

**PART I**  
**THE MORAL UNDERPINNINGS**  
**AND POLITICAL ENDS OF R2P**



# THE KANTIAN DEFENCE OF MURDER

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## 1. INTRODUCTION

The Responsibility to Protect (R2P) did not appear in this world fully formed in the International Commission's report on Intervention and State Sovereignty.<sup>1</sup> Rather, that report was 'an attempt to integrate pre-existing but dispersed practices of protection into a coherent account of international authority'.<sup>2</sup> It is an idea with a long history. Anne Orford's historical account of the development of the idea of protection draws attention to how it interacts with sovereignty and self-determination, particularly in decolonising states. Orford's account of R2P asks an old question of this new discourse – who decides? Who decides what protection is, or who can offer protection.<sup>3</sup> The language of responsibility and protection provides potential concrete grounds for judging who is an effective sovereign, but it also moves away from the traditional values of sovereignty as originating in the people, and moves to an external judgement by the international community.<sup>4</sup> I want to look at one particular form of justification for intervention within a state, which Orford also addressed more recently: the idea of a moral duty derived from Kant.<sup>5</sup> However, whereas Orford primarily addresses Kenneth Walzer as representative of this form of argument, I will critically engage with two writers who more directly draw on Kant for their 'moral internationalism': Jürgen Habermas<sup>6</sup> and Fernando

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<sup>1</sup> Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001) available at <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> accessed 17.05.2015.

<sup>2</sup> A. ORFORD, *International Authority and the Responsibility to Protect* Cambridge University Press, 2011, p. 2.

<sup>3</sup> *Ibid.* See also on the question of "who decides" A. ORFORD, 'Moral Internationalism and the Responsibility to Protect' *The European Journal of International Law* (2013) 24, 83.

<sup>4</sup> *Ibid.*

<sup>5</sup> ORFORD, 'Moral Internationalism' (n. 3) 87–9.

<sup>6</sup> Habermas has of course produced a huge body of work, but here I will primarily focus upon his essay J. HABERMAS, 'Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight', in J. BOHMAN and M. LUTZ-BACHMANN (eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, MIT Press, 1997.

Tesón.<sup>7</sup> Both these leading proponents of a moral basis for intervention use Kant to support their argument. I call this the Kantian defence of murder.

These arguments in support of intervention are based primarily on Kant's essay 'Perpetual Peace: A Philosophical Sketch'.<sup>8</sup> In this famous work Kant sets out what would be required to guarantee a state of perpetual peace. Lawyers have failed to achieve peace, their work amounting merely to 'sorry comfort' in the face of politics.<sup>9</sup> What is needed is a set of specific changes in the structure of global politics. Kant's essay is fundamentally about how to secure a universal, normative, metaphysical morality which applies to all rational beings, as described in 'Groundwork to the Metaphysics of Morals'.<sup>10</sup> As such it describes the final point of human development, anticipated in Kant's teleological works.<sup>11</sup> The actual essay contains preliminary articles about how to achieve peace, and definitive articles on how to order the world to secure peace once it is achieved. Importantly, Kant's state of perpetual peace is yet to come. It is a future condition postponed until after humanity has developed. Anybody outside of the 'lawful state' which seeks perpetual peace is an enemy.<sup>12</sup> Any man who lives outside of this ordered society 'robs me of any security and injures me by virtue of this very state in which he coexists with me... he is a permanent threat to me, and I can require him either to enter into a common lawful state along with me or to move away from my vicinity'.<sup>13</sup> For Kant, the pursuit of peace requires forcing others to live in a particular way. In the supplements to 'Perpetual Peace' Kant is even clearer: 'Nature has chosen war as a means of attaining the end [development]'.<sup>14</sup> Warfare, conflict and struggle are the tools which will lead to perpetual peace, but it may well be the peace of the graveyard.<sup>15</sup>

R2P is the latest manifestation of a justification for intervention, warfare and killing which bases its claim on a moral position which is to some extent inherited from Kant. In his political philosophy, Kant also offers a detailed and extensive body of moral philosophy which provides tools for judging the morality of different actions. Kant's thinking has been appealing to both

<sup>7</sup> Tesón's main works are: F. TESÓN, *A Philosophy of International Law*, Westview, 1998; F. TESÓN, *Humanitarian Intervention*, Transnational, 1988; and F. TESÓN, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 54.

<sup>8</sup> I. KANT, 'Toward Perpetual Peace: A Philosophical Sketch' in I. KANT, *Political Writings* (H. Reiss ed.), Cambridge University Press, 1970, 98.

<sup>9</sup> *Ibid.*, 103.

<sup>10</sup> I. KANT, 'Groundwork to the Metaphysics of Morals' in I. KANT, *Practical Philosophy* (M.J. Gregor ed.), Cambridge University Press, 1996.

<sup>11</sup> In particular see I. KANT 'Idea for a Universal History with a Cosmopolitan Purpose' in KANT, *Political Writings* (n. 8) p. 41.

<sup>12</sup> KANT, 'Perpetual Peace' (n. 8) p. 98.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, 111.

<sup>15</sup> *Ibid.*, 98. Kant begins the essay with a joke about a sign over a public house called The Perpetual Peace and showing a graveyard.

international lawyers and political philosophers.<sup>16</sup> Often, Kant's thinking provides a framework for a justification of intervention of different sorts, an opportunity to judge an action against the 'Categorical Imperative', or 'the Universal Principles of International Justice'. I want to look at the interpretations and application of Kant's thinking. My intention is to try and provide a useful insight into the use of this moral theorising in international law and see if it can illuminate and explain the development of the R2P doctrine as a contribution to and strengthening of this form of argument.

Orford has considered the increased force of moral argument in international law in light of R2P in a subsequent article.<sup>17</sup> This is another aspect of the transformative effect of R2P, in moving towards an international order which safeguards common interests and values. But the question remains, who decides what are our common interests and values. As Orford concludes at the very end of the book, R2P draws attention to the work of law and politics 'that takes place in the attempt to move *between* metaphysics and physics, universal and particular, ideal and real, or then and now'.<sup>18</sup> Both Tesón and Habermas attempt to put the universal categories they have learnt from Kant to work on the ground through a moral form of argument in support of intervention. R2P makes these moves from the universal to the particular even more applicable, and thus a close examination of the arguments and their problems more pressing. The imposition of the universal on to the particular is imperialism. By engaging with Habermas and Tesón I am engaging critically with two main forms of this moralising.

