightened in the Security Council by its representative's omission of the 100,000 Vietnamese troops already stationed in Cambodia from its account of the situation (ICISS 2001b, 59). Moreover, the only countries that supported Vietnam's use of force were the Soviet Union and its political allies (ICISS 2001b, 59).

Although some references to the moral legitimacy of an armed humanitarian intervention are discernible in the Cold War period, the general pattern of justification for the use of force remained strictly and formally legal. The meaning of legitimacy in cases of armed humanitarian intervention remained within the strict purview of positive international law. Accordingly, the meaning of sovereignty was narrowly construed as the final and absolute authority of a state in its internal and external affairs. The instrumentalization of international law in favour of a state's strategic interests clearly demonstrated the subordination of law to politics in the Cold War. Consistent with the constellation of law, morality and politics that Schmitt advanced, international law remained free from morality. The French representative to the Security Council deliberations on Vietnam's intervention in Cambodia clearly expressed this separation:

The notion that because a regime is detestable foreign intervention is justified and forcible overthrow is legitimate is extremely dangerous. That could ultimately jeopardize the very maintenance of international law and order and make the continued existence of various regimes dependent on the judgement of their neighbours. It is important for the Council to affirm, without any ambiguity that it cannot condone the occupation of a sovereign country by a foreign power (ICISS 2001b, 59).

The military interventions in the Cold War period further demonstrate 'a rule of international law free of law'—the exigencies of Cold War politics dictated the ebb and flow of international political life. Legitimacy was defined as legality and international order premised on a narrow definition of sovereignty. The extraordinary circumstances of the Cold War period ensured that most 'humanitarian interventions' remained *de facto* extra-legal and therefore, subject to the political wills of sovereign powers.

Schmitt's definition of sovereignty as a ruling authority's ability to make political decisions was most closely approximated during the Cold War. An understanding of sovereignty in these terms further perpetuated a system of interstate relations based on

the absolute non-interference of one state in the affairs of another. Moreover, the ever-present threat of nuclear annihilation at the heart of Cold War politics ensured that state decision-making remained in a constant state of exception. In this state of exception, it was necessary that both the authoritarian states in the Eastern communist bloc and the liberal states in the Western capitalist bloc remained free to act with political decisiveness. The 'political' context of state action in the Cold War period legitimated the decisions that governments of authoritarian, communist and democratic, capitalist states alike took.<sup>26</sup> These governments acted in their interests under the cover of their absolute, external sovereign statuses. The symmetric recognition of each adversary as a political opponent or *justus hostis* and the constant threat of real nuclear war ensured that Cold War antagonisms followed a predictable rhythm of mutual escalation and restraint.

#### *Post-Cold War Interventions*

The end of the Cold War brought with it new opportunities to expand the meaning of military intervention for human protection purposes. The dissolution of the Soviet Union, the triumph of capitalism over communism and the creation of new states through decolonization incited the fires of nationalism within states and exposed the fragility of newly-created state borders. In the 1990s, the proliferation of ethnic and national conflicts was matched by an unprecedented activism in the Security Council. The number of UN- or delegated- missions that received Chapter VII authorizations was eight out of the nine humanitarian interventions that took place in the 1990s: Northern Iraq

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<sup>26</sup> The notable exception to this general pattern of state behaviour is the interventionary approach to South African apartheid taken by states in the Eastern and Western Blocs alike. States in both ideological camps collectively condemned the racist practices of the South African apartheid regime and imposed non-

(1991), the Former Yugoslavia (1992), Somalia (1992), Rwanda (1994), Haiti (1994), Sierra Leone (1997), Kosovo (1999) and East Timor (1999) (ICISS 2001b, 80). Of those nine interventions, four did not receive initial Security Council authorization but later received UN support (ICISS 2001b, 30). In these military interventions, the meaning of ‘threats to international peace and security’ was expanded by the Security Council to include not merely aggressive violations of one state’s territorial and political independence by another state but the violation of a population’s human rights. Massive and widespread violations of human rights by means of genocide, ethnic cleansing or crimes against humanity constituted threats to human security and by extension, threats to the peaceful maintenance of international security.

In general, the legitimacy of military actions was increasingly assessed in terms of ‘lawfulness’ rather than strict legality. The Cold War examples of armed humanitarian intervention clearly showed that legitimacy was measured in terms of international legal permissibility rather than by the desirable humanitarian ends of the the initial action. In contrast, an emphasis on the ‘lawfulness’ of a military intervention implies the permissibility of actions that respect standards of human dignity though they may violate the positive letter of the law. Jane Stromseth specifies that a ‘lawful’ action must have a legal basis within the normative framework of international law, which includes the protection of human rights norms (2003, 244). Indeed, the post-Cold War military interventions signify the gradual convergence of morality, law and politics in international problem-solving and suggest the possible emergence of a “new norm of military intervention for humanitarian purposes” (Wheeler 2004, 29).

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military sanctions in opposition to the official government (Independent International Commission on Kosovo 2000).

The American, British and French-led intervention in Northern Iraq marked the first example of a military action partially justified in humanitarian terms. United Nations Security Council Resolution (UNSCR) 688 (1991) called for Iraq to end the repression of the Kurds and other citizens “as a contribution to removing the threat to international peace and security in the region.” The “necessary means” authorized by UNSCR 678 (1990) was practically interpreted to mean the creation of ‘no-fly zones’ for the restoration of peace and security to the area (McLain 2002, 243). The intervening powers claimed that the no-fly zones were necessary humanitarian measures aimed at deterring the internal repression of the Kurds. In August 1992, a second no-fly zone was established to protect the Shia’s population. At this point, the British government began to articulate an additional justification for intervention based on a putative right of humanitarian intervention rather than the enforcement of Security Council resolutions (McLain 2002, 243). In September 1996, a right of humanitarian intervention was invoked in conjunction with UNSCR 688 in Operation Desert Strike. The U.S. militarily intervened to enforce a northern no-fly zone to protect the Kurdish population. The legitimacy of this intervention was, however, brought into serious question. The French declined to take part in the mission and withdrew from the protection of the Kurds (McLain 2002, 244). Indeed, many condemned this American use of force as ‘hasty’ (McLain 2002, 244). In December 1998, the Security Council rejected the disproportionate American and British military responses to Iraq’s non-cooperation with the United Nations Special Commission (UNSCOM) and the International Atomic Energy Agency (IAEA) inspectors. Operation Desert Fox comprised four days of cruise

missile strikes aimed at destroying Iraqi missile factories, command centres and airfields without the explicit authorization of the Security Council.

The controversial interpretation of UNSCR 688 further weakens current American claims to a legitimate use of force in Iraq on the basis of UNSCR 1441.<sup>27</sup> Nevertheless, the intervention in Northern Iraq was the first formal attempt by states to argue for a ‘right of humanitarian intervention:’ the brutal suppression of dissent among the Kurdish and Shia’s populations by Saddam Hussein’s regime was among the reasons offered in favour of a military intervention.

The legitimacy of an independent justification for military humanitarian intervention was most forcefully affirmed in NATO’s ‘illegal, yet legitimate’ intervention in Kosovo. NATO’s military intervention in Kosovo represents the paradigmatic case of a use of international force for the sole purpose of protecting human rights: “[I]t was the first time in history that the Western alliance attacked a sovereign state (the Federal Republic of Yugoslavia (FRY)/Serbia) by justifying the action on the [sole] basis of humanitarian intervention” (Bono 2004, 222). The ethnic tension between Serbian nationalists and Kosovar Albanians is long-standing and deep-seated. In June 1989, President Slobodan Milosevic attempted to annex Kosovo to Serbia but ethnic Albanian politicians resisted this rule and declared independence one year later. Serbia’s refusal to recognize the political autonomy of Kosovo culminated with the murder of dozens of suspected ethnic Albanian separatists by Serbian police forces. (ICISS 2001b, 109-110). As tensions in the region mounted and the killing of Kosovar Albanians intensified, many prominent voices within NATO, particularly then U.S. Secretary of State, Madeleine

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<sup>27</sup> For a more detailed discussion of America’s war in Iraq, see the section in this chapter entitled “A Moralization of Politics in a Post-9/11 World.”

Albright, began to call for the Security Council's authorization of military force. Following the massacre of 45 civilians in Racak and the failure of the Rambouillet negotiations to secure a peace accord between the belligerent parties, NATO commenced air strikes against the FRY on March 24, 1999 (ICISS 2001b, 112). NATO Secretary-General, Javier Solana, justified NATO's actions against the FRY as a last resort; all other available diplomatic avenues were said to have been exhausted (ICISS 2001b, 112). NATO's intervention in Kosovo was, however, illegal because it was undertaken without the express authorization of the Security Council.

The Security Council passed three resolutions with respect to Kosovo, none of which explicitly authorized the use of military force. UNSCR 1160 (1998) condemned the excessively forceful activities of the Serbian police and the terrorist activities of the Kosovo Liberation Army (KLA) (S/RES/1160 (1998)). It further supported an enhanced status for Kosovo (S/RES/1160 (1998)). UNSCR 1199 (1998) condemned the deteriorating conditions between ethnic nationalists in Kosovo as a "threat to peace and security in the region" but demanded only a ceasefire and immediate action to improve the humanitarian situation (S/RES/1199 (1998)). The Security Council committed itself only to "consider further action and additional measures to maintain and restore peace and stability in the region" if the FRY failed to end the action of its police forces, return refugees and displaced persons to their homes and guarantee the free passage of humanitarian organizations and supplies into the country (S/RES/1199 (1998)). UNSCR 1203 (1998) reiterated the terms of the previous two resolutions and threw its weight behind NATO's air verification mission over Kosovo (S/RES/1203 (1998)). Moreover, the resolution continued to condemn the grave humanitarian situation in Kosovo and

reiterated the responsibility of the FRY to create the conditions in which refugees and displaced persons could return to their homes safely (S/RES/1203 (1998)). Since there was no explicit authorization for military force provided in any of these Security Council resolutions, NATO's military action in Kosovo was extra-legal.

Many have argued that NATO's illegal military intervention in Kosovo was nevertheless, legitimate. Some supporters of NATO's action have justified the intervention in terms of a moral right to use military action in defence of human rights<sup>28</sup> (Bono 2004, 223). The UK Foreign Affairs Committee threw its general support behind the Kosovo intervention. In its inquiry into the legal merits of the case, the Committee concluded: "[...] NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds" (cited in ICISS 2001b, 114). The Independent International Commission on Kosovo similarly concluded that the NATO campaign was "illegal, yet legitimate" in its own report:

The Commission concludes that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule (2000).

The controversial idea expressed in this conclusion is that a 'right of humanitarian intervention' may be consistent with the spirit of the UN Charter though it contravenes the strict letter of the law (Independent International Commission on Kosovo 2000). NATO's intervention must be assessed in the context of Serb abuse in Kosovo, the

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<sup>28</sup> A number of commentators have substantiated NATO's action in terms of a moral right of military intervention: Marc Weller. 1999. The Rambouillet Conference on Kosovo. *International Affairs* 75(2): 211-251; Adam Roberts. 1999. NATO's 'Humanitarian War' over Kosovo. *Survival* 41(3): 102-123; Ivo H.

experience of ethnic cleansing in Bosnia a few years earlier and a lack of international response to genocide in Rwanda (Independent International Commission on Kosovo 2000). These factors combined to create a “strong moral and political duty on the part of the international community to act effectively” (Independent International Commission on Kosovo 2000).

Habermas concurs with this general point. He points to three circumstances of NATO’s intervention in Kosovo that offered it legitimation after the fact:

First, the intervention aimed at the prevention of ethnic cleansing, which was known at the time of the intervention to be taking place. Second, it was tasked with fulfilling the provision of international law for emergency aid, addressed to all nations. And finally, we can refer to the undisputed democratic and rule-of-law character of all the members of the acting military coalition (Habermas 2003a, 366).

That NATO’s member states are all democratic does not, however, negate the paternalism of the action and certainly does not lend support to the creation of a general norm of armed humanitarian intervention without the authorization of the Security Council (Habermas 1999).

Others emphasized the legitimacy of NATO’s campaign as a last resort<sup>29</sup> consistent with just war principles (Bono 2004, 223). Some commentators preferred to justify NATO’s intervention in more conventional terms by emphasizing its goal of protecting against threats to international peace and security that would have resulted from spill-over effects (Bono 2004, 223).

In practice, NATO’s intervention in Kosovo was legitimated in different ways. On the date that NATO commenced its air strikes against the FRY (March 24, 1999), the

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Daalder and Michael E. O’Hanlon. 2000. *Winning Ugly: NATO’s War to Save Kosovo* (Washington, D.C.: Brookings Institution).

U.S. emphasized America's security interests in preventing a wider war in addition to humanitarian concerns. The U.K. clearly emphasized the humanitarian dimension of the intervention: to protect Kosovar Albanian citizens (ICISS 2001b, 112). The U.S., Canada and France maintained that the FRY was in clear violation of its legal obligations as established in Security Council resolutions 1199 and 1203 (ICISS 2001b, 112). On this justification, enforcement measures, whether taken under the auspices of a UN mission or a delegated mission to a coalition of the willing such as NATO, were considered legitimate.

Equally, many critics have rejected the claim that NATO's intervention was justified on moral grounds. Indeed, many refer to the fact that NATO's bombing campaign initially exacerbated humanitarian problems. Prior to the bombing, the United Nations High Commissioner for Refugees (UNHCR) estimated that 410,000 ethnic Albanians were internally displaced because of Serbian operations and an additional 90,000 were displaced across the border (ICISS 2001b, 113). After the bombing started, these numbers climbed to 750,000 and 250,000 respectively (ICISS 2001b, 113). Moreover, NATO's targets expanded over the 78-day bombing period from strictly military targets to the eventual bombing of Belgrade itself (ICISS 2001b, 113). Other critics argue that NATO's intentions were geo-strategic and self-interested; the situation in Kosovo had not reached a level of grave humanitarian proportions that would have warranted a military intervention (Bono 2004, 224). Of the Security Council members, Russia, China, Belarus and India rejected NATO's intervention as a violation of the UN Charter (ICISS 2001b, 112). Still others dispute the claim that NATO's decision to

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<sup>29</sup> For example, Tom Farer has argued that NATO's intervention was legitimate because it was an action of last resort aimed at ending gross violations of human rights (2003, 68).

commence air strikes was a decision of last resort (Bono 2004, 224). Both supporters and detractors alike criticize the unwillingness of NATO to mount a ground campaign that would have likely averted the mass exodus of refugees and the creation of even more internally displaced persons (ICISS 2001b, 114).

The debates and narratives that surrounded NATO's intervention in Kosovo centred on the question of whether a norm of military intervention for human protection purposes had emerged both in the practice and opinions of states. Although the legitimacy of the intervention was still sought in legal justifications for the use of force, an independently legitimate moral justification for a right of humanitarian intervention had clearly emerged. States that violated shared standards of human dignity could no longer rely on the protection of an absolute conception of state sovereignty. Rather, state sovereignty was increasingly framed as a function of membership in an international society of states, wherein each was mutually concerned with the security and well-being of the other.

NATO's military intervention in Kosovo is also significant from an international criminal jurisprudence standpoint. An *ad hoc* military tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY), was established in May 1999 to prosecute the war crimes, crimes against humanity and genocide committed by former President Slobodan Milosevic and other senior FRY officials.<sup>30</sup> On the one hand, this

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<sup>30</sup>The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by Security Council Resolution 827 on 25 May 1993. It was created as a response to the threat to international peace and security posed by serious violations of international humanitarian law committed in the former Yugoslavia since 1991. To this end, the ICTY was given the mandate to prosecute those individuals responsible for serious violations of international humanitarian law, bring justice to the victims, deter further crimes and contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia. The tribunal has the authority to prosecute and try four offences: grave breaches of the 1949 Geneva Conventions; violations of the laws or customs of war; genocide; and crimes against humanity. Some of the tribunal's notable indictments include those of Radovan Karadzic, the President of the

trend of linking international criminal prosecution and military intervention for humanitarian purposes threatens to usher in something akin to Schmitt's moralization of politics. Schmitt's concern with the criminalization of war in the context of a moralization of politics applies to the degrading effects that military humanitarian intervention is perceived to have on the formal political equality of enemies. Moreover, the legitimacy of a conflict is determined on a discriminatory basis of humanitarian or anti-humanitarian intent. We will recall that Schmitt's understanding of 'criminal' referred not only to the politicization of a fundamentally apolitical category—'humanity'—but also to one who is subject to punishment (Schmitt 2003, 143). In the first instance, a criminal is treated as an 'outlaw of humanity'—one who is deemed outside the realm of civil treatment and therefore, subject to total annihilation. Schmitt fears that all moderation in war is removed when one's political adversary is treated as anything other than a *justus hostis*.

In the second and related instance, the treatment of one's enemy as a moral inferior opens the possibility of punishing a political actor by means of criminal prosecution for acts of war deemed 'aggressive.' A discriminatory concept of war is created by the distinction between a legal and illegal war. 'Aggressive' wars are illegal while wars waged in self-defence or with Security Council authorization are legal. Schmitt's insistence on formal, political concepts of war and the enemy is also premised on an international system characterized by a balance of power politics and the rule of Classical European international law—two features of international political life that have

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Republika Srpska and the Head of the Serbian Democratic Party (SDS); and Ratko Mladic, Commander of the Bosnian Serb Army. These public officials were charged with war crimes, crimes against humanity and genocide.

been significantly challenged by the increasing prevalence of military interventions for human protection purposes.

Yet, Schmitt's concept of sovereignty is still relevant to our understanding of a 'right of humanitarian intervention.' We will recall that Schmitt understood sovereignty as the ability of a state authority to decide politically in the exception. The humanitarian interventions in Northern Iraq and Kosovo were both classified as 'emergency' situations and justified in extra-legal terms by the intervening states. That the exception was engaged in NATO's intervention is affirmed by former U.S. Secretary of State Madeleine Albright: "[NATO's intervention in Kosovo] was a unique situation *sui generis* in the region of the Balkans" (cited in ICISS 2001b, 112). British Prime Minister, Tony Blair, similarly asserted: "There is no general doctrine of humanitarian necessity in international law" (cited in ICISS 2001b, 114).

Our assessment of NATO's intervention in Kosovo takes an interesting turn in the context of Schmitt's exception. It could be contended that the sovereign member states of NATO decided to act politically in a case that was arguably extra-legal. There is no positive international law governing military interventions undertaken to prevent or halt gross human rights violations. Many commentators would, however, agree that there is a large body of customary international law that prohibits the violation of fundamental human rights. Therefore, some enforcement measure is warranted. Whether it can, however, be claimed that the member-states of NATO collectively decided to exercise their sovereign status to use force in an extra-legal situation and thereby, act within their political rights on Schmitt's view is questionable.

The validity of this ‘Schmittian’ argument would require showing that FRY President Slobodan Milosevic did not also act within his sovereign political right to annex Kosovo. Furthermore, it would have to be argued that Kosovo did not similarly have the equal sovereign status to engage in war with the FRY. There is also the question of whether NATO treated its enemy justly. NATO’s bombing campaign from 15,000 ft. renders dubious the claim that the FRY was treated as a *justus hostis*. Moreover, Serbia’s perpetration of human rights atrocities on the ethnic Albanian population clearly indicates that Kosovo, if it can be considered a sovereign authority on Schmitt’s definition, was not treated as a formally equal, political actor with a symmetric right to wage war. In light of these outstanding questions, NATO’s intervention in Kosovo can still be considered a moralization of politics on Schmitt’s view even if the action is interpreted as an exception.

On the other hand, the growing connection between international criminal prosecution and military intervention for human protection purposes may point towards a Habermasian ‘mediation’ of a moralization of politics. According to Habermas, the first decisive step towards a constitutionalization of international relations is the reflection of moral concerns through the prism of law. Habermas observed: “World citizenship would not mean that violations of basic human rights are evaluated and fought in an unmediated way according to philosophical *moral* standards, but instead are prosecuted as criminal acts within a state-ordained *legal* order” (1999, 268). The ICTY, ICTR and ICC are progressive in Habermas’s sense precisely because each administers international justice through supranational *and* national courts. One of the great achievements of the ICTY and ICTR is their contribution to a fortified international rule of law through the

reconstruction of national judicial systems. Moreover, the principle of complementarity is affirmed as a fundamental pillar of the Rome Statute of the ICC.<sup>31</sup>

It is precisely these kinds of interaction between political processes at the national, international and global levels that define a world domestic policy. Habermas's emphasis on interdependent, mutually reinforcing political processes at all levels of governance within a global framework of a common political culture points to a shared conception of justice that depends not on a common morality but on common processes of public reasoning. The use of public reason within postnational and global institutional deliberative processes is also informed by the opinions of global civil society. In this respect, the formal and informal tracks of democratic will- and opinion-formation characteristic of national deliberative democracies are approximated at the global-level.

Furthermore, the ICC's focus on victim's rights affirms the importance not only of retributive but restorative justice to the rebuilding of a nation. In this respect, the ICC may be indicative of a 'higher-level of institutionalization of cosmopolitan law' and therefore, a step towards the 'mediation' of a moralization of politics. The inclusion of individual voices and non-state actors in otherwise strictly formal institutional processes provides one example of how informal opinion-formation interacts with and filters through the various levels of governance to further democratize the global sphere.

Habermas envisions a world domestic policy supported by international negotiating systems operating on a relational and fluid conception of sovereignty. The meaning of external sovereignty is not determined prior to interstate relations. Just as pre-political individuals have no intelligible rights prior to their socialization (Habermas

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<sup>31</sup> The complementarity principle asserts that the ICC shall be complementary to national criminal jurisdictions.

1996b, 772), states in an international state of nature can have no intelligible rights apart from their relationships with one another. The notion of a state's entitlement is intelligible only if there is a duty on the part of another state to fulfil that right. If the meaning of sovereignty is determined relationally, then it cannot be strictly mobilized to provide a state with absolute insulation from the interference of other rights-holders. The full meaning of a relational conception of sovereignty is realized when the common sources of solidarity among states in a pluralistic international sphere are emphasized. For Habermas, the transcendence of state territorial boundaries and cultural differences is achieved through intersubjective forms of communication and shared processes of public reasoning. These sources of informal opinion-formation interact with and influence formal political processes at various levels of governance to democratize national, international and global decision-making processes. On a relational conception of sovereignty, a state's authority is asserted in the obligations it shares with other members of the international community and in the duties it owes to a 'global civil society.' State sovereignty is further legitimated through the constant interaction of international negotiating systems at the global-level.

As NATO's intervention in Kosovo, however, amply exemplifies, a politics of human rights that includes the possibility of using interventionary force remains vulnerable to the dangers of an unmediated moralization of politics (Habermas 1999: 267). The violations of human rights alone are not sufficient conditions for armed intervention precisely because the legitimacy of the action will also be decided in terms of its consequences. Here, the dilemma of humanitarian intervention is expressed in terms of a gap between legitimacy and effectiveness. Legitimate claims to military

intervention for human protection purposes may fall short of their projected outcomes as was the case in Srebrenica<sup>32</sup> (Habermas 1999: 269). Alternatively, illegitimate interventions may yield desirable humanitarian outcomes. NATO's intervention in Kosovo is a prime example of an illegitimate but effective intervention (Habermas 1999: 269). The gap between legitimacy and effectiveness that accompanies all claims to legitimate armed humanitarian intervention in varying degrees is indicative of the "low-level of the institutionalization of cosmopolitan law" (Habermas 1999: 269).

In spite of the numerous advances that have been made towards the realization of cosmopolitan law and order, Habermas's constitutionalization of an international state of nature is far from complete. Habermas, himself has acknowledged the "unfinished character of global civil society" (1999, 271). At its most fundamental level, a constitutionalization of international relations requires basic institutions capable of actualizing an established procedure for resolving disputes: a functioning Security Council; an international criminal court with the power to make binding decisions; and a "second-level" of representation for global citizens that supplements the General Assembly of governmental representatives (Habermas 1999, 268). The current state of international relations has yet to meet these most basic requirements:

Since this reform of the United Nations still remains out of reach, drawing attention to the difference between legalization and moralization certainly remains a correct retort, but one that nonetheless cuts both ways. For as long as human rights are institutionalized only weakly on the global scale, it remains possible for the borders between law and morals to become blurred [...] (Habermas 1999: 268).

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<sup>32</sup> The massacre of 7000 Muslim men in the Bosnian town of Srebrenica, a United Nations designated safe area, by Bosnian Serbs in 1995 is a prime example of the disparity between Security Council rhetoric and resolve (ICISS 2001b: 93). Dutch peacekeepers were lightly armed and could not protect themselves or ensure the safety of innocent civilians. The traditional peacekeeping philosophy of neutrality and non-violence proved wholly unsuited to the conflict in Bosnia (ICISS 2001b, 181).

For this reason, the distinction between legalization and moralization failed to register in NATO's justification for intervention. Habermas argues: "Because the Security Council is blocked from acting effectively, it is only possible for NATO to appeal to the moral validity of international law—and to norms for which no effective and universally recognized instances assure their application and enforcement" (1999, 269). The paradox of NATO's intervention in Kosovo is that its use of force was illegitimately-authorized but effective in its outcomes (Habermas 1999: 269). For Habermas, NATO's intervention was paradoxical but necessary in a period of transition from an international rule of classical international law to a rule of the 'law of global citizens.' In an international sphere ordered by a 'low level of institutionalization of cosmopolitan law,' state actors are forced to "act as though there were already a fully institutionalized global civil society, the very promotion of which is the intention of the action" (Habermas 1999: 270-71).

NATO's war in Kosovo, as Habermas calls it, may be considered legitimate if we understand the "precarious transition from classical power politics to a global civil society as a learning process" (Habermas 1999, 271). Habermas elaborates on this point:

When nothing else is possible, neighbouring democratic states should be allowed to rush to provide emergency help as legitimated by international law. But precisely the unfinished character of global civil society calls out for a special sort of sensitivity. Existing institutions and procedures are the only available controls over the fallible judgments of a party aspiring to act on behalf of the common interest (1999, 271).

In the absence of a higher-level of institutionalization of cosmopolitan law, state actors must be able to use existing institutions and procedures to mediate their claims to legitimate armed humanitarian intervention with an awareness of the partisan quality of every self-authorized use of force. Habermas acknowledges the paternalistic nature of

NATO's campaign in Kosovo but argues that it may be an inevitable part of the growing pains that international society must undergo to reach a higher-level of institutionalization of cosmopolitan law. Habermas explains:

When [the members of NATO] authorize themselves to act militarily, even nineteen indisputably democratic states remain partisan. They are making use of interpretive and decision-making powers to which only independent institutions would be entitled if things were already properly in order today; to that extent their actions are paternalistic. There are good moral reasons for this. Whoever acts with an awareness of the inevitability of a transitory paternalism, however, is also aware that the force he exercises still lacks the quality of a compulsory legal action legitimated by a democratic civil society of global citizens. Moral norms appealing to our better judgment may not be enforced in the same fashion as established legal norms (1999: 270).

NATO's intervention in Kosovo is part of the transition from a rule of international law to a rule of cosmopolitan law that can guide and direct international policies through the medium of legality.

In stark contrast to NATO's intervention in Kosovo, the failure of the international community to intervene in Rwanda serves as a powerful reminder that international relations have not reached a level of constitutionalization sufficient to compel state action as a legal and not merely moral response. The lack of international political will and resolve to intervene in Rwanda in spite of the genocide is demonstrated by the Security Council's decision to reduce the United Nations Assistance Mission for Rwanda (UNAMIR)'s force to 270 in the middle of the crisis<sup>33</sup> (ICISS 2001b, 98). The ICISS observed: "By withdrawing the [UNAMIR] force as the bloodbath was gathering

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<sup>33</sup> UNSCR 912 adjusted the mandate of UNAMIR in light of the deteriorating conditions in Rwanda. The Security Council authorized a force-level consistent with the second alternative presented in the Secretary-General's report of April 20, 1994. Alternative II restricts the mandate of this small group to facilitating a ceasefire agreement between the two warring parties. The team would be comprised of approximately 270 members: infantry company, military observers and civilian staff. The remainder of the UNAMIR personnel would be withdrawn (Special Report of the Secretary-General on the UN Assistance Mission for Rwanda, 20 April 1994, SC/1994/470).

speed, the UN sent an unmistakable message to the genocidal forces that there was little or no international resolve to stand in their way” (2001b, 98).

The unwillingness of the international community to intervene in Rwanda can be partially attributed to the ‘Somalia syndrome’ – the growing reluctance of Western countries to sustain military casualties in distant lands for fundamentally humanitarian objectives. In Somalia, the costs of humanitarian intervention were clearly captured by the image of a dead American soldier’s body as it was dragged through the streets of Mogadishu. As domestic political support for humanitarian interventions subsequently waned, the degree to which strictly legal and moral reasons could actually compel decisive military action also diminished.

Furthermore, the failure of Security Council members and UN officials to describe the massacre of Tutsi minorities and Hutu moderates as “genocide” effectively absolved them of any onerous legal obligations they may have had to prosecute or extradite suspected war criminals under the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (ICISS 2001b, 100). Other commentators point to a more insidious reason for the international community’s failure to react. Lieutenant-General Romeo Dallaire, the commanding officer of the UNAMIR mission, recalled one assessment of the events in Rwanda: “We will recommend to our government not to intervene as the risks are high and all that is here are humans” (cited in Dallaire 2004, 6). The Rwandan genocide was described as a “domestic political problem” and a “barbarous act of savagery” (Dallaire 2004, 6). By stripping the Rwandan people of all of their

political rights and reducing them to a state of abstract human nakedness,<sup>34</sup> the crisis was ‘de-humanized’ and effectively removed from the purview of Western states. In response, the Organization of African Unity (now the African Union (AU)) and various aid agencies accused the UN Security Council of applying different standards in Africa than in Europe (ICISS 2001b, 98). Lt-Gen. Dallaire articulated the deep-seated racism that may have guided the international community’s refusal to intervene:

What I have come to realize as the root of it all, however, is the fundamental indifference of the world community to the plight of seven to eight million black Africans in a tiny country that had no strategic or resource value to any world power. An overpopulated little country that turned in on itself and destroyed its own people, as the world watched and yet could not manage to find the political will to intervene (2004, 6).

The political decision of the international community not to intervene effectively relegated the Rwandan genocide to ‘no-where’—a space outside law, morality and politics.

Morally, the members of the international community deliberately chose to turn a blind eye to the atrocities that they knew were occurring in Rwanda. Legally, the international community refused to categorize the mass killing as genocide and thereby, evaded any legal duty of intervention they may have had. Politically, the absence of sustained domestic pressure on Western governments to take responsible action in Rwanda translated into one of the worst acts of omission in the history of international relations. In words and in deeds, the international community firmly rejected any connection between their moral, legal and political responsibilities. The constitutionalization of international relations has yet to reach a level where international

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<sup>34</sup> Hannah Arendt articulated the dangers of reducing human rights to their most essential features in *The Origins of Totalitarianism* (1958). Human rights that are not attached to any system of law or political community threaten to reduce a people to ‘abstract nakedness.’

human rights claims are enforced as legal rights first and foremost. The weak enforcement of international human rights laws confirms that human rights are still predominantly conceived as moral rights.

Human rights are treated as moral rights rather than legal rights in the international sphere for many systemic reasons. The United Nations is deficient as an enforcer of peace and security in international relations. The financial and military resources for UN-interventions are still controlled by individual member states and consequently, rely too heavily on their good will to protect human rights (Habermas 2003b). The selectivity with which the Security Council decides the disasters that constitute legitimate threats to international peace and security suggests that national interests trump global concerns (Habermas 2003b). Finally, the veto-power of the Security Council's Permanent-Five prevents its effective enforcement of international human rights laws (Habermas 2003b). For these reasons, state sovereignty continues to be a dominant organizing principle in international relations. Consequently, a definition of sovereignty in absolute terms still threatens the transition from a rule of international law to a rule of cosmopolitan law. An absolute conception of state sovereignty is implicated in a moralization of politics on either Schmitt's or Habermas's views. On Schmitt's view, a reassertion of absolute state sovereignty in protection of one's own borders creates the conditions for the resolution of a moralization of politics. On Habermas's view, an absolute conception of state sovereignty impedes the 'mediation' of a moralization of politics through cosmopolitan law.

## A MORALIZATION OF POLITICS IN A POST-9/11 WORLD

An understanding of humanitarian intervention through the lens of a moralization of politics continues to be important in a post-9/11 world. The American administration's justification for the Iraq war (March 2003) raises the spectre of a moralization of politics in a particularly stark way. According to the Bush administration, the primary issue of justification surrounded the legal question of whether Saddam Hussein's regime had failed to comply with its disarmament obligations as mandated by UN resolutions dating back to the first Iraq war in 1991. Yet, the humanitarian justification for war was equally present. In several Presidential addresses to the American people over the past two years, the message of freeing the Iraqi people from the tyrannical rule of its own government has been consistent. The official policy statements on the Iraq war reintroduce the language of morality to the discourse of international peace and security in precisely the way that Schmitt had feared. In his remarks to the United Nations General Assembly one-year after the September 11 attacks, President Bush declared:

Above all, our principles and our security are challenged today by outlaw groups and regimes that accept no law of morality and have no limit to their violent ambitions. In the attacks on America a year ago, we saw the destructive intentions of our enemies. This threat hides within many nations, including my own. In cells and camps, terrorists are plotting further destruction, and building new bases for their war against civilization. And our greatest fear is that terrorists will find a shortcut to their mad ambitions when an outlaw regime supplies them with the technologies to kill on a massive scale (Bush 2002).