There are a variety of different attempts to justify a policy of intervention based on Kant's thinking.<sup>19</sup> This is broadly an appeal to Kantian morality as a way to escape from the contradiction between sovereignty and human rights. Generally, the appeal to morality to answer law's indeterminacy is familiar,<sup>20</sup> as is the appeal to Kantian morality in particular. Looking at intervention

<sup>16</sup> A couple of good examples of international lawyers engaging with Kant, albeit in very different ways, would include P. CAPPIS, 'The Kantian Project in Modern International Legal Theory' (2001) 12 *European Journal of International Law* 1010; and M. KOSKENNIEMI, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalisation' (2006) 8 *Theoretical Enquiries in Law* 9. In political philosophy, the work of John Rawls and Thomas Pogge, as well as Habermas, are most notable.

<sup>17</sup> ORFORD, 'Moral Internationalism' (n. 3).

<sup>18</sup> ORFORD, *International Authority* (n. 2) 212.

<sup>19</sup> Other than the two authors considered here, some prominent work in this area includes: K. WALTZ, 'Kant, Liberalism and War' (1962) 56 *American Political Science Review* 331; M. DOYLE, 'Kant, Liberal Legacies, and Foreign Affairs' (1983) 12 *Philosophy & Public Affairs* 205 & 12(4) *Philosophy & Public Affairs* 323; M. DESCH, 'America's Liberal Illiberalism' (2007.8) 32 *International Security* 7; B. OREND, *War and International Justice: A Kantian Perspective*, Wilfred Laurier University Press, 2000; A. BELLAMY, *Just Wars*, Polity, 2006; M. EVANS (ed.) *Just War Theory: A Reappraisal*, Edinburgh University Press, 2005.

<sup>20</sup> The leading proponent of the 'indeterminacy thesis' is Martti Koskeniemi, and his clearest expression of it is perhaps M. KOSKENNIEMI, 'The Politics of International Law' 1 *European Journal of International Law* (1990) 4. All of the arguments referenced above in some way rely on morality to escape from this conflict between sovereignty and human rights.

is looking at a very specific claim. Not just that there is some morality (which morality?) which can help us escape indeterminacy and lead to justice (whose justice?), but that our morality helps us settle a specific legal question: ‘when is it legal to intervene in the internal affairs of a state?’<sup>21</sup> The general question of the relation between law and morality is set aside here, and my focus is solely on the Kantian justification of intervention. Habermas and Tesón offer two of the best known arguments in support of some form of intervention. Habermas justifies intervention as lawful within a cosmopolitan legal order. In such an order intervention can and must be carried out according to the law. Interventions must be by legal uses of force, and when they are, they are no longer conceived as ‘wars’, but as police enforcement actions.<sup>22</sup> Tesón takes a different approach to Kant. Tesón instead focuses on what is *morally* required, both by states in relation to their own people, and the duties other states and peoples owe to each other. Human rights violations are morally wrong, and must be stopped. Intervention to stop a human rights violation is morally justified, and the law is trumped by this morality. In the pages that follow I will consider these two arguments in turn as forms of moral internationalism which are particularly relevant in an age of responsibility and protection. R2P makes these arguments stronger and gives them new ways of taking effect. Therefore, engagement with these ideas is timely and important.

## 2. KANTIAN THEORIES OF INTERVENTION

### 2.1. HABERMAS: A LEGAL ARGUMENT

Jürgen Habermas, in a well-known essay, attempted to reformulate Kant’s cosmopolitan ideal to fit the present day.<sup>23</sup> Habermas asserts straight away that Kant’s political philosophy leads ultimately ‘to a global legal order that unites all peoples and abolishes war’.<sup>24</sup> International law offers peremptory norms<sup>25</sup> to govern war which ‘are valid only until pacification through law shows the way to a cosmopolitan order that abolishes war’.<sup>26</sup> The possibility of this cosmopolitan order is developed in ‘Perpetual Peace’. Kant’s proposals

<sup>21</sup> A subsidiary question would be what does intervention mean, and this is addressed later in the chapter.

<sup>22</sup> John Rawls is of course also a well-known philosopher associated with these questions. I exclude him from my discussion here as his theory is similar to Habermas’s, but less persuasive and less clearly and rigorously based in Kantian theory.

<sup>23</sup> HABERMAS, ‘Two Hundred Years’ Hindsight’ (n. 6).

<sup>24</sup> *Ibid.*, 113.

<sup>25</sup> This is Habermas’s idea of peremptory norms, and he does not elaborate. For the orthodox view, see J. CRAWFORD, *Brownlie’s Principles of Public International Law* (8<sup>th</sup> ed.), OUP, 2012, 594–8.

<sup>26</sup> HABERMAS, ‘Two Hundred Years’ Hindsight’ (n. 6) 113.

are unavoidably structured by his contemporary setting. Habermas offers to reformulate Kant's ideas 'with a view to the contemporary global situation'.<sup>27</sup> In particular, Habermas sets out to defeat objections to the universalism of plans for cosmopolitan law, by setting out the distinction between law and morals. This part of his argument is directed primarily against the work of Carl Schmitt.<sup>28</sup> These arguments also have renewed force and relevance when considering the universal category of protection in R2P. In Habermas's essay, Kant starts from two outdated premises of limited warfare<sup>29</sup> and of nation states which have absolute internal sovereignty.<sup>30</sup> These two premises have to be corrected, to take account of modern, unlimited warfare, and of the more fluid distinction between domestic and foreign policy. It is because of the limited nature of war in Kant's experience that he cannot envisage a *legal* regulation on making war, only a law *in* war. On sovereignty, it is because of the exceptional nature of the democratic constitutional state, only America and revolutionary France in Kant's time, that Kant cannot see 'the possibility of a community of peoples under the hegemony of a powerful state'.<sup>31</sup> This produces the contradictions found in the text concerning whether a coercive union of states or merely a voluntary federation is necessary to secure perpetual peace.

Next, Habermas addresses three features of perpetual peace which have turned out to be mistaken, but which nevertheless contain 'a peculiar dialectical quality'.<sup>32</sup> They are the peaceful nature of republics, the power of world trade to create communal ties, and the function of the political public sphere.<sup>33</sup> Kant claimed that the republican form of government causes states to lose their bellicose character since the citizen's consent is required before engaging in war, and citizens, acting in their own self-interest, would be reluctant to give this consent.<sup>34</sup> In this case, Habermas says, the power of nationalism showed Kant to be over-optimistic. The move from mercenary armies to national citizen militias, which Kant saw as essential to guarantee peace, was in fact vital to the huge increase in the scale of war. But Habermas has indicated that these historical trends are dialectical, and here he argues that liberal states have not entered into wars with one another. Citizens *do* have an impact on the way that their state makes wars. Public opinion affects the choice of wars which are

<sup>27</sup> *Ibid.*, 114.