This short passage is striking precisely because it replicates many of the key features of Schmitt's moralization of politics thesis. Politics and morality are clearly linked as goals to be defended internationally. Ostensible 'outlaws of civilization' threaten our

principles and our security. The enemy is treated not as a *justus hostis* but as an unjust criminal—an ‘outlaw of humanity’ that respects no law of morality. Moreover, just cause is reasserted as the main determinant of a war’s justice. Bush’s references to the “violent and mad ambitions” and “destructive intentions” of his political adversary strip the enemy of any formal equality. Moreover, America’s fear of a future terrorist attack on its soil is covertly asserted as the overriding factor in its decision to use force in Iraq; respect for a rule of international law that includes a dedication to shared standards of human dignity and collective security effectively becomes a secondary motivational factor. The conditions for a moralization of politics are created: ‘civilization’ is a political category capable of justifying war; war discriminates between just and unjust causes for war and enemies.

That the war in Iraq was justified on the bases of dubious legal arguments and proceeded without Security Council authorization suggest that international relations have yet to reach a level of constitutionalization sufficient to preclude unilateral uses of force. The primary legal justifications offered in favour of a use of force in Iraq can be broadly characterized as: 1) a right to enforce Security Council resolutions requiring disarmament; 2) a right of self-defence; and 3) a right of defence of the international community (O’Connell 2003). The American and British administrations premised the first legal claim on a particular understanding on what constitutes ‘material breaches’ of Iraq’s disarmament obligations. According to the American and British interpretations of UNSCR 1441 (November 2002), Iraq’s proliferation of weapons of mass destruction (WMD) constituted a ‘material breach’ of its obligations under previous Security Council resolutions and posed a threat to international peace and security (United Kingdom.

House of Commons 2003, 03/22 p.3). As such, Iraq 'faced serious consequences' under Security Council resolution 1441. Although these 'serious consequences' were not specified, the U.S. and U.K. interpreted its meaning to include the use of force. Specifically, it was argued that Iraq's 'material breach' of its disarmament obligations effectively nullified the cease-fire conditions set forth in UNSCR 687 (April 3, 1991). Iraq's failure to eliminate its WMD and ballistic missile capabilities effectively returned the parties to the pre-ceasefire conditions stipulated in UNSCR 678 (November 29, 1990) (O'Connell 2003). UNSCR 678 authorized the use of "all necessary means" to restore international peace and security and affirmed the attacked party's right of self-defence consistent with Article 51 of the UN Charter.

The validity of this legal reasoning is hotly contested. Mary Ellen O'Connell argues that Security Council resolutions cannot be materially breached in the same way as international treaties because they are not agreements (O'Connell 2003). Rather, UN Security Council resolutions are mandated. A 'material breach' is only intelligible in the context of a contract or agreement negotiated and consented to by all the relevant parties. As a mandate, the cease-fire conditions set forth in UNSCR 687 (1991) could not have lapsed and reinstated pre-cease-fire conditions in March 2003. Furthermore, it is highly unlikely that the meaning of "all necessary means" contained in UNSCR 678 included the forcible change of Iraq's regime by the Americans in 2003 (O'Connell 2003). Moreover, Security Council resolutions 687 and 678 were in direct response to Iraq's invasion of Kuwait, a situation that no longer threatens the region (O'Connell 2003).

With respect to the second legal justification advanced by the U.S. and the U.K., it was not clear that the threat Iraq posed to the U.S. was "imminent" or "in progress."

The connection between Iraq and Al-Qaeda was never clearly and incontrovertibly established. If the U.S. truly believed that Saddam Hussein's regime posed a threat to the safety of the international community then the concern should have been formally brought to the Security Council. Moreover, pre-emptive uses of military force in international law are plainly prohibited in Article 2(4) of the UN Charter. The dubiousness of American and British claims to a legal use of force in Iraq is also confirmed by the failure of UN weapons inspectors to uncover any weapons of mass destruction. Nevertheless, President Bush remains resolute in his claim to have waged a 'just' war:

Although we have not found stockpiles of weapons of mass destruction, we were right to go into Iraq. We removed a declared enemy of America, who had the capability of producing weapons of mass murder, and could have passed that capability to terrorists bent on acquiring them. In the world after September the 11<sup>th</sup>, that was a risk we could not afford to take (Bush 2004).

In a post-9/11 world, the threat of a moralization of politics is great because any and all security threats can be brought under the umbrella of the American "War on Terror."

Habermas argues that the intensification of the Bush Doctrine of pre-emptive self-defence<sup>35</sup> by the addition of a "war against terrorism" offers "no new legitimacy" for the American pursuit of hegemonic unilateralism (2003a, 368). The Bush doctrine does not meet the new burdens of proof for an argument in favour of a pre-emptive or preventive use of military force against the threat of terrorism (Habermas 2003a, 367-8). As such, an appeal to the alleged 'good' consequences of the American invasion, symbolized by

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<sup>35</sup> In the National Security Strategy of the United States of America (2002), the Bush Doctrine of pre-emptive self-defence is presented: "The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if

the image of a toppled Saddam from his pedestal, remains the sole argument for an illegal intervention (Habermas 2003a, 368).

For Habermas, there are a number of reasons why this justification for the war in Iraq is grossly inadequate. First, the complex interdependencies of a global society bar any claims to centralized control under a single hegemon (Habermas 2003a, 368). Moreover, a politics of hegemonic unilateralism threatens to undermine those very liberal values, the defence and promotion of which, are the purported aims of the American intervention in Iraq (Habermas 2003a, 368). American soldiers have tortured the Iraqi and Afghani detainees imprisoned at Abu Ghraib and Guantanamo Bay respectively. Moreover, basic national civil liberties are threatened by the United States Patriot Act.<sup>36</sup> Most important, American attempts at imposing their political form of life and their democratic culture on another society are imperialistic (Habermas 2003a, 369). In this respect, the crucial issue of dissent not only in the context of the Iraq war but within a broader threat of an unmediated moralization of politics becomes “whether the justification through international law can and should be replaced by the unilateral world-ordering politics of a self-appointed hegemon” (Habermas 2003a, 368).

Habermas rejects a ‘politics of hegemonic unilateralism’ because the constitutionalization of international relations cannot be achieved through the external imposition of democracy on individual nation-states. Rather, the principle of democracy at the foundation of any national system of rights must be given concrete meaning

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uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.”

<sup>36</sup> The United States Patriot Act (2001) was passed by the United States government in an effort to deter and punish terrorist acts in the United States and around the world. The act threatens to infringe on the most basic civil liberties of the American people by expanding the government’s investigative powers to permit the FBI to demand health, library, and tax records in intelligence investigations without judicial approval.

“within normative orders and practices of particular forms of cultural life” (Habermas 2003a, 369). An allegiance to democratic principles must develop organically within constitutionalized states before a common political culture can be given effective expression at the postnational European-level and approached at the global-level. Only then can an unmediated moralization of politics be effectively resisted.

The events of September 11, 2001 have simultaneously created the conditions in which a moralization of politics is more difficult to detect but even more necessary to address. In the next chapter, we will examine how *The Responsibility to Protect* contributes to a discourse of humanitarian intervention and assess its relevance in a post-9/11 world.

## CHAPTER 4

### RECONSTRUCTING THE DILEMMA OF HUMANITARIAN INTERVENTION: “THE RESPONSIBILITY TO PROTECT”

The heightened threat of a moralization of politics in a post-9/11 world impedes the development of a norm of humanitarian intervention on the basis of a responsibility to protect. This is not the least because the report's terms can be instrumentalized as part of the 'moralizing' rhetoric of states seeking to exert their power by means of force. This very threat has already materialized in American justifications for war in Iraq. It is the purpose of this chapter to assess whether and how the framework of a 'responsibility to protect' can be mobilized as part of a project to resist attempts at a moralization of politics on either Schmitt's or Habermas's understandings. First, we will briefly review the main tenets of the International Commission on Intervention and State Sovereignty (ICISS)'s report, *The Responsibility to Protect* and sketch its contribution to the discourse of humanitarian intervention. Second, we will distil the constellation of law, morality and politics that the report constructs and assess its adequacy as a response to a moralization of politics. Using the conceptual tools outlined in the first two chapters, it will be argued that a shift in the discourse of humanitarian intervention from a 'right to intervene' to a 'responsibility to protect' simultaneously avoids some of the conditions that give rise to a(n) (unmediated) moralization of politics while replicating others.

### RECENT DEVELOPMENTS IN THE DISCOURSE OF HUMANITARIAN INTERVENTION: “THE RESPONSIBILITY TO PROTECT”

As the historical evolution of international opinion and state practice suggests, the notion of a 'right to intervene' for the protection of human rights has emerged but there is

little consensus on what it means. To this end, the ICISS released its seminal report, *The Responsibility to Protect* in December 2001. In it, the principles and practice of military intervention for human protection purposes are articulated. Specifically, the report seeks to answer the challenge issued by UN Secretary-General Kofi Annan:

[...][I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity? (cited in ICISS 2001a, VII)

From a policy perspective, the ICISS was tasked with resolving the gap between two fundamental pillars of international law and society: a respect for the principle of state sovereignty and the protection of shared standards of human dignity. On a practical and theoretical level, this is the same dilemma with which political theorists and states contemplating a ‘right of humanitarian intervention’ have been trying to grapple since the sixteenth century. The practice of military intervention for humanitarian purposes in the 1990s tended to resolve the dilemma in favour of one principle. References to human rights as “trumps” over the principle of state sovereignty implied the fundamental irreconcilability of human rights protection with a respect for state sovereignty.

*The Responsibility to Protect*’s novel contribution to the discourse of humanitarian intervention is found in its dissolution of the ‘sovereignty versus intervention’ dilemma and its replacement of a ‘right to intervene’ with a ‘responsibility to protect.’ Indeed, the responsibility to protect is gradually becoming the dominant paradigm for conceiving and discussing issues of humanitarian intervention. References to a responsibility to protect can be found in the recent academic literature on humanitarian intervention, the foreign policy mandates of many industrialized countries

in the West and in the UN Secretary-General's Millennium Report (2005). UN Secretary-General Annan affirms a collective responsibility to protect and urges its international implementation: "I believe that we must embrace the responsibility to protect and when necessary, we must act on it" (2005, 135). The language of a responsibility to protect has been embraced in modern international parlance but the ever-present danger of a moralization of politics cautions against its unconditional and unconsidered adoption.

To date, a focused and systematic analysis of the main concepts and tenets proposed by *The Responsibility to Protect* has yet to be conducted. In the following section, I will attempt to begin such an exercise by unpacking the report's foundational concept of 'sovereignty as responsibility.' Next, the report's principles of military intervention will be assessed with a view to determining their implications for a moralization of politics. In particular, I will approach this analysis with a view to exposing the constellation of law, morality and politics that the report constructs. Finally, I will make some preliminary observations that begin to address the questions of whether and how a responsibility to protect can successfully meet one of the primary challenges to humanitarian intervention: a(n) (unmediated) moralization of politics.

#### CONSTRUCTING A "RESPONSIBILITY TO PROTECT"

*The Responsibility to Protect* attempts to fill the 'lacuna of humanitarian intervention in international law and practice.'<sup>37</sup> Many of the military interventions conducted in the post-Cold War period were for human protection purposes but they were

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<sup>37</sup>Simon Chesterman has argued that a 'right of humanitarian intervention' has not been found in international law but within a "lacuna in the enforceable content of international law" (2001, 2).

not consistently justified. The purpose of the ICISS was to “forge unity” around the basic questions of principle and process involved in a ‘right of humanitarian intervention.’ “If there is a right of intervention, how and when should it be exercised and under whose authority?”(ICISS 2001a, VII). After a year of consultations and discussions with many state and non-state representatives around the world, the ICISS emerged with a new principle: the ‘responsibility to protect.’ States, as members of the international community, do not have a ‘right of humanitarian intervention’ but more accurately, a ‘responsibility to protect’ when sovereign states are unwilling or unable to protect their own citizens from avoidable catastrophe: mass murder, rape and starvation (ICISS 2001a, VIII). The responsibility to protect is first and foremost the responsibility of a sovereign state to protect the people within its borders. When that sovereign state is unwilling or unable to halt or avert the suffering of its population, whether that harm is the result of an internal war, insurgency, repression or state failure, the responsibility to protect falls to the remaining sovereign members of the international community.

Put differently, the logic of a responsibility to protect presumes the sovereign equality of states and the principle of non-intervention in international relations. When a state fails to meet the commitments constitutive of its internal sovereign status, its external sovereignty, understood as political independence and territorial integrity, also becomes temporarily suspended. In this moral, legal and political vacuum, an analogous social contract between sovereign states as members of the international community is imagined. The international community has a residual responsibility to protect the human rights of suffering populations when their own sovereign governments fail to honour the social contract it has with them. This move towards the “internationalization

of the human conscience” finds support in state practice, international law and a relational conception of sovereignty that emphasizes state rights in conjunction with state obligations.

The responsibility to protect actually comprises three responsibilities: the ‘responsibility to prevent,’ the ‘responsibility to react’ and the ‘responsibility to rebuild.’ The ‘responsibility to prevent’ requires that intervening states address the root causes and conditions that create instability in a ‘failed’ state. By eradicating the sources of threat to a population, a state can limit the instances in which foreign military intervention is necessitated. The ‘responsibility to rebuild’ follows a similar logic by requiring that intervening states assist in the recovery, reconstruction and reconciliation of a state with a full understanding of the situation’s causes. The preventative orientations of both responsibilities to prevent and rebuild support the report’s claim that “prevention is the single most important dimension of the responsibility to protect” (ICISS 2001a, XI). Indeed, one of the main priorities of *The Responsibility to Protect* is to weaken the strong and controversial association between a practice of humanitarian intervention and the use of force. The ICISS’s effort to distance a responsibility to protect from military intervention tacitly recognizes this aspect of humanitarian intervention as the most vulnerable to state abuse. For this reason, it is even more important to assess whether and how the military principles of a responsibility to protect safeguard against this kind of abuse.

At the most cursory level of analysis, *The Responsibility to Protect* shifts the terms of the humanitarian intervention discourse away from a ‘right to intervene’ and toward a ‘responsibility to protect.’ The language of a responsibility to protect

significantly improves upon the de-legitimizing connotations of a ‘right to intervene.’ First, the language of a ‘right to intervene’ focuses on the “claims, rights and prerogatives” of the potentially intervening states rather than those peoples in need of support (ICISS 2001a, 16). Second, claims to a ‘right of intervention’ in the past decade of state practice have been narrowly associated with a state’s reaction to a crisis rather than on preventative or reconstructive activities (ICISS 2001a, 16). Last, the claim that an intervention is ‘humanitarian’ tends to pre-legitimate a use of force and automatically de-legitimate a state’s inaction as ‘anti-humanitarian’ (ICISS 2001a, 16).

In contrast, the language of a responsibility to protect purports to focus on the populations in need of support and includes the responsibilities of intervening states to prevent, react and rebuild (ICISS 2001a, 17). In this way, the focus is shifted from the rights of intervening states to the rights of individuals as ‘citizens’ of the world. A focus on the rights of suffering populations engages the symmetric duties of sovereign states to uphold those rights. The burden of legitimate justification remains with the intervening state. An intervening state must successfully show that it has met the strict threshold conditions for military action on the basis of a responsibility to protect: a large-scale loss of life or large-scale ethnic cleansing must be threatened or in progress. The window of opportunity for legitimating a use of force consistent with a responsibility to react is, therefore, ostensibly narrowed.

Above all of these improvements is the report’s dissolution of the ‘sovereignty versus intervention’ dilemma in favour of ‘sovereignty as responsibility.’ Sovereignty as responsibility asserts: “State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself” (ICISS 2001a, XI).

With the presumption in favour of an absolute conception of external sovereignty as non-intervention yields to an international responsibility to protect when a state is unwilling or unable to halt or avert the suffering of its population (ICISS 2001a, XI). In other words, a state authority's right to non-intervention in its domestic affairs is contingent upon its fulfilment of duties owed to its own people. The concept of sovereignty as responsibility is thereby premised on the inextricable interconnection between a state's rights and its duties.

By focusing on this crucial interrelationship between right and duty, the concept of sovereignty as responsibility engages the more general tension between national autonomy and international co-existence. On the one hand, sovereignty means non-interference; the principle of national autonomy delimits a space in which state governments have full authority over domestic matters. On the other hand, sovereignty gains meaning in the context of states as members of an international community. As such, states are subject to the constraints imposed by multilateral treaties and international institutions (Cronin 2002, 148). The tension is, however, dissolved if a state's membership in the international community is also understood as a voluntary decision—a decision made possible in virtue of a state's sovereign independence. Membership in the United Nations not only signifies a state's voluntary acceptance of the responsibilities of international membership but its recognition of other member states as responsible sovereigns that have equally exercised their internal sovereign statuses.

Francis Deng affirms the mutual interdependence between internal and external sovereignty: "The sovereign state's responsibility and accountability to both domestic and external constituencies must be affirmed as interconnected principles of the national

and international order” (1996, xvii). If we understand the relationship between internal and external sovereignty in mutually-reinforcing terms, then sovereignty comes to refer “not merely to the right to be undisturbed from without, but the responsibility to perform the tasks expected of an effective government” (Deng 1996, xvii). Internal and external stability depend on the ability of a state authority to govern effectively both inside and outside of its borders. When a state’s government fails in this capacity, a residual responsibility resides with the international community to intervene and restore a state’s effective government (ICISS 2001a, 17). A state contemplating military intervention in response to gross human rights violations no longer chooses between a respect for absolute external state sovereignty and the protection of human rights. Rather, states must act responsibly in ‘conscience-shocking’ situations in virtue of their sovereign statuses. A concept of ‘responsible’ sovereignty implies a dual responsibility: responsible sovereign states have a responsibility to protect their own populations and foreign populations when one of their members fails in the former capacity.

The imputation of cosmopolitan obligations to the very meaning of state sovereignty is one of the great advances of sovereignty as responsibility. Yet, a closer examination of the concept’s presuppositions reveals that sovereignty as responsibility retains an essentially statist core. The statist origins of sovereignty as responsibility are apparent in its earliest articulation by Francis Deng:

The state has a right to conduct its activities undisturbed from the outside when it acts as the original agent to meet the needs of its citizens. This right is merely and normally the obligation of the first resort and it is dependent on the performance of the agent. If the obligation is not performed, the right to inviolability should be regarded as lost, first voluntarily as the state itself asks for help from its peers and then involuntarily as it has help imposed on it in response to its own inactivity or incapacity and to the unassuaged needs of its own people. [...] On the international level, sovereignty becomes a pooled function to be protected when exercised responsibly, and to be shared when help is needed. [...] It is best to think of the international exercise in terms of layers of

assistance. The state exercises sovereignty at home. It can turn to its neighbours for assistance, next to its regional partners, and finally to the global organization, the United Nations (1996, xviii).

As Deng suggests, the reason why members of the international community have a responsibility to protect is not primarily because international human rights should be universally protected and effectively enforced. Rather, a state that fails to meet its “obligations of first resort” has its sovereign status temporarily suspended. In this political, legal and moral vacuum, there is no ‘sovereign status’ for intervening states to violate. For this reason, it becomes acceptable for other members of the international community to intervene and restore that state to its original sovereign condition.

The concept of sovereignty as responsibility appears to reconcile sovereignty with intervention for human rights protection but this resolution does not address the tensions between law, morality and politics in the international sphere. Rather, the responsibilities to protect are mere extensions of what it means to be sovereign rather than necessary corollaries of inviolable human rights standards. In one respect, the ability of sovereignty as responsibility to achieve the cosmopolitan goal of protecting international human rights without engaging in the moral debate over their universalistic or culturally relative natures may be regarded as a strength of the ICISS’s approach. On this view, it appears that international law and politics remains uninfected by moral considerations. Therefore, *The Responsibility to Protect* seems to evade Schmitt’s concerns of a moralization of politics. Yet, the particular constellation of law, morality and politics that grounds the framework for military intervention according to a responsibility to react reveals the extent to which a responsibility to protect remains vulnerable to a(n) (unmediated) moralization of politics.

## DECONSTRUCTING A “RESPONSIBILITY TO PROTECT”

### *Just War Framework for Military Intervention on the Basis of a “Responsibility to Protect”*

Those states that justify a use of force on the basis of a responsibility to react operate within a just war framework. Just war principles are organized into two categories: *ius ad bellum* principles (the justice of resort to war) and *ius in bello* principles (the justice of conduct of war). The principles for military intervention outlined as part of a responsibility to react mirror the *ius ad bellum* and *ius in bello* principles. Consistent with the *ius ad bellum* principles of classical just war theory, any claim to military intervention on the basis of a responsibility to react must meet the following criteria: just cause, right intention, last resort, proportional means and a reasonable prospect of success. The just cause threshold and precautionary principles outlined as part of a responsibility to react combine to ensure that a military intervention undertaken for human protection purposes is indeed just. The just cause threshold limits those situations that count as legitimate military interventions. The justification of a military intervention on the basis of a responsibility to react is reserved for only the most extreme cases:

Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur of the following kind:

- A. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- B. large scale ‘ethnic cleansing’, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape (ICISS 2001a, XII).

In addition to meeting the just cause threshold, four precautionary principles must also be satisfied: the military action is based on a right intention; executed as a last resort when all other diplomatic avenues and less coercive means have been exhausted; is proportional in the means that it employs; and has a reasonable chance of success (ICISS 2001a, XII). By requiring that intervening states meet these criteria, the first pillar of classical just war theory, *ius ad bellum*, is replicated.

The principles of right authority further clarify the meaning of ‘legitimate’ military intervention on a ‘sliding’ scale of justification. All military interventions should strive to be ‘legal’ at best and ‘lawful’ at worst. A military intervention authorized by the Security Council’s application of Chapter VII of the UN Charter is preferred to a use of force undertaken unilaterally. On a sliding scale of justification, however, both scenarios may be equally legitimate under a responsibility to react. In the preferred case of an UN-authorized military action, legitimacy is equated with legality. An intervening state that resorts to unilateral force acts in an equally legitimate fashion if other ‘more legal’ avenues of action have first been exhausted. Legitimacy for one’s military intervention must first be sought in the Security Council and failing this, in the UN General Assembly or within regional security organizations. As we move along the scale of legitimate justification, the scope of its meaning expands from legality to lawfulness. The legitimacy of any military intervention, whether legal or lawful, is subject to one further proviso: the actual conduct of the intervention itself must meet with strict operational principles.

At this point, the second pillar of classical just war theory—*ius in bello*—is approximated within the frame of a responsibility to react. The qualitative differences

between a military intervention and a conventional war fought between two adversaries are recognized in the operational principles set out by the ICISS. Military forces must accept “limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a government; force protection cannot become the principal objective” (ICISS 2001a, XIII). Moreover, the military action must adhere to the following *ius in bello* principles: proportionality in fighting and the strict observation of international humanitarian law (ICISS 2001a, XIII). Maximum coordination between the military and humanitarian organizations is also required. From this brief overview of the principles for military intervention under a responsibility to protect, it is clear that legitimacy derives from meeting classical just war principles. We now turn to a more thorough dissection of the principles for military intervention under a responsibility to react to uncover the constellation of law, morality and politics it constructs and to assess whether this scheme is sufficient to guard against a(n) (unmediated) moralization of politics.

#### CONSTELLATION OF LAW, MORALITY AND POLITICS IN “THE RESPONSIBILITY TO PROTECT” AND ITS IMPLICATIONS FOR A MORALIZATION OF POLITICS

The constellation of law, morality and politics in *The Responsibility to Protect* reveals aspects of both Schmitt’s and Habermas’s analyses of a moralization of politics. The principles of military intervention outlined in the report preserve a classical conception of human rights as moral rights but make some advances toward highlighting the relevance of natural law principles in a system of positive international law. The picture of international politics that the report paints is realistic insofar as it recognizes

self-interested states as the primary agents of political decision-making but it also aims to realize a distinctly cosmopolitan goal—the protection of foreign populations from widespread and systematic human rights violations. This gap between realistic means and cosmopolitan ends renders the constellation of law, morality and politics in *The Responsibility to Protect* less rigorous than either of the constellations discerned in Schmitt's or Habermas's thought.

### *Law and Morality*

The report leaves open the possibility of constructing a responsibility to react as either a legal or a moral obligation, each capable of justifying a military intervention independent of the other. To achieve this, the report assumes a moral concept of human rights and replicates a just war framework for military intervention. Both of these strategies contribute to a moralization of politics on Schmitt's account. In the first instance, a responsibility to react with military might should refer to a legal obligation. On a sliding scale of legitimacy from strict legality to general lawfulness, an intervening state should seek UN Security Council authorization for its proposed military action (ICISS 2001a, 31). The practice of the Security Council in the 1990s has been to interpret large-scale killing and ethnic cleansing as threats to international peace and security thereby capable of legally activating Chapter VII enforcement actions (ICISS 2001a, 34). If, however, the Security Council fails to discharge its responsibility to protect in conscience-shocking situations, then the next most legitimate course of action an intervening state can take is to initiate a "Uniting for Peace Procedure"<sup>38</sup> in the

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<sup>38</sup> The Uniting for Peace procedure was introduced by UN Resolution 377 (A)(V) in 1950 shortly after the Korean War. The procedure was intended to allow the United Nations to meet its primary responsibility to

General Assembly. Alternatively, an intervening state can delegate a mission to a regional security organization but this option is also subject to Security Council authorization. In the latter case, the same obstacles to Security Council authorization that arose in the first instance persist (ICISS 2001a, 53). For this reason, the ICISS recommends that the Permanent Five members agree not to use their veto powers where a conscience-shocking situation does exist (ICISS 2001a, 75). When all of these measures have failed, an intervening state may use force unilaterally and illegally.

A lawful, unilateral intervention of last resort would, however, be detrimental to the Security Council's reputation:

[...] [I]f following the failure of the Council to act, a military intervention is undertaken by an ad hoc coalition or an individual state which *does* fully observe and respect all the criteria we have identified, and if that intervention is carried through successfully – and is seen by world public opinion to have been carried through successfully – then this may have enduring serious consequences for the stature and credibility of the UN itself (ICISS 2001a, 55).

The legitimacy of a military intervention as determined on a sliding scale of right authority is most unequivocally established in conformity with international law but when these legal avenues have been exhausted, the compelling force of a moral norm is sufficient to legitimate a use of force.

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“maintain international peace.” In cases where the Security Council is locked in stalemate or one of the Permanent Five members uses its veto with the result of preventing the UN from carrying out its mission, a member of the United Nations can request that the Uniting for Peace procedure be initiated by the Secretary-General. After this, the General Assembly must convene within 24 hours in an emergency session to consider the matter. It can then recommend collective measures to UN members including the use of armed force. The procedure must be agreed to by seven members of the Security Council or by a majority of the General Assembly members. The Uniting for Peace procedure has been used ten times since 1950. It was first used by the United States in the Suez Crisis of 1956 and later on that year in response to the intervention in Hungary. Some have argued that the preconditions for this procedure had been met in the case of the United States' use of force in Iraq (See Ratner and Lobel 2003; Currie 2003). In the case of Iraq, we can identify: a threat to peace, breach of peace or act of aggression; a lack of unanimity among the Permanent Five members of the Security Council with respect to an authorization of armed force; the Security Council's failure to meet its primary responsibility for the maintenance of international peace and security.

On a sliding scale of right authority, law and morality are independently legitimate spheres of action. Although the legitimacy that Chapter VII of the UN Charter lends to a military intervention is preferred in *The Responsibility to Protect*, the legitimacy of moral principles can themselves provide an alternative basis of justification. The report's claim that a responsibility to react with force remains even after an intervening state has exhausted all legal measures is supported by a just war framework that legitimates itself on both legal and moral grounds. The just cause threshold of large-scale killing or ethnic cleansing raises the spectre of legal obligations enshrined in the UN Genocide Convention and the Rome Statute of the ICC. It further alludes to the legality of those military interventions authorized by the Security Council under Chapter VII as affirmed in the previous decade of state practice. Nevertheless, the just cause requirement for a military intervention also assumes a system of positive international law based on shared standards of human dignity and not merely state consent.

The legitimacy of a military intervention is secured not only by the legal obligations implicit in the just cause threshold but by the moral quality of human rights themselves. An interpretation of human rights as legal claims to entitlements enforceable within national systems of law is supported by an International Bill of Rights and various UN conventions. The precise scope of the legal obligations flowing from these sources is, however, hotly contested. Moreover, the legal legitimacy of military interventions authorized by the Security Council on the basis of Chapter VII must be reconsidered in light of the selectivity with which states do intervene in actual practice. The chequered record of human rights enforcement in state practice suggests that human rights are most

compelling as justifications for military action when they are conceived as moral rather than legal rights.

The possibility of waging an illegal but lawful war under a responsibility to protect supports the claim that human rights are by nature, moral rights. Here, the concept of human rights is understood in the way that Jack Donnelly suggests: human rights are rights of last resort and serve as the highest appeal in a hierarchy of rights claims available to an agent (1989, 13). Human rights are rights that individuals have in virtue of being human. These rights exist irrespective of whether they have been legally codified. In pressing a human rights claim, an individual first exhausts all legal avenues of resolution within his/her national judicial system. If a human rights violation is not vindicated at the level of national law, then an individual has one final appeal to have his/her human rights enforced internationally.

In the threshold situations contemplated by the architects of *The Responsibility to Protect*, foreign populations are unable to press their human rights claims in their respective national judicial systems. This is because their governments are unwilling or unable to protect their human rights. On Donnelly's interpretation of human rights, a foreign population is entitled to press their human rights claims internationally as a final appeal in these cases. Consequently, a military intervention waged in conformity with a responsibility to protect can be interpreted as a successful attempt by a foreign population to have their moral human rights enforced. The nature of this final appeal is moral because it is universally available to all as human beings irrespective of territorial boundaries; each person is provided with an equal chance to have his/her rights vindicated internationally.

The just war framework for military intervention enshrined in *The Responsibility to Protect* recognizes the dual character of human rights as enforceable legal rights and as universally-valid moral rights. Yet, the inconsistency with which human rights claims are actually enforced by states and the tendency to privilege positive sources of international law over customary sources threatens to reduce human rights to a dangerous level of abstraction. Hannah Arendt articulated the dangers of reducing human rights to their most essential features in *The Origins of Totalitarianism*:

[...] [T]he abstract nakedness of being nothing but human was [the Holocaust survivors'] greatest danger. Because of it, they were regarded as savages and, afraid that they might end by being considered beasts, they insisted on their nationality, the last sign of their former citizenship, as their only remaining and recognized tie with humanity (1958, 295).

The fragility of human rights as legal rights in international law risks reducing a victim of gross human rights violations to an abstract naked body with merely natural rights—rights that may not necessarily be protected by the international community. For this reason, Arendt argues that human rights must be understood in terms of a ‘right to have rights:’

[...] [H]uman dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities (1958, ix).

Habermas’s claim that human rights are by nature, moral rights follows the Arendtian concept of a ‘right to have rights.’ In order to enjoy human rights, one must have status as a legal person. In order to have legal status, one must have political status as a citizen. Therefore, an understanding of human rights is meaningless unless it is tied to some conception of a political community with its own set of laws:

Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever has been the calamity which has befallen ever-increasing numbers of people. Man, it turns out, can lose all so-called Rights of Man without losing its essential quality as man, his human dignity. Only the loss of polity itself expels him from humanity (Arendt 1958, 295).

Similarly, Habermas identifies human rights as legal rights because they are primarily enforceable rights tied to a domestic legal constitution. The cosmopolitan views of Arendt and Habermas are not, however, to be confused with nationalistic positions. That Arendt and Habermas emphasize the importance of having rights attached to a political community does not require that this community take the form of a nation-state. The claim that individuals have the right to belong to some kind of organized community in which they are judged by their actions and opinions can be consistent with a concept of 'global citizenship.' The 'right to have rights' means that individuals are entitled to equal membership in a political community backed by law in two respects. On one level, a right to belong is based on an individual's moral status as a member of humanity. On another level, 'belonging' is based on an individual's status as citizen in a political community. Habermas takes the latter to be decisive for the enforcement of human rights. A domain of legal consociation, reciprocal obligations and mutual identification most often associated with liberal constitutional democracies must be translated internationally according to democratic standards of legitimation if an unmediated moralization of politics is to be avoided. The question is whether sovereignty as responsibility is sufficiently robust to move the international sphere towards constitutionalization in the area of military intervention for human protection purposes.