<sup>28</sup> For a discussion and defence of Schmitt's position see W. RASCH, *Sovereignty and its Discontents: On the Primacy of Conflict and the Structure of the Political*, Birkbeck Law Press, 2004, particularly chapter 2, 'A just war? Or just a war? Schmitt vs Habermas'.

<sup>29</sup> HABERMAS, 'Two Hundred Years' Hindsight' (n. 6) 115.

<sup>30</sup> *Ibid.*, 118–9.

<sup>31</sup> *Ibid.*, 119.

<sup>32</sup> HABERMAS, 'Two Hundred Years' Hindsight' (n. 6) 119. Dialectical is here used in the Hegelian sense, in that these theses of Kant's contain a negative which is perceived through experience, leading to the concrete.

<sup>33</sup> *Ibid.*

<sup>34</sup> KANT, 'Perpetual Peace' (n. 8) 100.

entered into. Wars fought for ‘the implementation of democracy and human rights’ have become prevalent.<sup>35</sup> Whether this is simply the way that wars are sold to citizens, rather than the influence of people upon governments, is not a doubt which enters Habermas’s argument.

The growth of world trade is also viewed by Habermas as having a dialectical character. Kant was incorrect to say that the greater interdependence of different societies would lead to peace, as the growth of capitalism created internal class conflicts and civil wars and external wars of imperial conquest and domination.<sup>36</sup> However, Habermas explains, after the Second World War the invention of the welfare state calmed class antagonisms and globalisation provided the spread of social and cultural relationships needed to bring peaceful economic integration. The denationalisation of the economy separated economic and political concerns, and national politics has lost its control over the conditions of production, rendering it neither popular nor possible to fight wars for economic gain. In Habermas’s terms “soft power” forces “hard power” aside and robs the subjects Kant had counted on in his association of free states of the very basis for their independence’.<sup>37</sup>

Thirdly, Habermas describes the dialectical character of the political public sphere. The requirement of *publicity* is the requirement to offer proper justifications for the actions of a government.<sup>38</sup> However, again in developments Kant could not have foreseen, the public sphere has been transformed by ‘electronic mass media, semantically degenerated, and taken over by images and virtual realities’.<sup>39</sup> By such means, this enlightenment value of “speech and discussion” has been utterly transformed into forms of indoctrination without language and linguistic deception’.<sup>40</sup> Habermas is not without hope though that something like a global public sphere is beginning to emerge. He cites the outcry against the war in Vietnam and the first Gulf War, as well as the many United Nations world summits, as examples of issues of importance to a global public, and attempts to subject governments to world opinion.<sup>41</sup> The subjection of states to world opinion clearly forms the basis of the second and third pillars of R2P. The question of whose opinion is unasked. Publicity, as part of an embedded liberal constitution, ‘is the medium through which progress in the political process of civilizing a population takes place’.<sup>42</sup> Habermas puts great emphasis on publicity, and dismisses Kant’s appeals to nature, in his reformulation of

<sup>35</sup> HABERMAS, ‘Two Hundred Years’ Hindsight’ (n. 6) 121.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, 123.

<sup>38</sup> Publicity is an important requirement in both Kant’s political and moral philosophy. See, for example KANT, ‘An answer to the Question: What is Enlightenment?’ in KANT, *Political Writings*, Cambridge, 1991, p. 54.

<sup>39</sup> HABERMAS, ‘Two Hundred Years’ Hindsight’ (n. 6) 124.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, 124–5.

<sup>42</sup> *Ibid.*, 125.



this part of Kant's thinking. He adds two other crucial developments that have contributed to the realisation of perpetual peace: the outlawing of war, and the addition to criminal law of crimes against humanity. As a result of this transition from international law to cosmopolitan law, as Habermas calls it, 'governmental subjects of international law lost their general presumption of innocence in a supposed state of nature'.<sup>43</sup>

After these developments and the transition to cosmopolitan law, intervention in a sovereign state becomes a matter of policing criminal states or criminal actions. Habermas envisages a world where all forms of intervention short of physical violence, such as cultural, diplomatic and most importantly economic,<sup>44</sup> are good.<sup>45</sup> External influences which *destabilise* a state are nowhere considered, and the responsibility is always with the government of the state. Habermas admits to problems in his universal history, but the movement is always forward, and the most serious reactions against the 'civilizing' of a population can be punished. There are a variety of objections immediately apparent here. In terms of Habermas' updating of Kant, the substitution of 'publicity' for 'nature' may use a terminology which is more suited to a 21<sup>st</sup> century audience, but it does serious harm to Kant's philosophy. The separation of nature from morality is crucial in Kant's political thinking. This distinction is what separates the political works from the moral works. In 'Universal History' the progress of the species is according to nature's plan.<sup>46</sup> Without nature, developments such as war would be judged according to morality, and found to be wrongful. It is important that Kant specifically makes the development of the species *not* subject to morality. Secondly, Habermas claims to be reading Kant in context, and observes that we live in different times and therefore need to update Kant's thinking. However, his view of Kant's 'times' is very limited. It is simply a world of battlefield warfare and unlimited sovereignty. No discussion is given to colonialism, which was on the verge of its 19<sup>th</sup> century expansion, and the discoveries and developments of which Kant was a keen observer. No thought is given to the character of 'man' who is developing in Kant's plan. The category 'man' is surely more complicated in the 21<sup>st</sup> century than it was for Kant. Presumably Habermas would not exclude women, as Kant did.<sup>47</sup> More importantly, Habermas himself has said that his philosophy is not subject

<sup>43</sup> *Ibid.*, 126.

<sup>44</sup> It is worth noting that R2P does not directly address these issues, with 'sanctions' being discussed very generally in the Secretary General's reports, see e.g. Report of the Secretary General, *The Responsibility to Protect – Timely and Decisive Response* A/66/874–S/2012/578.

<sup>45</sup> This view can be found in current international law, most obviously on the issue of third-party countermeasures, proposed in J. CRAWFORD, *International Law Commission Yearbook* 2000/II(1) 3, 106–9.

<sup>46</sup> KANT, 'Universal History' (n. 11).

<sup>47</sup> KANT, 'Observations on the Feeling of the Beautiful and Sublime' in P. FRIERSON (ed.) *Kant: Observations on the Feeling of the Beautiful and Sublime and Other Writings*, Cambridge University Press, 2011.

centred.<sup>48</sup> Thirdly, there are the arguments against Kant he does recognise, which need a little more consideration.

Habermas has reconceived and reconstructed Kant's approach in a number of ways, to 'reconstruct the universal conditions of knowledge and action'.<sup>49</sup> Habermas's reconstructed Kantianism is:

'dialogical rather than monological, grounded in actual intersubjective practices of communication and socialisation rather than in a metaphysical philosophy of individual consciousness, context-dependent in a number of ways rather than independent, quasi-transcendental rather than transcendental, fallible rather than foundational, dependent on hypotheses generated in the empirical and reconstructive social sciences rather than free standing, and open to revision rather than certain.'<sup>50</sup>

Habermas gives us 'Perpetual Peace' as a limit. The limit of the constitution is liberal, the limit of the economy is global free trade and the limit of the law is a public cosmopolitanism. These are limits because they are 'universal, necessary and obligatory'.<sup>51</sup>

### 2.1.1. *Foucault vs Habermas*

Michel Foucault sought to show that limits that are 'given to us as universal, necessary, and obligatory' are actually 'singular, contingent, and the product of arbitrary constraints'.<sup>52</sup> Foucault's opposition to Habermas goes far beyond my discussion here,<sup>53</sup> but his objections can be applied to Habermas's specific argument concerning 'Perpetual Peace'. Tully analyses four objections Foucault had to Habermas: that Habermas is not truly critical, that his own approach is reasonable, that a genealogy of the decentred subject is possible, and that Habermas is utopian.<sup>54</sup> The first and last are relevant here.<sup>55</sup>

Foucault criticises Habermas for not being truly critical, in that Habermas is not critical of his form of reflection. As Foucault puts it 'there is always something ludicrous in philosophical discourse when it tries, from the

<sup>48</sup> J. HABERMAS, *The Philosophical Discourse of Modernity*, MIT Press, 1987.

<sup>49</sup> M. FOUCAULT, 'What is Enlightenment?' in P. RAINBOW (ed.), *The Foucault Reader*, Pantheon, 1984, 46.

<sup>50</sup> J. TULLY, 'To Think and Act Differently' in S. ASHENDEN and D. OWEN (eds.), *Foucault Contra Habermas: Recasting the Dialogue between Genealogy and Critical Theory*, SAGE Publications, 1999, 84.

<sup>51</sup> *Ibid.*, 94.

<sup>52</sup> FOUCAULT, 'What is Enlightenment?' (n. 49).

<sup>53</sup> The essays in ASHENDEN and OWEN, *Foucault Contra Habermas* (n. 50) are an excellent starting point concerning the engagement between Habermas and Foucault, and their respective supporters.

<sup>54</sup> TULLY, 'To Think and Act Differently' (n. 50).

<sup>55</sup> The other two objections concern the method of philosophy used by the two thinkers, the detail and implications of which are beyond my current argument.

outside, to dictate to others, to tell them where their truth is and how to find it'.<sup>56</sup> Essentially, Habermas's decentred subject is assumed as the ideal subject. Furthermore, this form of the subject only appears in modern societies, with 'second-order concepts', which allow for reflection on one's own culture, which has a decentring effect, and 'demands *similar* processes of learning and adaptation of *any* culture that crosses it'.<sup>57</sup> Habermas does not allow other cultures access to this universal subject, as they are developmentally behind. Habermas's position is developmental, not contextual, posits a universal subject, and universal limits on human developments. If nothing else, we can complain that this limits political action and potential. It is surely much more promising to 'give up ever acceding to a point of view that could give us access to any complete and definitive knowledge of what may constitute our historical limits',<sup>58</sup> and therefore permit our theory to engage with what is particular, contingent and arbitrary. The conditions of sovereignty recast as responsibility should have this focus, rather than the universal form that R2P adopts.

The objection that Habermas is utopian was made by Foucault in an interview in 1984. In discussing his interest in Habermas, he said:

'There is always something which causes me a problem. It is when he assigns a very important place to relations of communication and also a function that I would call 'utopian'. The thought that there could be a state of communication which would be such that the games of truth could circulate freely, without obstacles, without constraint and without coercive effects, seems to me to be Utopia.'<sup>59</sup>

Habermas's idea of communicative action and communicative rationality appear in his discussion of 'Perpetual Peace', in his arguments concerning publicity.<sup>60</sup> They are utopian not because Habermas does not believe in power relations, but because he believes that discourses are separable from the power relations which shape them. The attempt of R2P to be a truly objective discourse also suffers from this utopian thinking. This is utopian in two senses; firstly, because there is no place where discourse can be free of power, and secondly, to look at discourse in such a way, to measure them against this abstract regulative ideal, is to 'abstract oneself from what is really going on and the possibilities of concrete freedom *within them*'.<sup>61</sup> For Foucault, freedom can only be found within power relations, as they are pervasive. Any attempt to discover something outside of

<sup>56</sup> M. FOUCAULT, *The Uses of Pleasure*, Vintage Books, 1985, 9.

<sup>57</sup> J. HABERMAS, *Justification and Application: Remarks on Discourse Ethics*, MIT Press, 1994, 157–8.

<sup>58</sup> FOUCAULT, 'What is Enlightenment?' (n. 49) 47.

<sup>59</sup> M. FOUCAULT, 'Interview' in J. BERNAUER and D. RASMUSSEN (eds.), *The Final Foucault*, MIT Press, 1988, 18.

<sup>60</sup> Habermas sets out his theory of communicative action in *The Theory of Communicative Action*, 2 vols, Beacon Press, 1984.

<sup>61</sup> TULLY, 'To Think and Act Differently' (n. 50) 131.

power relations is purely abstract, and distracts attention from what is concrete and real. To crudely apply this to the subject of humanitarian intervention, Habermas ignores the very real effects of economic and political intervention,<sup>62</sup> which destabilise relations, worrying instead about whether these interventions and the violence which follows fit his regulative ideal. While Habermas may be willing to alter the ideal to better work on actual reality, it might be simpler to drop the ideal entirely.

### 2.1.2. *Schmitt vs Habermas*

Habermas places his theory in specific opposition to Carl Schmitt's thought in his 'Perpetual Peace' essay.<sup>63</sup> In Habermas's terms, Schmitt's political theory has two basic propositions: 'that the politics of human rights leads to wars that are disguised as police actions to lend them a moral quality and that this moralisation stamps the enemy as an inhuman criminal and thus opens the floodgates'.<sup>64</sup> William Rasch summarises Habermas's task as 'to demonstrate, in explicit opposition to Carl Schmitt's criticisms, that ... a world state does not represent a moral or political despotism'.<sup>65</sup> His world state is:

'The United Nations of the World, [which] ought to be cast in the image of the United States of America. [...] There will be no discrepancy between state and cosmopolitan law because state law will simply be cosmopolitan law realised at the local level. The 'community of peoples' will not be hindered by the internal sovereignty of nation states and therefore will be able to exact 'compliance with its rules', presumably by use of military might. The triumph of this strong version of the cosmopolitan ideal not only necessitates the obsolescence of historical nation-states, reducing them to 'provinces' of a larger, all-encompassing federation; it also requires the global establishment of liberal constitutions, guaranteeing (as yet unspecified) human rights and dismantling regimes that are deemed illiberal, traditionally authoritarian, or theocratic. Not only will there be one world government, there will be one world religion, a secular religion of the rights of man.'<sup>66</sup>

<sup>62</sup> For an excellent illustration of the external causes of war in the former Yugoslavia, see A. ORFORD, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443.