The principle of sovereignty as responsibility requires that the first order obligations a state has to its own people are met and as such, locates a responsibility to

protect at the level of the individual state. Similarly, Habermas has argued that the obligation of a national government to protect its population's basic human rights is to be maximally achieved within a system of rights that guarantees the co-originality of human rights and popular sovereignty or law and morality. A cosmopolitan order "aimed at creating a constant acknowledgement of human rights while promoting them by military means if necessary" (Habermas 1999: 269) is the end-goal for both Habermas and the architects of *The Responsibility to Protect*. For Habermas, the achievement of a high-level of institutionalization of cosmopolitan law within this order requires support from constitutional states and democracies (1997: 146). The logic of sovereignty as responsibility returns us to the point from where Habermas departs: the individual state. The report's principles of military intervention permit the initiation of an armed intervention by members of the international community in those instances where the mutually reinforcing, circular relationship between public and private autonomy within a state is interrupted as a result of internal war, insurgency, repression or state failure. In these cases, a national government can be understood as failing in its first-order duties to protect the private and public autonomy of its people.

To the extent that military actions undertaken as part of a responsibility to protect are understood in the context of a holistic approach that includes prevention, reaction and rebuilding, the report makes some advances towards institutionalizing a high-level of cosmopolitan law in international relations. Of the three responsibilities encompassed by a responsibility to protect, Habermas would be in particular support of a responsibility to prevent as an answer to an unmediated moralization of politics. For Habermas, the creation of a 'culture of prevention' requires ensuring that the individual member-states

of the international system are sufficiently constitutionalized. Most crucial to the constitutionalization of a nation-state is the institutionalization of a system of rights that has, at its core, the moral universalism of the discourse principle and the egalitarian universalism of legal form. The mediation of morality through law yields a principle of democracy that ensures the co-originality of public and private autonomy in national political life. Habermas would further focus on strengthening a rule of law within states as a primary strategy for root cause prevention under a responsibility to prevent. The constitutionalization of a national political sphere in turn creates the conditions for a constitutionalized international system defined by multi-level politics between international negotiating systems. The linking of state and non-state actors at all levels of political process in a mutually-reinforcing and interactive cosmopolitan framework approximates the formal and informal tracks of democratic will- and opinion-formation in a deliberative democracy. Similarly, a responsibility to prevent requires an approach to conflict-prevention that is “integrated into the policies, planning and programmes at the national, regional and international levels” (ICISS 2001a, 26). The successful implementation of a world domestic policy at the global-level would require the mediation of multi-level political processes through the form of cosmopolitan law. Establishing a high-level of institutionalization of cosmopolitan law requires strengthening general attempts at international legal reform, such as the creation of an International Criminal Court. The ICISS’s focus on prevention as the most important aspect of a responsibility to protect suggests that its long-term approach to resolving the dilemma of humanitarian intervention is in line with Habermas’s vision.

In those cases where prevention is no longer an option and military intervention is contemplated, Habermas's position becomes more ambivalent. The protection of human rights is a necessary but insufficient condition for armed intervention. For example, NATO's intervention in Kosovo amply demonstrated that where the gap between legitimate and effective military action is at its widest, the level of institutionalization of cosmopolitan law is at its lowest. *The Responsibility to Protect* falls short of meeting this goal of international constitutionalization. The report appears to acknowledge the double character of human rights as moral and legal rights but in failing to require the legal institutionalization of its own principles, it perpetuates the idea that human rights are predominantly moral rights to be guaranteed according to the individual 'good' consciences of state and non-state actors. Habermas does, however, recognize that the transition from a rule of "classical international law of states" to a "cosmopolitan law of global civil society" (Habermas 1999, 264) is incomplete.

In this transition to a cosmopolitan order, Habermas acknowledges that many paradoxes will arise in the justification for uses of force aimed at protecting human rights. Since human rights are still viewed predominantly as moral rather than legal reasons for military action, many states claiming to use force according to the principles of a responsibility to protect will have to act "as though there were already a fully institutionalized global civil society, the very promotion of which is the intention of that action [...]" (Habermas 1999, 270-71). In many cases, the military responses of intervening states claiming a responsibility to protect will be paternalistic to a certain extent. If we, however, understand these moments of "transitory paternalism" as inevitable parts of a "learning process" that will take us from "classical power politics to

global civil society” (Habermas 1999, 271), then we can comprehend *The Responsibility to Protect* as a first step in the mediation of humanitarian intervention practices against a moralization of politics. That the framework of a responsibility to protect does little to challenge a conception of human rights as mere moral orientations for political activity is not a sufficient reason to reject the report wholesale. Rather, the tensions and ambivalences found within the report are precisely indicators that the current international order is in transition from a rule of classical international law to a law of global citizens.

From the preceding analysis, it is clear that the relationship between law and morality constructed in *The Responsibility to Protect* is significantly weaker than the connection required for the achievement of constitutionalized international relations on Habermas’s view. This particular shortfall may not, however, be sufficient to dismiss the potential value of the report even on Habermas’s own view. In the next section, we distill the relationship between law and politics in the report. The relationship between law and politics is best demonstrated in those principles guiding a responsibility to react and closely approaches Schmitt’s view of the interaction between sovereignty and the exception.

### *Law and Politics*

Only those actions that can meet the just cause threshold, precautionary principles, right authority and operational requirements count as legitimate military humanitarian interventions in *The Responsibility to Protect*. The exceptional nature of those ‘emergencies’ that warrant a military intervention in conformity with a

responsibility to react suggests that states operate within an extra-legal space. In this space outside of the law, Schmitt's concepts of the exception and sovereignty are useful for understanding how self-interested states can be compelled to achieve cosmopolitan ends. The concept of sovereignty as responsibility starts from a norm of sovereign non-intervention in international relations. Responsible sovereignty is, in the first instance, the responsibility of a state government to protect its inhabitants from internal and external harm. When a state government is no longer able to meet its primary obligations, the normal condition of a functioning international system—sovereign non-interference—is disrupted. The resulting situation qualifies as an instance of exception on Schmitt's understanding—a case of extreme peril or danger to the existence of the state, which is not codified in the existing legal order (1985, 6). When a state ceases to meet the requirements of responsible sovereignty within its own borders, the normal conditions of internal and external sovereignty are temporarily suspended. In this international legal, moral and political vacuum, a logic of sovereignty as responsibility compels the remaining sovereign states to restore one of its irresponsible members to a condition of normal sovereign function (ICISS 2001a, 17).

In the threshold scenarios contemplated by *The Responsibility to Protect*, a state finds itself in the exception because of its own irresponsible sovereign acts of commission or omission. Consequently, that irresponsibly sovereign state temporarily loses its political authority to decide without external interference. In this temporary state, an irresponsible member of the international community is not considered sovereign. Instead, the remaining states in the international community reserve the

sovereign right to decide politically. It is therefore open to these states to intervene militarily for the protection of human rights.

A responsibility to rebuild follows any legitimate claim to military intervention and aims to create the conditions in which the normal conditions of state sovereignty can flourish once more. This state is normal to the extent that members of the international community retain their sovereign rights to political independence and territorial integrity. Specifically, the responsibility to rebuild advocates the importance of reconstructive activities aimed at returning the task of governing to the local community through justice and reconciliation initiatives (ICISS 2001a, 45). Furthermore, the responsibilities of foreign actors following a military intervention should be limited to supervising and monitoring elections; any resurrection of the “trusteeship” concept should be resisted (ICISS 2001a, 43).

By focusing on when and how the concept of exception is engaged in *The Responsibility to Protect*, Schmitt’s definition of sovereignty and by extension, his view of the appropriate relationship between law and politics can be engaged in a way that promotes cosmopolitan ends. The crucial feature of sovereignty on Schmitt’s view is the political decision of a state authority. The political, extra-legal actions taken by sovereign states in the exception as part of a responsibility to protect are aimed at restoring the normal conditions of sovereign non-intervention. The primary weakness of using Schmitt’s concepts of sovereignty and the exception to describe the logic of sovereignty as responsibility is found in the conceptual incongruence between an absolute sovereign state’s uses of self-regarding, ‘political’ justifications for the fulfillment of other-regarding, cosmopolitan ends. This incongruence reduces moral

actions to their favourable consequences rather than their 'right intentions.' The question remains whether interpreting the concept of sovereignty as responsibility through the lens of Schmitt's political thought is sufficient to shield *The Responsibility to Protect* from a moralization of politics on his own terms.

### *Politics and Morality*

As the preceding discussion suggests, the concept of sovereignty as responsibility can keep international law free of morality and the law in service of politics when interpreted through the lens of Schmitt's political thought. In another respect, the principles of military intervention that constitute a responsibility to react violate the separation of politics and morality in a particularly stark way. The report's use of just war principles in the framework for military intervention effectively re-couples the question of *justa causa* with the problem of just war. For Schmitt, the great achievement of modern international law was precisely its replacement of questions of *justa causa* with questions of *justus hostis* (2003, 121). That intervening states are required to meet a just cause threshold of a large-scale loss of life or ethnic cleansing 'moralizes' the right of sovereign states to make political decisions in extra-legal circumstances. By asking whether a just cause and other precautionary principles have been met in the justification for a military intervention, the concept of enemy as *justus hostis* is rejected. An irresponsibly sovereign state is theoretically liable to 'total' annihilation at the hands of the intervening states even though the additional requirements of right authority and operational principles dictate otherwise.

That a primary focus on the question of *justa causa* threatens a moralization of politics has been witnessed in the American justification for war in Iraq. President Bush advanced both legal and moral-humanitarian justifications to obscure the formal equality of the enemy and effectively toppled a regime that was legitimately sovereign. To date, there is no sufficient evidence that Saddam Hussein's regime was in breach of its legal disarmament obligations. Moreover, there is no proof that the current humanitarian situation in Iraq had reached a 'conscience-shocking' level that would have legitimately warranted an armed intervention.

As the preceding analysis suggests, *The Responsibility to Protect* remains vulnerable to a moralization of politics because it fails to advance a constellation of law, morality and politics as robust as either of the constellations discerned in Schmitt's and Habermas's political theories. Specifically, the constellation of law, morality and politics that the report constructs fails to approximate the robust connection Habermas conceives between law and morality. Though the report envisions an interaction between law and politics that approaches Schmitt's view of the mutually reinforcing relationship between the exception and the rule of law, it creates the very conditions for Schmitt's moralization of politics by locating the political determination of whether to use armed force within a just war framework. This just war framework violates a concept of enemy as *justus hostis* and reinstates a discriminatory conception of war. We now turn to the task of assessing whether the report's ambivalence between Schmitt's statism and Habermas's cosmopolitanism is sufficient to render it an unproductive contribution to a discourse of humanitarian intervention.

## RECONSTRUCTING A “RESPONSIBILITY TO PROTECT”

An analysis of *The Responsibility to Protect* in terms of either Schmitt’s or Habermas’s political thought leads us to an impasse. *The Responsibility to Protect* is caught between the statism of Schmitt and the cosmopolitanism of Habermas. This is problematic because these two visions of international political life are defined in direct opposition to the other. Habermas does not seriously engage with Schmitt’s reflections on the nature of the ‘political.’ Schmitt presents an insufficiently complex picture of the legal pacifist position. Each refuses to present his argument using a language that the other finds compelling. Schmitt and Habermas talk *at* each other rather than *with* each other. This apparent incommensurability in Schmitt’s and Habermas’s respective political approaches is not easily resolved within an analytical framework that itself turns on an antagonism between statism and cosmopolitanism. Our analysis leaves us at a conceptual crossroads because we have assumed that the problem of military intervention for human protection purposes and the meaning of a responsibility to protect are exhausted by either Schmitt’s statism or Habermas’s cosmopolitanism. Implicit in our analysis of *The Responsibility to Protect* through the lenses of Schmitt’s and Habermas’s respective political theories is the assumption that there is only one legitimate and consistent direction for international political life. We can either adopt Schmitt’s profoundly statist concept of the ‘political’ or we can embrace Habermas’s cosmopolitan concept of a dialogic and proceduralist conception of constitutionalization as our future. That *The Responsibility to Protect* aims to mobilize statist assumptions towards the achievement of cosmopolitan ends suggests that this choice may be difficult to make in concrete political practice. The question remains: How are we to assess the value of *The*

*Responsibility to Protect* if the goal is to preserve its cosmopolitan potentialities and limit the instrumentalization of its logic by states?

We can already refer to a few examples of how *The Responsibility to Protect* has been mobilized in response to a moralization of politics. According to some commentators, the report occupies a low-level of priority in a post-9/11 world. In this respect, Thomas G. Weiss has observed:

The use of military force to protect human life had been an international priority, but the Al-Qaeda attacks were a political earthquake—changing the strategic landscape, intellectual discourse and international agenda. And when the dust from the World Trade Center and the Pentagon settled, humanitarian intervention became a tertiary issue (2004, 136).

Gareth Evans, one of the co-chairs of the ICISS, has expressed a similar concern with respect to the impact of the Iraq war on the future of *The Responsibility to Protect*:

[...] [T]o the extent that the invasion was based on Saddam Hussein's record of tyranny over his own people—but again poorly and inconsistently argued, and with the [Security] Council by-passed—we have seen close to being choked at birth what many were hoping an emerging norm justifying intervention on the basis of the principle of 'responsibility to protect' (2003).

Other commentators recognize the continued relevance of a responsibility to protect in a post-9/11 world particularly because humanitarian intervention is now more vulnerable to a moralization of politics than ever. The language of a responsibility to protect has been accepted by many academics and state practitioners as the new paradigm for conceiving and resolving problems related to humanitarian intervention. As the language of responsibility and duty becomes a part of the international vernacular, the possibility that these terms will be moralized also increases. Indeed, the language and concepts underlying a responsibility to protect have not evaded those who would misuse them for their own ends. In President George W. Bush's remarks at the UN General

Assembly in September 2002, he referred to the “urgent duty of protecting other lives without illusion and without fear” (Bush 2002). The nature of this duty to protect the lives of the Iraqi people flows from “a great moral cause and a great strategic goal” (Bush 2002). Here, politics and morality converge to promote the creation of another neo-liberal state: “Free societies do not intimidate through cruelty and conquest and open societies do not threaten the world with mass murder” (Bush 2002). According to Bush, the security of national populations and the maintenance of international peace depend on the spread of neo-liberal democracy to states. Furthermore, both the letter and spirit of international law compel the U.S. to take decisive action in Iraq: the Security Council’s resolutions must be enforced and the “just demands of peace and security” must be met (Bush 2002).

On Bush’s logic, law, morality and politics converge to affirm a principle that closely resembles sovereignty as responsibility. A national government that fails in its responsibility to its own people has its political authority to rule temporarily suspended: “[A] regime that has lost legitimacy will also lose its power” (Bush 2002). Since Saddam Hussein’s regime has failed to protect its own people, the U.S. has a responsibility to ensure that liberty is restored to the Iraqi people. The purpose of restoring freedom to the Iraqi people is, however, to ensure that the Iraqi government will no longer perpetrate harms on its people or threaten the security of its neighbours. Most important, Iraq will no longer be able to threaten the U.S. with another terrorist attack of the same or greater magnitude as September 11<sup>th</sup> (Bush 2002). Here, the meaning of a responsibility to protect devolves into the American administration’s responsibility to protect its own people from external security threats. The relevant danger is the prospect of Iraq gaining

and deploying the most terrible weapons or supplying these weapons to its terrorist allies (Bush 2002). The language of responsibility reverts to the logic of absolute state sovereignty; a sovereign state has the absolute right to protect itself against foreign threats. The focus shifts back to the rights of the intervening state and away from the rights of suffering populations. The logic of a responsibility to protect remains vulnerable to a moralization of politics when the legal, moral and political reasons for an action can be combined at the will of a powerful state.

In a climate characterized by terrorist threats to international peace and security and the resurrection of interstate warfare in response, the strategy of many who want to preserve a space for *The Responsibility to Protect* has been to deny that these wars are military interventions for human protection purposes. Evans denies that the war in Iraq is a humanitarian intervention precisely because it fails to meet the just war criteria for military action as outlined in *The Responsibility to Protect* (2003). For Evans, wars of self-defence or aggression fall outside the scope of military intervention on the basis of a 'responsibility to protect.'<sup>39</sup> Similarly, Ken Roth, the executive director of Human Rights Watch, has argued that the war in Iraq is not a humanitarian intervention because it fails to satisfy the Just War criteria of just cause, right intention, last resort, proportional means and reasonable prospects of success (2004). Weiss has also suggested that a rigorous application of *The Responsibility to Protect*'s principles of military intervention

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<sup>39</sup> Interestingly, Evans has argued that *The Responsibility to Protect* provides a relevant framework for evaluating any military intervention. Although neither the war in Afghanistan nor the war in Iraq qualify as instances of humanitarian intervention under a 'responsibility to protect,' the just cause threshold and the precautionary principles outlined in the report can provide a useful legitimating framework for any military action contemplated by states (Evans 2003). Framed in this way, the principles for military intervention in *The Responsibility to Protect* fail to contribute anything 'new' to the debate. Worse, the just war framework for military action may eradicate any differences in the international treatment of conventional wars and military humanitarian interventions.

can effectively preclude certain uses of force by self-interested states (2004, 148). These arguments suggest that the primary value of *The Responsibility to Protect* is located in its definition of what humanitarian intervention is *not*.

In the next chapter, we will examine the possibilities of reconceptualizing *The Responsibility to Protect* not necessarily as a framework for creating a norm of humanitarian intervention but as an effective tool in the fight against a moralization of politics. As the preceding discussion has shown, attempting an evaluation of *The Responsibility to Protect* within an analytic framework fixed by ultimately antagonistic concepts of the ‘political’ yields few productive conclusions. Schmitt’s concept of the ‘political’ requires rejecting a productive role for morality in either law or politics. In this respect, Schmitt’s approach to the conceptualization of international relations may be too ‘political;’ it reduces all moral and legal categories to the ‘political’ decision of a sovereign authority in the exception. In contrast, Habermas’s concept of the ‘political’ requires rejecting those decisions that are not mediated through law. In this respect, Habermas’s approach to international relations may be too ‘legal;’ morality and politics cannot be understood independent of law.

*The Responsibility to Protect* recognizes that the current state of international relations remains both statist and cosmopolitan. In this respect, the report operates in the transitional space between a rule of classical international law and cosmopolitan law that Habermas highlights. On Habermas’s approach then, we can certainly understand the report’s contribution to a discourse of humanitarian intervention in terms of a “learning process.” Similar to the paradox of presupposing the very constitutionalized state to which one aims to promote by one’s action, the report recognizes the necessity of

articulating a legitimate foundation on which to justify humanitarian interventions even though a cosmopolitan order in Habermas's sense remains 'unfinished.' In the next chapter, another approach to the assessment of the report's productive potentialities will be advanced.

It will be argued that *The Responsibility to Protect* can be most productively mobilized if we take the report outside of the Schmitt/Habermas impasse and move it into a radical democratic space. The concept of radical democracy relevant to this study is the one articulated by Ernesto Laclau and Chantal Mouffe in *Hegemony and Socialist Strategy* (1985). Specifically, *The Responsibility to Protect* supplies the conceptual seeds from which a counterhegemonic discourse of humanitarian intervention can emerge and eventually flourish. This counterhegemonic movement challenges the existing discourse of humanitarian intervention and paves the way for a revision of its terms. It is my contention that a more promising role for *The Responsibility to Protect* exists in a post-9/11 world. The value of the report is *not* necessarily in its ability to create a customary norm of humanitarian intervention but rather, in its *capacity* to ground a counterhegemonic discourse of humanitarian intervention sensitive to the threats of a moralization of politics. By conceiving *The Responsibility to Protect* in this way, we can begin to unlock the report's radical potentialities.

## CHAPTER 5

### “THE RESPONSIBILITY TO PROTECT” IN A POST-9/11 WORLD

#### RE-EVALUATING A RESPONSIBILITY TO PROTECT

Our evaluation of *The Responsibility to Protect* through the moralization of politics problematic has exposed both the report's strengths and weaknesses. In many respects, *The Responsibility to Protect* moves the discourse of humanitarian intervention in a progressive direction. The report dissolves the dilemma of 'sovereignty versus intervention' through a concept of sovereignty as responsibility, expands the purview of humanitarian intervention to include preventative and rebuilding activities, and recognizes that international political life is and will continue to be a mix of both statist and cosmopolitan features.

Yet, the liberal-conservative core of sovereignty as responsibility ultimately fixes its meaning in terms of non-intervention in the domestic affairs of states. Moreover, the report's ambivalent position in between Schmitt's statism and Habermas's cosmopolitanism threatens to create the conditions for a moralization of politics on the bases of its own terms. From the outside, the threat of a moralization of politics has been heightened by the events of September 11, 2001. The 9/11 terrorist attacks have dramatically altered the international political landscape and reasserted a rule of force in response to any security threat that may be remotely linked to terrorism. These inward and outward threats to a moralization of politics pose real limits to the report's potential as a coherent organizing framework for a discourse of humanitarian intervention. If *The*

*Responsibility to Protect* remains vulnerable to a moralization of politics on both Schmitt's and Habermas's views, then how do we assess the report's value in a post-9/11 world? Will the language of a responsibility to protect become another instrument of strategic state interests? Is the potential of the report limited to merely defining what a responsibility to protect precludes or will it ground a positive program of political change in the thought and practice of humanitarian intervention?

It will be argued that the ambivalent aspects of the report can be productively mobilized if an evaluation of its terms is relocated in a radical democratic terrain of politics. The discourse of humanitarian intervention can be radically reoriented within the framework of a responsibility to protect if we can recuperate a concept of the 'political' that defies definition in terms of either a particular vision of statism or cosmopolitanism. If we can accept an open concept of radical, democratic politics as articulated by Ernesto Laclau and Chantal Mouffe, then the division of the political terrain of analysis into two opposing statist and cosmopolitan camps ceases to be an obstacle to the conduct of politics. When plural, political terrains are assumed, the meaning of a moralization of politics is no longer exhausted by either Schmitt's statist or Habermas's cosmopolitan formulations. Moreover, a resolution to a moralization of politics can no longer be preset according to a particular constellation of law, morality and politics. Rather, a moralization of politics becomes a part of political processes defined by the constant contestation and revision of their terms. By locating *The Responsibility to Protect* in an open political terrain, we can accommodate the constellation of law, morality and politics that the report constructs, productively mobilize its ambivalence between Schmitt's statism and Habermas's cosmopolitanism

and reinterpret the threat of a moralization of politics as part of circular processes of creation, reproduction and transformation crucial to political practices.

#### LACLAU AND MOUFFE'S CONCEPT OF THE 'POLITICAL'

Our point of entry into Laclau and Mouffe's complex thought is taken from their critique of essentialist apriorism within any discourse. According to Laclau and Mouffe, essentialist apriorism is the "conviction that the social is sutured at some point, from which it is possible to fix the meaning of any event independently of any articulatory practice" (2001, 177). In other words, the scope of a discourse is never closed and only temporarily fixed through a struggle over meaning. Since every discourse is necessarily open, the notion of 'discursive totality' becomes metaphorical (Laclau and Mouffe 2001, 111). The incomplete character of every totality has its own set of implications:

The incomplete character of every totality necessarily leads us to abandon, as a terrain of analysis, the premise of 'society' as a sutured and self-defined totality. 'Society' is not a valid object of discourse. There is no single underlying principle fixing—and hence constituting—the whole field of differences. The irresolvable interiority/exteriority tension is the condition of any social practice: necessity only exists as a partial limitation of the field of contingency. It is in this terrain where neither a total interiority nor a total exteriority is possible, that the social is constituted. For the same reason that the social cannot be reduced to the interiority of a fixed system of differences, pure exteriority is also impossible. In order to be totally external to each other, the entities would have to be totally internal which is not subverted by any exterior. But this is precisely what we have just rejected. *The field of identities which never manage to be fully fixed, is the field of overdetermination* (Laclau and Mouffe 2001, 111).

Since Laclau and Mouffe assume the 'openness of the social' and the impossibility of fixing either a system of complete interiority or exteriority, they are compelled by their own logic to define a subject's identity relationally. Moreover, Laclau and Mouffe must account for the expression of differences between subject identities without assuming that

they are totally fixed. How, then, is the relational quality of difference *articulated*<sup>40</sup> within a discourse?

For Laclau and Mouffe, difference is articulated in a field of *antagonisms*. An antagonism denotes a “relation wherein the limits of every objectivity are shown” (Laclau and Mouffe 2001, 122). Since Laclau and Mouffe assume that social and political meanings are open, an antagonism cannot be expressed as a real opposition between two completely fixed identities (Laclau and Mouffe 2001, 124). Rather, an antagonism is articulated within a discourse when the positive identity of each subject position is subverted through the creation of equivalences between them. The *reciprocal subversion* of discursively-constructed subject identities through chains of equivalence allows for the expression of difference without referring to the positive features of each subject’s identity (Laclau and Mouffe 2001, 128). Rather, difference is expressed as something which the object is not (Laclau and Mouffe 2001, 127). A negative and equivalential understanding of difference creates a second meaning that subverts the original meaning of a discursive moment<sup>41</sup> (Laclau and Mouffe 2001, 127).

To illustrate this point, Laclau and Mouffe refer to the construction of different identities within a discourse of colonization. For example, the positive specificities of each differential position within the discourse – dress, language, skin colour, customs— are subverted through the establishment of equivalences among these subject positions

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<sup>40</sup>Laclau and Mouffe define articulation as “any practice establishing a *relation among elements* such that their identity is modified as a result of the articulatory practice” (2001, 105).

<sup>41</sup>Discursive moments are the differential positions insofar as they appear articulated within the discourse (Laclau and Mouffe 2001: 105).

(Laclau and Mouffe 2001, 127). As such, these discursive elements<sup>42</sup> come to express the identity of the ‘colonizer’ in terms of what it is not—the ‘colonized.’ Through the establishment of equivalences between differential moments, the ‘colonizer’s’ identity is negatively defined (Laclau and Mouffe 2001, 128). In this way, difference is discursively-constructed without assuming that a subject’s identity is totally fixed. Laclau and Mouffe clarify: “The equivalence exists only through the act of subverting the differential character of those terms [...] the contingent subverts the necessary by preventing it from fully constituting itself” (2001, 128). The limit of the social or the unfixity of every identity is experienced in an equivalential moment. In this moment, the positive features that differentiate one subject position from another are dissolved (Laclau and Mouffe 2001, 128). In this space of antagonism, the meaning of any subject position can only be partially fixed. As such, its meaning is constantly subject to processes of subversion and redefinition. The articulation of any antagonism through a constant process of displacing social limits and redefining social and political spaces is hegemonic (Laclau and Mouffe 2001, 144). The mutual transformation of antagonistic social and political spaces characteristic of any hegemonic politics is achieved through the multiplication of chains of equivalence and frontier effects between different discourses (Laclau and Mouffe 2001, 135-6).

Hegemony is the central category of Laclau and Mouffe’s political analysis. They begin with a Gramscian concept of hegemony but radicalize it by rejecting his assumption that a single political space is necessary for the emergence of equivalence and

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<sup>42</sup> Elements are “any difference that is not discursively articulated.” Elements become crucial in the articulation of antagonisms. Since the identity of an element is not pre-determined, it takes on a floating character capable of forming chains of equivalence between different objects.

frontier effects (2001, 136-7). According to Antonio Gramsci, hegemony is the process that generates “the ‘spontaneous’ consent given by the great mass of the population to the general direction imposed on social life by the dominant fundamental group [historical bloc]” (cited in Hunt 1993, 229). The Gramscian concept of hegemony is thereby, concerned to explain how rulers gain and sustain their dominant rule over a particular community of subjects. In answer to this question, Gramsci argued that it is the power of ideas and values capable of uniting a number of sectors rather than coincidental and temporary convergences of interests that render political leadership hegemonic (Laclau and Mouffe 2001: 66).

Consistent with their claim that the social is fundamentally open, Laclau and Mouffe assume a “plurality of political and social spaces which do not refer to any ultimate unitarian basis” (Laclau and Mouffe 2001, 140). For Laclau and Mouffe, politics is a practice of creation, reproduction and transformation of social relations that construct a subject in a relationship of subordination<sup>43</sup> (Laclau and Mouffe 2001, 153). As such, the central political problem becomes “identify[ing] the discursive conditions for the emergence of a collective action, directed towards struggling against inequalities and challenging relations of subordination” (Laclau and Mouffe 2001, 153). A politics with hegemonic aspirations must always mobilize itself and challenge relations of subordination on multiple discursive planes.

The plural political terrains from which a hegemonic politics emerges are also radical and thereby potentially democratic. Plural political planes are *radical* to the

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<sup>43</sup> According to Laclau and Mouffe, relations of subordination are relations wherein an agent is subject to the decisions of another (2001, 153).

extent that “subject positions cannot be led back to a positive and unitary founding principle” (Laclau and Mouffe 2001, 166). Laclau and Mouffe elaborate:

Pluralism is radical only to the extent that each term of this plurality of identities finds within itself the principle of its own validity, without this having to be sought in a transcendent or underlying positive ground for the hierarchy of meaning of them all and the source and guarantee of their legitimacy (2001, 166-7).

This radical pluralism is *democratic* insofar as the political terrains in which a hegemonic politics operates are comprised of egalitarian discourses. Chains of equivalence are multiplied between and among democratic struggles for meaning on plural, political planes. A state of ‘democratic equivalence’ is achieved when the identities of different groups are changed in such a way that the demands of each group are articulated equivalentially with those of others (Laclau and Mouffe 2001, 183). Moreover, democratic equivalence is always hegemonic because it creates more than just an ‘alliance’ between given interests; the identities of the forces engaging in that alliance are also reciprocally modified (Laclau and Mouffe 2001, 183-4). The reciprocal modification of each object’s identity within a hegemonic articulation exemplifies the openness of any subject position within a discourse, the meaning of which is always subject to subversion and revision.

#### DISPLACING “THE RESPONSIBILITY TO PROTECT” FROM A STATIST/COSMOPOLITAN POLITICAL TERRAIN

By relocating *The Responsibility to Protect* on a radical, democratic political terrain, we can begin to understand how certain tensions in the report can be productively mobilized to redirect the discourse of humanitarian intervention in concrete practice. The constellation of law, morality, and politics that the report constructs and its tenuous

concept of sovereignty as responsibility situate *The Responsibility to Protect* in an ambivalent position between Schmitt's statism and Habermas's cosmopolitanism. In the absence of a clear selection between these two competing conceptions of politics by the ICISS and in conjunction with the ever-present threat of a moralization of politics in a post-9/11 world, the value of a responsibility to protect may be reduced to its mere rhetorical effect. On the one hand, the report's ambivalence between Schmitt's statism and Habermas's cosmopolitanism highlights the need for greater consistency in our theorizations of politics. Consequently, a choice between a 'Schmittian' and 'Habermasian' concept of politics may have to be made. If we, however, assume that the relevant concept of politics in an evaluation of a responsibility to protect is itself open, plural and egalitarian, then those very sources of threat to the report's coherence can be reconceived and mobilized to radically democratize the discourse of humanitarian intervention.

Laclau and Mouffe advance a concept of the 'political' that rejects a discourse fixed by an opposition between statism and cosmopolitanism. To a certain extent, this antagonistic relation is reproduced in an evaluation of the report on the bases of Schmitt's and Habermas's respective political concepts. The incommensurability between Schmitt's statism and Habermas's cosmopolitanism arises not only because these two political theorists start from very different premises about the nature of and co-operative possibilities within international political life. This opposition is produced because the concepts of politics that Schmitt and Habermas respectively develop are in their own ways, "closed" or "sutured" to a certain extent.

According to Schmitt, politics is defined by an antagonism understood as real opposition—“the physical act of one subject against another” (Laclau and Mouffe 2001, 123). The adversarial core of Schmitt’s politics requires a choice between friend and enemy. Furthermore, the possibility of real conflict and war is a precondition of political action. Antagonism in Schmitt’s sense of politics requires dividing a political space into two adversarial camps. In this political space, state actors are essentialized within the categories of friend and enemy. Those with whom a temporary alliance of interests can be made are friends while those with conflicting and irreconcilable interests are enemies.

The essentialist categories of friend and enemy are further reproduced in Schmitt’s moralization of politics thesis. Schmitt rejected a discriminatory conception of war and resisted a reversion to questions of *justa causa* in the problematization of just war because these considerations fundamentally subvert the formal equality that enemies share. By classifying a war as just or unjust, one rejects a concept of enemy as *justus hostis*. Instead, the enemy is treated as an ‘outlaw of humanity’—a moral inferior to be totally annihilated. The infection of the friend/enemy distinction with the moral categories of ‘good’ and ‘evil’ essentializes friends as ‘moral equals’ worthy of preservation and enemies as ‘moral inferiors’ worthy of total destruction. A moralization of politics dangerously essentializes the friend/enemy distinction by removing the moderating mechanisms inherent to formal, political relations of friendship and enmity.