<sup>63</sup> Habermas mostly refers to C. SCHMITT, *The Concept of the Political*, Rutgers University Press, 1976. In the discussion that follows I primarily draw on secondary sources who have put Schmitt and Habermas' thought in dialogue at much greater length than is available to me here.

<sup>64</sup> HABERMAS, 'Two Hundred Years' Hindsight' (n. 6).

<sup>65</sup> RASCH, *Sovereignty and Its Discontents* (n. 28) 52. For a detailed discussion of this work as a whole, see J. BECKETT, 'Conflicting Orders: How Peace is Waged' (2007) 20 *Leiden Journal of International Law* 281.

<sup>66</sup> RASCH, *Sovereignty and Its Discontents* (n. 28) 55.

This cosmopolitan world order of perpetual peace may well seem attractive. But it is a world which bans opposition and politics. There is one world order, and one set of rights. Habermas ‘reduces the foreign to the domestic and the domestic to the legal’.<sup>67</sup> In Schmitt’s thinking, ‘the political world is a pluriverse’,<sup>68</sup> the only world in which a multitude of views can exist. By reducing this to the legal, only one view can exist. The legal, contrary to what Habermas suggests, is not free of interests; ‘the legal *always* reflects someone’s interests’,<sup>69</sup> but these interests are not perceived by those putting forward the law. This is imperialism again and again, subsuming the other under a universal. Schmitt, in prioritising politics and conflict, asks the question whether there is now any place for political conflict outside of the supervision of this legal morality.<sup>70</sup> Furthermore, any opposition to this morality becomes a terrorist action in a global police state. The outlawing of war leads to the outlawing of opposition in general.<sup>71</sup> To bring R2P back in, when Schmitt famously declares that the state presupposes politics,<sup>72</sup> R2P disagrees and declares that protection is primary. This is explicitly stated in the first pillar. Before politics can happen within a state, the state must provide protection. This externally imposed condition disallows any genuine politics which must carry with it the ultimate risk of conflict, warfare and death. Habermas’s neo-Kantian theory advocates a perpetual war to compel those who are different to join the world order in the name of perpetual peace. As Rasch says in opposition to this, ‘Schmitt the nationalist might also be Schmitt the international multiculturalist’.<sup>73</sup>

In his reconstruction of Kant’s proposal Habermas views the achievement of perpetual peace as a process requiring the growth of cosmopolitan law and the current situation as a transition from international law to cosmopolitan law.<sup>74</sup> This process permits and requires certain forms of intervention, generally non-violent, and specifically economic sanctions. This may be a form of ‘gentle compulsion’,<sup>75</sup> but force is inherent in these actions. This reconstruction of perpetual peace allows for intervention alongside the process of building a cosmopolitan order of a genuinely democratic United Nations with coercive powers through law. This lawful coercion is peaceful; it is peaceful in the same way as are police actions within the domestic constitution.<sup>76</sup> R2P provides an

<sup>67</sup> *Ibid.*, 62.

<sup>68</sup> *Ibid.*, 59.

<sup>69</sup> BECKETT ‘Conflicting Orders’ (n. 65) 290.

<sup>70</sup> SCHMITT, *The Concept of the Political*, Chicago Press, 1996, 53–8.

<sup>71</sup> See in particular SCHMITT, *The Nomos of the Earth*, Telos Press, 2003 Chapter 7.

<sup>72</sup> SCHMITT, *The Concept of the Political*, Chicago Press, 1996, 19.

<sup>73</sup> RASCH, *Sovereignty and Its Discontents* (n. 28) 62.

<sup>74</sup> HABERMAS, ‘Two Hundred Years’ Hindsight’ (n. 6) 130.

<sup>75</sup> *Ibid.*, 133.

<sup>76</sup> This analogy of intervention as police action is widespread in the intervention discourse. For example Tom Farer refers repeatedly to ‘the cops’ in T. FARER, ‘Intervention in Unnatural Humanitarian Emergencies: Lessons of the First Phase’ (1996) 18 *Human Rights Quarterly* 1.

opportunity to apply these arguments and ideas again, judging the validity of a state according to how it protects its citizens. Whatever the specifics of the pillars; this language changes the focus of international law and intervention by making sovereignty conditional upon this responsibility. R2P greatly increases the power of hegemonic states to declare other states, most obviously those which embrace a competing ideology, illegitimate and therefore open to intervention and force.

Cosmopolitan law holds a monopoly on the use of force. R2P, in its most basic form of the three pillars, looks like a form of cosmopolitan law, inviting the community to judge other members against universal standards. Only lawful coercive force can be exercised and it can only be exercised by the world community acting through the United Nations. Crucially, Habermas has replaced nature with this process of development from international to cosmopolitan law. In this process, wars are fought by liberal states against non-liberal states. However, where they are in line with cosmopolitan law, they are no-longer conceived as wars but as police actions. As he says elsewhere, 'the erosion of the principle of non-intervention in recent decades has been due primarily to the politics of human rights'.<sup>77</sup> Human rights as a source of legitimacy for aggressive wars are familiar and Kant is used to add philosophical weight. As Rasch says, though, in his own conclusion:

'[O]pposition to this development is not merely anachronistic, it is illegitimate, not to be tolerated. [...] After all, when push comes to shove, 'we' decide – not only about which societies are decent and which ones are not, but also about which acts of violence are 'terrorist', and which comprise the 'gentle compulsion' of a 'just war'.<sup>78</sup>

## 2.2. TESÓN: A MORAL ARGUMENT

Habermas approached Kant's text and found in it a limited justification of intervention. Fernando Tesón approaches matters from the opposite direction; he is looking for a justification of intervention and finds it in Kant.<sup>79</sup> Whereas Habermas attempted to separate law from morality, claiming that human rights are 'distinctly juridical in character',<sup>80</sup> and giving intervention force as legal

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Similar language is used in W. M. REISMAN, 'Some Lessons from Iraq: International Law and Democratic Politics' (1991) 16 *Yale Journal of International Law* 203.

<sup>77</sup> J. HABERMAS, *The Inclusion of the Other: Studies in Political Theory* (C. CRONIN and P.D. GREIFF eds.) MIT Press, 1998, 147.

<sup>78</sup> RASCH, *Sovereignty and its Discontents* (n. 28) 148.

<sup>79</sup> Tesón has applied his moral theory of international law to explore and defend other practices, such as targeted killing and the use of mercenaries. See F. TESÓN, 'Targeted Killing and the Logic of Double Effect' in A. ALTMAN, C. FINKLESTEIN, and J. OHLIN (eds.), *Targeted Killings: Law and Morality in an Asymmetrical World*, OUP, 2012; and F. TESÓN 'Humanitarian Intervention: Loose Ends' (2011) 10 *Journal of Military Ethics* 192.

<sup>80</sup> HABERMAS, *The Inclusion of the Other* (n. 77) 137.

coercion, Tesón argues that 'intervention is morally justified in appropriate cases'.<sup>81</sup>

Tesón defends a liberal theory of international law in which 'the end of states and governments is to benefit, serve, and protect their components, human beings; and the end of international law must also be to benefit, serve, and protect human beings, and not its components, states and governments'.<sup>82</sup> In such a system 'the notion of state sovereignty is redefined: the sovereignty of the state is dependent upon the states domestic legitimacy',<sup>83</sup> and ultimately 'respect for states is merely derivative of respect for persons'.<sup>84</sup> 'Kant was the first to defend this thesis',<sup>85</sup> says Tesón, and he 'reconstructs and examines Kant's theory as put forth in his famous essay 'Perpetual Peace''.<sup>86</sup> His reading of 'Perpetual Peace' is very detailed, but can be summarised quite straight forwardly. He prioritises human rights, and thus focuses on the Definitive Articles, whereas '[c]ommentators in the realist tradition, who emphasize the primacy of the state as the international actor, exalt the Preliminary Articles'.<sup>87</sup> Tesón focuses on the Definitive Articles, particularly the requirement that states be republican.<sup>88</sup>

Tesón's main focus is on the three principles upon which the republican constitution rests: freedom, due process, and equality. He gives four arguments for why liberal democracies are peaceful: the 'consent of the citizens', the separation of powers, the education of citizens, and free trade. He relies on the 'consent of the citizens' passage in the First Definitive Article as supplying the argument that 'if people are self-governed, citizens on both sides of any dispute will be very cautious in bringing about a war whose consequences they themselves must bear'.<sup>89</sup> In contrast, 'the tyrant does not suffer the consequences', so 'it is relatively easy for a despot to start a war'.<sup>90</sup> The separation of powers argument is that 'a liberal democracy creates a system of mutual controls and relative diffusion of power that complicates and encumbers governmental decisions about war'.<sup>91</sup> Thirdly, Tesón argues that in Kant's

<sup>81</sup> F. TESÓN, 'The Liberal Case for Humanitarian Intervention' in L. HOLZGREFE and R. KEOHANE (eds.), *Humanitarian Intervention: Ethical Legal and Political Dilemmas* (CUP 2003) 93. Tesón first articulated his Kantian Theory in 'The Kantian Theory of International Law' (n. 7). He elaborated his thesis in the monograph *A Philosophy of International Law* (n. 7). The book chapter quoted here specifically addresses intervention from his Kantian perspective.

<sup>82</sup> TESÓN, 'The Kantian Theory of International Law' (n. 7).

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, 58. Tesón's reference is to F.H. HINSLEY, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States*, Cambridge University Press, 1967.

<sup>88</sup> Tesón uses 'republican' and 'liberal democracy', interchangeably, and explains this at *Ibid.*, 61–2.

<sup>89</sup> *Ibid.*, 74.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, 75.

republic ‘citizens will be educated in the principles of right and therefore war will appear to them as the evil that every rational person knows it is’.<sup>92</sup> His final argument is that ‘liberal democracies foster free trade and a generous system of freedom of international movement’<sup>93</sup> and that war is a costly threat to both.

It is worth pausing here and considering R2P again. As I have been arguing, R2P moves the authority to judge the sovereign away from the people and gives it to the international community, whoever they may be. This means that the requirement of states to be democratic has become unnecessary as a step towards perpetual peace. So long as powerful democracies exist which are able to intervene, they can judge the decisions of any tyrant. A people may be subject to a despot, but the international community now has objective standards against which to judge a state. Sovereignty no longer protects the tyrant under R2P and this would be a good thing if we could truly be sure of those objective standards: their universal applicability, and the *bona fide* intentions of the international community.

Returning to Tesón, he groups as Kant’s ‘empirical argument’ the four points mentioned above: consent of the citizens, the separation of powers, the education of citizens, and free trade.<sup>94</sup> This is followed with a straightforward normative argument: ‘governments should be required by international law to observe human rights because that is the right thing to do’.<sup>95</sup> This is found in Kant, for whom ‘the universal requirement of human rights and democracy [is] grounded in “the purity of its origin, a purity whose source is the pure concept of right”’.<sup>96</sup> This normative argument that ‘a global requirement of a republican constitution logically follows from the categorical imperative’,<sup>97</sup> is, for Tesón, Kant’s main argument. Tesón then dismisses the pacifist sections of Kant’s essay, offering ‘a reading more consistent with the rest of Kant’s views’, that ‘the non-intervention principle is dependent upon compliance with the First Definitive Article’,<sup>98</sup> that is, that it only applies to liberal democracies. As Tesón puts it, ‘sovereignty is to be respected only when it is justly exercised’.<sup>99</sup> It leads to the larger claim that states which are *not* liberal democracies are not obeying cosmopolitan law. R2P might contemplate a category between these, of states which are *unable* rather than *unwilling*. Tesón does not. States, like humans, have basic, universal, natural laws which they are able to follow. To not do so renders them liable to punishment.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, 76.

<sup>94</sup> *Ibid.*, 74. For a good discussion of the shortcomings of Tesón’s empirical methodology see P. CAPPS, ‘The Kantian Project in Modern International Legal Theory’ (2001) 12 *European Journal of International Law* 1010–14.

<sup>95</sup> *Ibid.*, 81.

<sup>96</sup> *Ibid.*, quoting KANT, ‘Perpetual Peace’ (Tesón’s emphasis).

<sup>97</sup> *Ibid.*, 82.

<sup>98</sup> *Ibid.*, 92.