Schmitt’s reification of the absolute meanings of internal and external sovereignty in his construction of the ‘political’ also essentializes the relation between domestic and foreign policies. A homogeneous domestic political sphere is secured when the sovereign power within a state retains the absolute authority to decide the exception.

According to Schmitt, the pluralism of modern liberal state forms is problematic precisely because it threatens a domestic sovereign's absolute right to decide politically. The presence of multiple political parties challenges the ability of a sovereign authority to decide in the exception through tactics of endless deliberation and constant constitutional reform (Schmitt 1996, 72). In order to ensure that the power of a unitary sovereign authority remains unfettered, pluralism must be relegated to the international domain (Mouffe 1999, 44). In a heterogeneous sphere marked by the possibility of real war, a state's national identity can be asserted and fortified in a political struggle against the enemy. Difference is asserted in a political contest between foes. The 'essentialist' and 'essentializing' features of Schmitt's concept of the 'political' foreclose a discourse of humanitarian intervention at certain predetermined points and further limit the possibilities for contesting and shifting its direction.

Furthermore, Schmitt 'closes' the meaning of his statism by subordinating law and morality to an existential concept of the 'political.' All political decisions are reducible to the decisions of a sovereign authority. The meaning of Schmitt's statism becomes fully complete only in direct opposition to the very precepts of a 'complete' cosmopolitanism. To a certain extent, Schmitt's statism gains positive meaning in opposition to the basic assumptions of cosmopolitanism. Absolute statism rejects any attempts to assert a non-instrumental relationship between politics and morality and seeks to keep legal reasoning free from moral considerations. Tacit within Schmitt's statism then is an understanding of political antagonism in terms of subordination and domination rather than mutual redefinition. Schmitt's statism is defined in opposition to

the most basic precepts of cosmopolitanism and divides the political terrain into two antagonistic camps.

For Laclau and Mouffe, a field of political planes criss-crossed by antagonisms is necessary for the emergence of a radical, democratic hegemonic politics. Contrary to Schmitt, Laclau and Mouffe's understanding of antagonism does not require dividing a political space into two adversarial camps. Rather, antagonism is expressed through the reciprocal subversion of a subject's positive identity through chains of equivalence and frontier effects (Laclau and Mouffe 2001, 135-6). Difference is expressed at the overdetermined points of a subject's identity. At these overdetermined subject positions, the presence of some objects is found in others (Laclau and Mouffe 2001, 104). Only in a field of overdetermination can an object's identity be negatively- and equivalentially-defined (Laclau and Mouffe 2001, 139). In this space, the positive features of each identity cancel each other out and difference is expressed in what is left in common between the subjects (Laclau and Mouffe 2001, 127).

To a certain extent, Schmitt's concepts of friend and enemy are overdetermined—those who are friends today may become enemies tomorrow depending on the interests at stake. That the identities of friends and enemies are 'closed' and therefore, immune to reciprocal subversion and redefinition is apparent in a moralization of politics. The moral categorization of enemies as 'outlaws of humanity' fixes their identities and renders them objects capable of total destruction. A moralization of politics thereby occurs at the moment when the moral categorization of an enemy as 'good' or 'evil' cannot be contested.

Laclau and Mouffe's concept of plural and democratic hegemonic politics is not possible until the fixity of every social identity is challenged in a field of antagonisms. This is because the hegemonic dimension of politics expands only as the open, non-sutured character of the social increases (Laclau and Mouffe 2001, 138). Unlike Schmitt's concept of the 'political,' hegemonic political relations are distinct from relations of subordination or power (Laclau and Mouffe 2001, 138). Interstate relations are not merely temporary alliances of interests as Schmitt's concept of 'political friendship' suggests but relations wherein the identities of the participants are reciprocally modified (Laclau and Mouffe 2001, 66-7).

Although Habermas acknowledges the relational quality of every identity and rejects the notion of a pre-political liberal individual identity constituted prior to socialization (1996b, 772), he nevertheless, retains a 'fixed' notion of politics—one that refuses to engage with Schmitt's existential concept of the 'political.' Some have contended that Habermas's concept of deliberative politics aims at minimizing the strategic considerations in political processes of deliberation and as such, does not fundamentally challenge the ends of any political process: rational consensus. For Habermas, strategic forms of communication are rationalized through a proceduralist paradigm of law that institutionalizes the communicative conditions for free and fair deliberations. Rational consensus is made possible through the interaction of formal processes of democratic will-formation and informal processes of opinion-formation. In this process, communicative power is transformed into administrative political power through rationalized deliberations between and among public officials and civil society.

By accepting that the end of any political process is rational consensus, Habermas accedes to the 'closure' of deliberative politics at the moment of rational agreement.

Laclau and Mouffe have made this argument:

To believe that a final resolution of conflicts is eventually possible—even if it is seen as an asymptotic approach to the regulative idea of rational consensus—far from providing the necessary horizon for the democratic project, is to put it at risk. Conceived in such a way, pluralist democracy becomes a 'self-refuting ideal,' because the very moment of its realization would coincide with its disintegration (2001, xviii)

According to Laclau and Mouffe, the defining moment of politics for Habermas—rational consensus—is simultaneously the moment when politics ceases to be. That Habermas's concept of deliberative democracy aims at the achievement of rational consensus can be seen in his acceptance of Joshua Cohen's communicative prerequisites for a deliberative procedure.<sup>44</sup> The last postulate of Cohen's deliberative procedure is of particular note: "The taking of yes/no positions is motivated solely by the unforced force of the better argument" (Habermas 1996a, 306). Habermas does not challenge the claim that any political decision-making exercise is aimed at reaching a definitive 'yes/no' outcome. Some may argue that in this respect, Habermas's deliberative democracy is aimed at the same kind of majoritarian consensus that Schmitt's concept of plebiscitary democracy seeks by authoritarian means. Habermas is, however, concerned that this decision is arrived at rationally.

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<sup>44</sup> (a) Processes of deliberation take place in argumentative form, that is, through the regulated exchange of information and reasons among parties who introduce and critically test proposals. (b) Deliberations are inclusive and public. No one may be excluded in principle; all of those who are possibly affected by the decisions have equal chances to enter and take part. (c) Deliberations are free of any external coercion. The participants are sovereign insofar as they are bound only by the presuppositions of communication and rules of argumentation. (d) Deliberations are free of any internal coercion that could detract from the equality of the participants. Each has an equal opportunity to be heard, to introduce topics, to make contributions, to suggest and criticize proposals. The taking of yes/no positions is motivated solely by the unforced force of the better argument (Habermas 1996a, 305-6).

He qualifies his use of ‘majoritarian rule’ in an effort to mitigate its ‘tyrannical’ potential. In his discussion of the European Union within a postnational constellation, Habermas argues that majority rule is to be built on a more abstract foundation of constitutional patriotism (2001, 74). The construction of civic solidarity on the basis of constitutional patriotism requires the successful “decoupling of political culture from majority culture” (Habermas 2001, 74). Habermas clarifies this point in the context of extreme nationalisms that rely precisely on a majoritarian culture:

The majority culture, supposing itself to be identical with the national culture as such, has to free itself from its historical identification with a general political culture, if all citizens are to be able to identify on equal terms with the political culture of their own country (2001, 74).

Habermas further argues that any achievement of rational consensus by a majority in a deliberative democracy is temporary and therefore, contestable. Habermas describes the *political character* of decision-making processes in the following way:

(e) Deliberations aim in general at rationally motivated agreement and can in principle be indefinitely continued or resumed at any time. Political deliberations, however, *must be concluded by majority decision in view of pressures to decide*. Because of its internal connection with a deliberative practice, *majority rule* justifies the presumption that the fallible majority opinion may be considered a *reasonable basis* for a common practice until further notice, namely, until the *minority convinces the majority* that their (the minority’s) views are correct (emphasis added) (1996a, 306).

The meaning of politics is temporarily fixed when the closest approximation to rational consensus has been reached; the majority’s decision stands and the political decision-making process ceases until the minority is able to convince the majority of something different. The informal processes of opinion-formation that take place at the level of a weak public sphere are not, however, fixed.

The kind of ‘closure’ in meaning that is more problematic in Habermas’s thought is his refusal to seriously engage with Schmitt’s concept of the ‘political.’ Habermas’s cosmopolitanism takes seriously Schmitt’s concerns of a moralization of politics and acknowledges the potential devolution of a politics of human rights into human rights fundamentalism. He does, however, resist serious engagement with the core of Schmitt’s statism—his concept of the ‘political.’ Habermas reformulates Schmitt’s moralization of politics thesis by making only a very brief mention to his concept of the ‘political.’ He forecloses further engagement with Schmitt’s reflections on the nature of the ‘political’ by dismissing them as “scurrilous” (Habermas 1997: 144).

On this score, Laclau and Mouffe’s concept of radical, democratic politics can be constructive. On the plural political terrains that they imagine, advocates of Habermas’s cosmopolitanism would be compelled to confront the proponents of Schmitt’s concept of the ‘political’ directly if their ideas are to gain a measure of hegemony in the discourse of international peace and security. If the nature of politics is conceived as hegemonic, then Schmitt’s statism and Habermas’s cosmopolitanism become two of many political strategies that aim to make their partial views of the world appear as the ‘total’ view (Koskenniemi 2004a, 1999). Laclau and Mouffe’s conception of politics allows us to take both Schmitt’s and Habermas’s incommensurate political ideas seriously and to choose between the two as part of a hegemonic strategy (Koskenniemi 2004a, 202). A hegemonic politics thereby rejects the notion that any ‘choice’ between statism and cosmopolitanism is definitive. If Habermas’s cosmopolitan strategy is to attain a hegemonic position within the international security discourse, it must be able to engage with competing political strategies on terms that are compelling to its detractors. In their

own ways, both Schmitt's statism and Habermas's cosmopolitanism rely on concepts of the 'political' that resist serious engagement with the other on their own terms. The 'closed' natures of Schmitt's statism and Habermas's cosmopolitanism in these respects have consequences for our evaluation of *The Responsibility to Protect*'s relevance in a post-9/11 world.

#### RELOCATING "THE RESPONSIBILITY TO PROTECT" ON A RADICAL, DEMOCRATIC POLITICAL TERRAIN

An evaluation of *The Responsibility to Protect* through the lenses of Schmitt's and Habermas's respective political concepts reproduces a 'closed' and divided terrain of politics. The 'closed' character of this political terrain of analysis has an effect on how each theorist formulates and resolves a moralization of politics. Schmitt's particular understanding of sovereignty subordinates law and morality to politics. Consequently, law and morality cease to have separate and distinct meanings apart from politics. A moralization of politics arises at the moment when moral considerations infect political decision-making with its 'good/evil' antithesis. A moralization of politics is resisted on Schmitt's account by adopting his essentializing account of politics.

In contrast, Habermas argues that a moralization of politics is problematic only in those instances where a relation of morality and politics fails to be mediated through the legal form. The political process is moralized when its outcomes have not been rationalized through the legal medium. A national system of rights founded on the discourse principle and legal form and secured through a principle of democracy guarantees a rational political outcome that reinforces the co-originality of human rights and popular sovereignty. For Habermas, a moralization of politics is a political problem

to the extent that the strategic nature of politics remains unchallenged by constitutional law. For this reason, Habermas argues that an unmediated moralization of politics is to be resisted by the constitutionalization of international relations through the medium of cosmopolitan law.

On both Schmitt's and Habermas's accounts, a moralization of politics is specifically formulated in direct opposition to the other's political orientation. This antagonism between Schmitt's statism and Habermas's cosmopolitanism in turn grounds their respective solutions to a(n) (unmediated) moralization of politics. A rejection of this divided political terrain in favour of a radical, democratic and hegemonic politics opens the meaning of a moralization of politics. The potential forms a moralization of politics can take move beyond the infection of law and politics with morality or the unmediated interactions between politics and morality. Moreover, the solutions to a moralization of politics expand beyond Schmitt's existential concept of the political and Habermas's dialogic and proceduralist conception of constitutionalization.

In the political terrain that Laclau and Mouffe imagine, a moralization of politics defies any single, unitary articulation or solution. Nevertheless, the correct insight expressed in the problem remains: a politics of human rights can devolve into human rights fundamentalism. On Laclau and Mouffe's approach, this crucial insight is articulated through hegemonic struggles within a field of antagonisms (Laclau and Mouffe 2001, 168). In this context, a moralization of politics emerges as part of a struggle for meaning within a hegemonic politics. The effects of a moralization of politics are felt to the extent that human rights fundamentalism challenges the democratic direction of a discourse of humanitarian intervention. The moralization of politics is

problematic to the extent that it temporarily steers a discourse in an undemocratic direction—one that reinforces relations of subordination and inequality.

The terms of a discourse of humanitarian intervention as they existed prior to *The Responsibility to Protect*, were complicit in reproducing relations of subordination because their meanings remained fixed within a hegemonic discourse of international peace and security. Today, the international security discourse operates within a broader hegemonic discourse of liberal-conservatism. Liberal conservatism constructs new hegemonic articulations through a system of equivalences that unifies multiple subject positions around an individualist definition of right and a negative conception of liberty (Laclau and Mouffe 2001: 175). Taken in the international context, the hegemony of liberal conservatism has been expressed in the main pillars of an international security discourse: the presumption of an international legal and states system constructed on the foundation of an absolute conception of state sovereignty as non-intervention; the privileging of states as the primary international actors; the tendency to frame international problems in terms of state rights and in practice, to orient discussions from the perspectives of the wealthiest and most influential developed states. Situated within this liberal-conservative international security discourse, the sub-discourse of humanitarian intervention as it was articulated before *The Responsibility to Protect* exhibited the same hegemonic features: a narrow articulation of international problems in terms of security threats, the tendency to identify legitimacy with strict legality, the classification of intervention as a deviation from the principle of state sovereignty and the discursive construction of international relations as relations of power among self-interested states.

Consistent with the Gramscian concept of hegemony, the dominance of a liberal-conservative international security discourse in foreign affairs has been sustained by a hegemonic bloc of liberal-democratic states. The continued dominance of this hegemonic bloc is sustained by its ability to address and incorporate some aspects of the interests and aspirations of subordinate groups from belligerents, insurgents and peoples claiming rights of self-determination. On this 'incorporative' understanding of hegemony,<sup>45</sup> the international security discourse has successfully sustained its dominance because it has, for example, successfully expanded the scope of international law to criminalize aggressive wars, crimes against humanity, genocide and war crimes. The Security Council's broadened interpretation of 'threats to international peace and security' to include threats to human security can be further interpreted as an attempt made by the hegemonic bloc to further secure its dominant status. The international security discourse has, thus, incorporated some of the concerns of other state and non-state actors but remains fundamentally liberal-conservative in its orientation.

Alternatively, the growing importance of cosmopolitan concerns in international law and practice can be understood as initiating a moment of 'hegemonic crisis' in the security discourse. Alan Hunt defines a 'hegemonic crisis' as: "[A] moment in which the previously secured leadership of a dominant bloc is unable to rule according to the status quo either because of some circumstances external to its own project or as a result of a

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<sup>45</sup> Here, I am referring to the concept of incorporative hegemony which claims that the dominance of a hegemonic/historical bloc or hegemonic project is achieved only if it succeeds in addressing and incorporating if only partially, some aspects of the aspirations, interests and ideology of subordinate groups (Hunt 1993, 230). Hunt outlines the steps to a successful hegemony: 1. A hegemonic/historical bloc or hegemonic project must incorporate values and norms that contribute to securing the minimum standards of social life; 2. It is the process by which a dominant bloc engages in a more or less self-conscious "compromise" to incorporate some element of the interests of a subordinate group; and 3. A dominant hegemony will articulate values and norms in such a way that they take on significant trans-class appeal (Hunt 1993, 230).

rapid advance in counterhegemonic forces” (1993, 234). This moment of hegemonic crisis can be attributed to the emergence of new actors and ‘interests’ vying for relevance in the constellation of forces comprising the hegemonic bloc and the articulation of its elements.

*The Responsibility to Protect* can be understood as one example of how these dissenting voices have initiated a moment of ‘hegemonic crisis’ within the sub-discourse of humanitarian intervention. An evaluation of the report within the radical, democratic terrain that Laclau and Mouffe propose reveals the extent to which *The Responsibility to Protect* can be interpreted as grounding a counterhegemonic challenge to the hegemonic discourse of international security. Specifically, the report does this by subverting the hegemonic articulations of power, interests and rights within a liberal-conservative international security discourse through counterhegemonic articulations of state responsibilities. These counterhegemonic articulations take into account the relational contexts in which states find themselves and therefore, the duties that they owe to other rights-holders. To this end, the report’s foundational concept of sovereignty as responsibility can be understood as a motor for multiplying chains of equivalence across international discourses.