<sup>99</sup> *Ibid.*



The clearest application by Tesón of his Kantian theory to the subject of intervention is in the book chapter 'The Liberal Case for Humanitarian Intervention'.<sup>100</sup> In this essay Tesón restates in similar terms his Kantian theory of international law. Individuals, as rights holders, are the primary unit of consideration. Governments are only legitimate as protectors of rights. He starts with the claim that 'Governments... who seriously violate [human] rights undermine the one reason that justifies their political power, and thus should not be protected by international law'.<sup>101</sup> He adds to this three moral assumptions: the obligation to respect rights, the obligation to promote respect for rights, and the obligation to rescue victims of rights abuses.<sup>102</sup> This third duty entails a right of humanitarian intervention. The limits on this intervention Tesón sets are proportionate force, used by a liberal state or alliance, to end tyranny or anarchy, which is welcomed by the victims, and that any harms are side effects of the good intentions and actions. The last point is 'the doctrine of double effect'.<sup>103</sup> The rest of the Tesón's chapter is a defence of this position against various criticisms or non-interventionist positions: relativism, sovereignty, law, order, and libertarianism.<sup>104</sup> He dismisses each fairly easily. Relativism is dismissed generally as lacking merit as a philosophical position,<sup>105</sup> and specifically on the basis that intervention is only justified in cases where no moral theory, western liberal or otherwise, could find the breach of rights acceptable. In terms of sovereignty, as I have discussed above, Tesón views only liberal states as truly possessing sovereignty, so national borders can have no moral force against a case for intervention. Where there are practical advantages for respecting state borders, such as stability and legal certainty, they would be trumped by the moral case for intervention. To the objection that international law prohibits humanitarian intervention,<sup>106</sup> Tesón says firstly that this is debatable, and debated, by lawyers, and secondly that, if international law *does* prohibit humanitarian intervention, then 'international law is morally objectionable'<sup>107</sup> and should be reformed. To the suggestion that global order and stability are threatened by intervention, Tesón again replies that this concern has no moral

<sup>100</sup> TESÓN, 'The Liberal Case for Humanitarian Intervention' (n. 81).

<sup>101</sup> *Ibid.*, 93.

<sup>102</sup> *Ibid.*, 94.

<sup>103</sup> This is elaborated at *Ibid.*, 115–7. In brief, it means simply that any bad consequences of an action are outweighed by the good, and therefore permissible.

<sup>104</sup> *Ibid.*, 100–129.

<sup>105</sup> *Ibid.*, 100: 'I have never been able to see merit in relativism as a general philosophical view'. See further F. TESÓN 'Human Rights and Cultural Relativism' (1985) 25 *Virginia Journal of International Law* 869.

<sup>106</sup> Tesón cites I. BROWNIE, 'Thoughts on Kind-hearted Gunmen' in R. LILLICH (ed.), *Humanitarian Intervention and the United Nations* (University Press of Virginia 1973). See also Patrick Capps' review of *A Philosophy of International Law*, which concludes that Tesón offers a Kantian moral foreign policy rather than a Kantian international law; P. CAPPS, 'The Kantian Project in Modern International Legal Theory' (n. 68) 1003.

<sup>107</sup> TESÓN, 'The liberal case for humanitarian intervention' (n. 55) 111.

force when confronted with gross human rights violations. He gives a similar response to the libertarian who would claim that it is not in a citizen's best interests for their state to intervene elsewhere, conceding only that professional soldiers should be used before volunteers and ultimately conscripts. In summary, Tesón's morality, which allows and demands intervention for breaches of human rights, which does not confer sovereignty or even the protection of international law on non-liberal states, trumps any other concerns.<sup>108</sup>

A similar tone was struck by Antonio Cassese, in discussing NATO's intervention in Kosovo, who argued that the action was illegal, but ethically justifiable.<sup>109</sup> Cassese posed the rhetorical question:

'Should one sit idly by and watch thousands of human beings being slaughtered or brutally prosecuted? Should one remain silent and inactive only because the existing body of international law rules proves incapable of remedying such a situation? Or, rather, should respect for the Rule of Law be sacrificed on the altar of human compassion?'<sup>110</sup>

R2P begins to offer a way out, and satisfy both the moralising international lawyer and the formalist. One role that R2P can take is as a device for turning moral outrage into lethal legal use of force. The moral cry of "never again!" does not allow for factual complexities to slow things down, but instead sees the hero ride into town and save the day.

### 2.2.1. *Tesón vs Orford*

Orford highlights how this plays into a narrative of a white male hero, stepping in to protect innocents and uphold universal values. The targets of the intervention are in turn depicted as passive victims. The international community, in the person of NATO and in particular the United States, has a duty to do this. This action changes 'Clinton to Clint (Eastwood). In bypassing the UN to sanction air strikes, Clinton demonstrates that he "gets things done" by ignoring

<sup>108</sup> It should be noted that others have read Kant as requiring the obedience of bad laws, see J. WALDRON, 'Kant's Legal Positivism' (1996) 109 *Harvard Law Review* 1535; and R. TUCK *The Rights of War and Peace* (OUP 1999) 207–214. Kant himself wrote 'Argue as much as you like, and about whatever you like, but obey!' in KANT, 'What is Enlightenment?' (n. 38) 59.

<sup>109</sup> A. CASSESE, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law* 23. Other international lawyers who took a similar stance include B. SIMMA, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *EJIL* 1; T. FRANCK, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002); and M.E. O'CONNELL, 'The UN, NATO and International Law after Kosovo' *Human Rights Quarterly* 22 (2000) 57. An excellent summary of the debates from the time can be found in R. FALK, 'Kosovo, World Order, and the Future of International Law' *The American Journal of International Law* 93(1999) 847. For another good critique of this position, see D. CHANDLER, *From Kosovo to Kabul and Beyond* (Pluto 2005).

<sup>110</sup> *Ibid.*, 25.

the “suits” and taking matters into his own hands to protect the common good.<sup>111</sup> Significantly, Tesón does not deal with the charge of colonialism, except by implication under relativism.<sup>112</sup> Neither does he ever accept that intervention may be a bit more complicated than ‘gross human rights violations’ envisaged. He is happy to accept what he euphemistically calls ‘interference’.<sup>113</sup> Orford draws attention to how partial this picture is. In portraying intervention as ‘active’, and non-intervention as ‘passive’, Tesón and others over-simplify the engagement of the international community in different settings. The two standard examples employed in this debate are the break-up of the former Yugoslavia and Rwanda. Yugoslavia was subject to austerity programmes and liberalisation implemented by the World Bank and IMF in the 1970s, 1980s, and into the 1990s. Orford provides compelling evidence that this form of intervention ‘contributed to the conditions in which [ethnic] hatreds (whether ancient or otherwise) were inflamed’.<sup>114</sup> While these changes were presented in purely economic terms, they had huge political implications, particularly the centralisation of authority away from the republics and the destruction of the socialist system. The government is left simply in the role of maintaining law and order, with all control of the economic and social life of the nation taken over by the international economic organisations. In such a situation, ethnic nationalism offers a sense of community and identity. While it cannot be said that this economic shock therapy caused the war and genocide in the former Yugoslavia, it can also not be said that the international community was uninvolved and free of blame before war broke out. The image of a purely local problem, requiring the saving of the people from themselves by outside force, is revealed as over simplified.