#### UNLOCKING THE ‘RADICAL’ POTENTIAL OF “THE RESPONSIBILITY TO PROTECT”

Our analysis of *The Responsibility to Protect* takes a radical turn once the opposition between statism and cosmopolitanism replicated by the Schmitt/Habermas impasse is transcended in favour of Laclau and Mouffe’s radical, democratic political imaginary. In this democratic and plural political terrain, we can understand the report as

part of a counterhegemonic struggle against the hegemony of a liberal-conservative international security discourse. Counterhegemony can be defined as the process by which subordinate subjectivities challenge the dominant hegemony and seek to supplant it by articulating an alternative hegemony (Hunt 1993, 230). Specifically, the report begins to approach this counterhegemonic position by building on the existing discourse of international security to introduce new elements capable of transcending the dominant discourse.<sup>46</sup>

Until this point, the dominant discourse of international security has been characterized by hegemonic liberal-conservative articulations. The power, interests and rights of the strong constitute the default points of reference in discussions that fall under the rubric of international peace and security. *The Responsibility to Protect* takes a significant step towards the construction of a counterhegemonic discourse by opening up that which has heretofore been 'silenced' within the dominant discourse of security: an articulation of the rights of a suffering population *in relation to* the duties that the international community has to these people.

In the context of a sub-discourse of humanitarian intervention, *The Responsibility to Protect* refocuses international attention away from the entitlements of potentially intervening states and toward the rights of foreign populations in need. A responsibility to prevent is prioritized above a responsibility to react by military means. Where a military intervention for human protection purposes is necessary, the legitimacy of a use of force is determined not only by an intervening state's adherence to 'just cause,' 'right

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<sup>46</sup> Hunt describes three characteristics or steps in the construction of counterhegemony: 1. It supplements that which is already in place by adding to or extending an existing discourse; 2. It opens up the 'silences' that a hegemonic discourse conceals; and 3. It puts into place discourses (while still building on the elements of hegemonic discourses) that introduce elements, which transcend that discourse (1993, 233).

authority' and 'operational' principles but its commitment to a responsibility to rebuild. An intervening state acting on the principles of a responsibility to protect aims to restore sovereign authority locally. Moreover, a unilateral action taken by an intervening state may be legitimate according to the principles of a responsibility to protect if other legal avenues of action have been exhausted. By focusing on the legal, moral and political duties that state and non-state actors have to one another, *The Responsibility to Protect* begins to challenge the hegemony of articulations that focus on the intervening state's rights and interests within the sub-discourse of humanitarian intervention

The report's capacity to steer the sub-discourse of humanitarian intervention in a radical, democratic direction depends on the extent to which the logic of sovereignty as responsibility can successfully multiply of chains of equivalence across democratic discourses. The radical, democratic terrain of politics that Laclau and Mouffe construct rejects an ultimate unitarian basis to which all political and social spaces can refer and affirms a plurality of political spaces. In this new political terrain, a hegemonic politics is democratically steered when an egalitarian discourse becomes available to articulate the different forms of resistance to subordination across discourses (Laclau and Mouffe 2001, 154).

In the current international political context, the liberal-conservative discourse of security plays a privileged role in the formation of systems of equivalence. Subject positions within discourses as diverse as human rights, sustainable environments and terrorism have been articulated and unified around a hegemonic conception of security and by extension, a principle of absolute sovereign state equality. Within an international security discourse, the primacy of state rights is presumed and defined individualistically.

As clearly demonstrated in the American justification for war in Iraq, a powerful state can claim to use force pre-emptively in defence of its own people and borders and act in clear violation of international law without any serious consequences. Chains of equivalence constructed around an individualist conception of right effectively impede the emergence of collective action against relations of subordination. Worse, the multiplication of chains of equivalence across discourses using an individualistic conception of state rights may reproduce and perpetuate unequal relations in practice.

*The Responsibility to Protect* introduces a relational conception of state rights and duties through the principle of sovereignty as responsibility. The logic of sovereignty as responsibility provides a potential new basis for the construction of a different system of equivalents. Far from renouncing the hegemonic discourse of international security and its logic of autonomy, *The Responsibility to Protect* attempts to “deepen and expand it in the direction of a radical and plural democracy” through sovereignty as responsibility (Laclau and Mouffe 2001, 176). By focusing on collective interests that include the perspectives of populations in need instead of individual state rights, sovereignty as responsibility makes possible the establishment of ‘*democratic* equivalence.’ Laclau and Mouffe understand democratic equivalence to mean “a new ‘common sense,’ which changes the identity of the different groups in such a way that the demands of each group are articulated equivalentially with those of the others” (2001, 183). Equivalences established between different struggles become truly democratic when “the demanding of rights is not carried out on the basis of an individualistic problematic but in the context of respect for the rights to equality of other subordinated groups” (Laclau and Mouffe 2001, 183-4).

The concept of sovereignty as responsibility allows the needs of the people to be 'voiced' at both the domestic and international levels of politics. National governments are sovereign in virtue of their abilities to meet the basic obligations owed to their own citizenries. The 'sovereignty' component of sovereignty as responsibility is defined in popular rather than absolute terms. The sovereign status of a political authority is contingent on its ability to protect the basic human rights of the people on whom its legitimate rule rests. When a government fails to meet its first-order obligations, the responsibilities of members in the international community to protect a suffering population is engaged. Fundamentally, this international duty to protect exists because the moral rights of human beings to have their basic dignities respected are violated. A military intervention justified on these terms alone can be just as legitimate as a legally-justified use of force if all other recourses to more legitimate alternatives have been exhausted. The emphasis that sovereignty as responsibility places on a popular and contingent concept of sovereignty grounds a democratic discourse of responsibilities and duties capable of expanding chains of equivalence to other democratic struggles against forms of oppression.

In addition to connecting different democratic discourses on an equivalential logic of responsibility, sovereignty as responsibility also extends democratic equivalences in a plural direction. The establishment of democratic equivalences across struggles remains precarious to the extent that the meaning of the 'social' is never fixed (Laclau and Mouffe 2001, 184). In order to strengthen the bonds that connect different struggles and secure a society that can signify itself in a manner consistent with radical democracy, the

logic of democratic equivalence must be complemented by a logic of autonomy (Laclau and Mouffe 2001, 184).

Laclau and Mouffe argue that the multiplication of equivalence effects between democratic struggles aims at a maximum autonomization of a generalized equivalential-egalitarian logic (Laclau and Mouffe 2001, 167). This is achieved by a relational conception of individual liberty: individual rights are neither pre-given nor determined prior to any socialization but defined in the context of social relations that delimit temporarily-fixed subject positions (Laclau and Mouffe 2001, 184). If democratic equivalences are to be established between subject positions located in different discourses, then a relational conception of right must be presupposed. The individual freedom of each person to pursue his or her conception of the good life must also be compatible with the freedom of each and every individual to exercise his or her democratic rights. Here, Laclau and Mouffe understand democratic rights as rights that are exercised collectively and which suppose the existence of equal rights for others (Laclau and Mouffe 2001, 184). In this context, Laclau and Mouffe argue: “We need to produce another individual, one that is no longer constructed out of the matrix of possessive individualism” (2001, 184).

On a similar logic, sovereignty as responsibility aims at producing another responsible state, one that guarantees the protection of its citizens’ basic human rights and is willing to help restore a fellow member of the international community to its full sovereign status when it fails to meet its first-order obligations. That every military intervention justified on the basis of a responsibility to react must also fulfil the responsibilities to rebuild and prevent suggests that a responsibility to protect aims not

merely at halting human rights abuses but at constructing another individual and state on the basis of a relational conception of rights and duties. Broadly, a responsibility to protect aims at creating another responsible state constructed out of a matrix of popular and contingent sovereignty.

The potential of sovereignty as responsibility to radically and democratically steer a hegemonic international politics dominated by discourses of security, power and interests is contingent upon the hegemonization of a discourse of responsibilities and duties. Plural and democratic chains of equivalence constructed around sovereignty as responsibility approach a hegemonic position to the extent that the identities of those subjects engaged in temporary alliances of interests are reciprocally modified (Laclau and Mouffe 2001, 183-4). A hegemonic politics constructed around a discourse of relational rights and duties would not merely be 'political' in the sense of a "temporal or coincidental convergence of interests at any given time" but 'moral-intellectual' (Laclau and Mouffe 2001, 66-7). In this latter sense, political leadership would be grounded in an "ensemble of 'ideas' and 'values' shared by a number of sectors (Laclau and Mouffe 2001, 66-7). The foundational concept of sovereignty as responsibility has already established equivalences across a number of different discourses. To date, the concept of sovereignty as responsibility has appeared in the discourses concerning conflict management in Africa,<sup>47</sup> humanitarian intervention and most recently, the non-proliferation of nuclear weapons.<sup>48</sup>

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<sup>47</sup> See F.M. Deng, S. Kimaro, et al. 1996. *Sovereignty as Responsibility: Conflict Management in Africa*. Washington D.C.: The Brookings Institution.

<sup>48</sup> See Lee Feinstein and Anne-Marie Slaughter. 2004. The Duty to Prevent. *Foreign Affairs* 83(1): 136-151. For an interesting response to this article, see Gareth Evans. April 2004. Uneasy Bedfellows: "The Responsibility to Protect" and Feinstein-Slaughter's "Duty to Prevent." *The American Society of International Law Conference*. Washington DC: The American Society of International Law; available from <http://www.crisisgroup.org/home/index.cfm?id=2560&l=1>.

The relocation of a responsibility to protect within a plural, democratic terrain does not, however, automatically guarantee that a sub-discourse of humanitarian intervention or other discourses connected by the equivalential logic of sovereignty as responsibility will move in a progressive direction. Indeed, Laclau and Mouffe argue that the direction and nature of hegemonic articulations are never predetermined; hegemonic articulations can either be progressive or oppressive:

Thus far we have spoken of a multiplicity of antagonisms whose effects, converging and overdetermined, are registered within the framework of what we have called a 'democratic revolution.' At this point it is necessary, nevertheless, to make clear that the democratic revolution is simply the terrain upon which there operates a logic of displacement supported by an egalitarian imaginary, but that does not predetermine the *direction* in which this imaginary will operate. If this direction were predetermined we should simply have constructed a new teleology. [...] But in that case there would be no room at all for a hegemonic practice. The reason why it is not thus, and why no teleology can account for social articulations is that *the discursive compass of the democratic revolution opens the way for political logics as diverse as right-wing populism and totalitarianism on the one hand, and a radical democracy on the other* (emphasis added) (2001, 168).

The persistent vulnerability of a responsibility to protect to a moralization of politics suggests that the multiplication of chains of equivalence across discourses using the logic of sovereignty as responsibility is not an unqualified good. There are no guarantees that a counterhegemonic politics initiated by *The Responsibility to Protect* will be radical and democratic.

In a plural and democratic terrain, the positive value of a responsibility to protect is not to be assessed on the basis of whether the problem of a moralization of politics continues to persist; a moralization of politics is part of a hegemonic politics. Hunt observed that the contested nature of hegemony implies that the process of hegemonic politics involves both changes in direction (advances and retreats) as well as changes in pace (1993, 234). A moralization of politics is always possible in hegemonic and

counterhegemonic discourses. Instead, the relevant question becomes whether a particular logic of equivalence reinforces an existing hegemonic discourse of security, power and interests or contributes to the deepening and expansion of that discourse in a radical, democratic direction.

I have argued that *The Responsibility to Protect* has the capacity to ground a counterhegemonic challenge in precisely the latter sense. Once a 'closed' terrain of politics is rejected as the relevant evaluative space for *The Responsibility to Protect* in a post-9/11 world, a moralization of politics—one of the report's gravest threats—ceases to be defined by a specific formulation or resolved by a particular solution. A moralization of politics will not be understood as the infection of international law and politics with moral considerations as Schmitt contends. The solution to Schmitt's moralization of politics will not be the assertion of an existential concept of the 'political' that distinguishes between friend and enemy. Similarly, the threat of human rights fundamentalism in an unmediated moralization of politics will not be ameliorated through a constitutionalized international sphere ordered by cosmopolitan law. In the radical, democratic political imaginary that Laclau and Mouffe propose, a moralization of politics will be rendered intelligible where articulations of power and individual state interests are reasserted in opposition to the multiplication of countervailing chains of equivalence on a logic of relational rights and duties. Attempts to reintroduce liberal-conservative articulations of individual state rights and interests are to be expected and resisted within a radical democratic terrain of politics. This terrain of politics is defined by creative, reproductive and transformative practices aimed at struggling against relations of inequality and subordination. It is precisely in this positive direction that the

tensions within *The Responsibility to Protect* can be productively mobilized to resist a moralization of politics and democratize international discourses beyond humanitarian intervention.

## CONCLUSION

In this study, we have attempted to answer the questions of whether and how the International Commission on Intervention and State Sovereignty (ICISS)'s report, *The Responsibility to Protect*, can be relevant in a post-9/11 world. In spite of the report's internal tensions and the external threat of abuse by state officials, we have attempted to carve out a productive space in which a responsibility to protect can function. I have suggested one way in which *The Responsibility to Protect* can remain relevant in a post-9/11 world in spite of its internal and external vulnerabilities to a moralization of politics.

*The Responsibility to Protect* contains the seeds of a counterhegemonic discourse capable of democratizing the dominant liberal-conservative international security discourse within which it operates. The report's foundational concept of sovereignty as responsibility and its ambivalence between Carl Schmitt's statism and Jürgen Habermas's cosmopolitanism can be productively mobilized to ground a counterhegemonic discourse of humanitarian intervention. In arguing that the report's most tenuous elements can be mobilized to establish chains of equivalence between discourses in common resistance to relations of inequality and subordination, we have suggested an alternative way of assessing the report's value—one that does not rely on showing that a norm of humanitarian intervention effectively exists.

We began with an analysis of *The Responsibility to Protect* through the lenses of Schmitt's and Habermas's respective formulations of a moralization of politics. The broad contours of Schmitt's statism and Habermas's cosmopolitanism emerged from our dissection of their respective moralization of politics theses. By uncovering the constellations of law, morality and politics in Schmitt's and Habermas's political works,

we could begin to discern where the report was positioned relative to Schmitt's statism and Habermas's cosmopolitanism. In turn, we were able to comprehend how the constellation of law, morality and politics constructed in *The Responsibility to Protect* could actually reproduce the conditions for a moralization of politics.

Simultaneously, our analysis of the report through a moralization of politics revealed the limits of an analytic approach that relies on a division of the relevant political terrain into two antagonistic categories: Schmitt's statism and Habermas's cosmopolitanism. In conjunction with the current international security context, which narrowly perceives threats as either 'terrorist' or 'anti-terrorist,' this divided political terrain effectively forecloses any positive assessment of the report's potential. It seemed that the report's potential in a post-9/11 world would be limited to its exclusion of those activities inconsistent with a responsibility to protect. In this analytic framework, the report's 'radical' potential was effectively obscured.

The analytic problem then became one of articulating an alternate political terrain for our evaluation of *The Responsibility to Protect*—one in which the report's 'radical' potentialities could effectively be unlocked. We advanced a radical, democratic political terrain as imagined by Ernesto Laclau and Chantal Mouffe. Within this 'new' political terrain, the report's positive cosmopolitan potentialities could be productively mobilized. Moreover, the problem of a moralization of politics could no longer be understood solely in terms of either Schmitt's statism or Habermas's cosmopolitanism. Rather, the dangers of a moralization of politics are experienced when hegemonic articulations of power and state interests threaten to subvert those discourses democratized by counterhegemonic articulations of relational rights and duties. A relational conception of state rights

perceives rights in relation to their duties and as such, takes into account the perspectives of other relevant actors. *The Responsibility to Protect* is capable of establishing democratic equivalences between different discourses through the logic of sovereignty as responsibility. The equivalential logic of sovereignty as responsibility can, in turn, be effectively mobilized to resist a moralization of politics—those attempts to steer a discourse in an undemocratic direction.

In a post-9/11 world, *The Responsibility to Protect* remains relevant. The logic of its foundational concept—sovereignty as responsibility—can be mobilized to ground democratic discourses that resist a project of American imperialism. The conduct of international politics in a post-9/11 world is fraught with many dangers and paradoxes. In this paradoxical space, it is possible to imagine that those potential instruments of empire can become the most important sources of its contestation. The capacity to imagine international politics differently is therefore our best defence against empire.

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