Rwanda tells a similar story of intervention prior to conflict being forgotten. The non-intervention in the face of genocide in Rwanda is the archetypal example of what happens when the international community fails to act. The details of the genocide are well known and horrifying. The general view is that the international community failed, and the genocide ‘could have been halted by forcible intervention’.<sup>115</sup> For many, ‘if there is a clear-cut case to be made for intervention, Rwanda was it’.<sup>116</sup> The general impression is ‘that the international community is responsible for the Rwandan genocide due to its failure to use

<sup>111</sup> A. ORFORD, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’ (1999) 10 *European Journal of International Law* 695 quoting P. LENTINI, ‘Yugoslavia ... Cop Flick, Western, Action Movie’ (1999) 41 *Arena Magazine* 45.

<sup>112</sup> TESÓN, ‘The liberal case for humanitarian intervention’ (n. 55) 100: ‘I have never been able to see merit in relativism as a general philosophical view’. See further F. TESÓN ‘Human Rights and Cultural Relativism’ (1985) 25 *Virginia Journal of International Law* 869.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*, 89.

<sup>115</sup> V.P. NANDA, T.F. MUTHER and A.E. ECKERT, ‘Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia – Revisiting the Validity of Humanitarian Intervention under International Law – Part II’ (1998) 26 *Denver Journal of International Law and Policy* 851.

<sup>116</sup> *Ibid.*

force to prevent or halt the genocidal killing'.<sup>117</sup> However, as Orford highlights, at the time the genocide commenced, there were 2,519 UN peacekeepers in Rwanda, and the preparations for the genocide were publicly and internationally known, and repeatedly commented on.<sup>118</sup> Furthermore, no attempts were made to prevent the genocide through non-military means, such as making aid and development assistance conditional on ending human rights abuses.<sup>119</sup>

Orford argues that, once again, the huge involvement of the international community and its development enterprise demonstrate that the genocide cannot be read as simply having local causes.<sup>120</sup> Peter Ulvin has demonstrated that aid provided 'a large share of the financial and moral resources of the government and civil society'.<sup>121</sup> In effect, the provision of aid of all sorts, from vaccines to military equipment, 'helped to maintain the strong state necessary to organise and administer the genocide'.<sup>122</sup> Once again, the process of economic shock therapy was also seen prior to the genocide, with the majority of the population forced into poverty during the structural adjustment process. As Michel Chossudovsky observed: 'no sensitivity or concern was expressed as to the likely political and social repercussions of economic shock therapy applied to a country of the brink of civil war. The World Bank team consciously excluded the "non-economic" variables from their "simulations"'.<sup>123</sup> Furthermore, the foreign aid community and their Rwandan assistants lived a comparatively lavish lifestyle, which also physically entered the poorest communities, building houses and infrastructure to service the foreign experts, decreasing further the already scarce land in impoverished farming communities.<sup>124</sup> This led to humiliation, resentment and hatred in the local community. Finally, the aid community and the development programme for Rwanda was clearly reminiscent of and based within the colonial system which preceded it.<sup>125</sup> Again, none of this decisively explains why the genocide happened, but it clearly unsettles the picture of a local problem which could have been prevented with international involvement.

Tesón presents an incredibly simplistic view of international society, comprised of good states, bad states, and those 'on probation'. His language is hugely paternalistic, with the people of those bad states desperate for our help. It does not particularly matter in the end whether his reading of Kant is right or wrong. It is the use he puts Kant to. Kant gives his view of society

<sup>117</sup> A. ORFORD, *Reading Humanitarian Intervention*, Cambridge University Press, 2003, 99.

<sup>118</sup> *Ibid.*, 99–102.

<sup>119</sup> P. ULVIN, *Aiding Violence: the Development Enterprise in Rwanda*, Kumarian Press 1998.

<sup>120</sup> ORFORD, *Reading Humanitarian Intervention* (n. 117).

<sup>121</sup> P. ULVIN, *Aiding Violence* (n. 119).

<sup>122</sup> ORFORD, *Reading Humanitarian Intervention* (n. 117) 104.

<sup>123</sup> M. CHOSSUDOVSKY, *The Globalisation of Poverty: Impacts of IMF and World Bank Reforms*, Zed Books, 1997, 119.

<sup>124</sup> ORFORD, *Reading Humanitarian Intervention* (n. 117) 106–8.

<sup>125</sup> *Ibid.*, 108–9.

some authority, borrowed from a long dead great philosopher. However, if we put Kant's thinking in context, then regardless of the best reading of 'Perpetual Peace', it can be seen as colonial, as being undermined by its linear teleology, and as being as simplistic and problematic a view of the world as Tesón's. The search for philosophical authority to support Tesón's view of international law is wasted time and effort. It would be much more productive to look at the much more complicated picture given to us by Orford. R2P allows for the international community to sit in judgment on a state and decide whether it has earned its sovereignty. It is 'idiot's law'.<sup>126</sup> My preference is for lawyers, if not the law itself, to be sophists, and to recognise the huge complexity of political struggles, over the simplicity of moral outrage. Particularly when that moral outrage is given force in the shape of bombs.

### 3. CONCLUSIONS

The Responsibility to Protect provides new vigour to these moralising arguments in international law. The language of responsibility and protection is genuinely transformative where it flips the source of sovereign authority. It is no longer is it derived from the people, but it is judged by third parties according to the standards of protection they define. This fits perfectly with the arguments for a universal cosmopolitan world legal system. However, as with any universalising discourse, it inevitably excludes. As Schmitt argued, the attempt to end war is an attempt to end politics, as real politics is not possible without the threat of war. The opposition to politics is the opposition to difference. As Orford argues, R2P is a potentially imperialist discourse, directed almost exclusively towards former colonies by former imperial powers, who sit in judgement on the effectiveness of the state. The arguments against humanitarian intervention remain important. R2P has not swept these ideas aside and created a wholly new paradigm. It has changed some of the language, and the structure of the argument. This change in the structure of legal argument creates huge potential. To finish by paraphrasing Orford again, if we engage critically with R2P we may come to worry not about how to defeat the enemies of humanity, but how to understand them.<sup>127</sup>

<sup>126</sup> T.M. FRANCK, 'Porfiry's Proposition: The Role of Legitimacy and Exculpation in Combating Terrorism', in Y. DINŠEIN and M. TABORY *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 149. Franck does not use the term 'idiot' pejoratively, whereas I do. Thanks to Richard Barnes for this reference.

<sup>127</sup> ORFORD, 'Moral Internationalism' (n. 3) 108.

