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*Friend or Enemy? Rethinking Schmitt's
Understanding of the Relationship between
Ethics, Law and the Use of Force in International
Relations*

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Abstract

This paper seeks to question the 'critical' readings of Karl Schmitt's understanding of international law and the use of force in international relations, particularly the approaches taken by critical cosmopolitan theorists and many post-structuralists who have used Schmitt to distance themselves from, and to critique, American foreign policy, especially under the Bush administrations. I suggest that critical theorists engage in a highly idealised understanding of Schmitt, focusing on his contingent political conclusions, using his work descriptively rather than analytically. It is argued that the idealist approach to Schmitt stems from these commentators' concerns to describe their work as critical rather than from any attempt to use Schmitt's underlying ontological framing of the relationship between law, ethics and the use of force to cast light upon the uncertainties of the practice and jurisprudence of the international sphere today. The consequence of this is that the undermining of the UN Charter order is critiqued morally and idealistically rather than understood as a mediated reflection of the underlying power-relations of the international sphere.

Introduction: Reading Nomos der Erde

In this paper I essentially wish to draw out what I see as the idealism of current uses of the work of Carl Schmitt to substantiate critical approaches to the international sphere, particularly with reference to humanitarian intervention and the Global War on Terror. I wish to draw out some common ground between the critical normative and cosmopolitan theorists who have mounted a defence of their position against Schmittian perspectives and the critical post-Marxist and post-structuralist opponents of liberal internationalism who have found much value in Schmitt's work. I then wish to draw out how Schmitt is read in an idealist manner through the focus on his work at the contingent level of his political conclusions rather than at the more fundamental level of his geo-political grounding of the limits of international law and its relation to sovereign power.

In his authoritative 2004 review of *Nomos*, in the journal *Constellations*, Martti Koskenniemi noted the power and influence of Schmitt's work:

Whatever Schmitt's political choices, readers have been struck by the expressive force of his critiques when applied to contemporary events: the war on terrorism as a morally-inspired and unlimited "total war," in which the adversary is not treated as a "just enemy"; the obsolescence of traditional rules of warfare and recourse to novel technologies – especially air power – so as to conduct discriminatory wars against adversaries viewed as outlaws and enemies of humanity; Camp Delta in the Guantánamo naval base with its still over 500 prisoners from the Afghanistan war as a normless exception that reveals the nature of the new international political order of which the United

States is the guardian – the source of the normative order, itself unbound by it.¹

Schmitt's nightmare vision of the fall of *jus publicum Europaeum*, commonly understood as the pluralist framing of international law, based on the Westphalian doctrines of sovereignty and non-intervention, appears to have been played out in the post-Cold War rise of wars of humanitarian intervention and especially in the post 9/11 Global War on Terror, which have been justified on the basis of universal values. Many international political theorists are turning to Schmitt to assist in the process of understanding and critiquing the current situation of international politics and theorising the emergence of a new more universal, post-state, post-sovereign international order.²

Koskenniemi outlines a number of ways in which Schmitt's *Nomos* has been read in terms of alternative legal framings of the international sphere,³ however, my interest in this paper is in the use of Schmitt by 'critical' IR theorists. By 'critical' I wish to group all those who oppose and wish to distance themselves from the liberal internationalism associated with the broad neo-conservative project seen to drive US foreign policy and associated with writers such as Robert Cooper, Robert Kagan, Anne-Marie Slaughter, Michael Reisman and Fernando Tesón.⁴ I wish to divide these 'critical theorists' into two broad camps, this is more of a heuristic device to draw out my theoretical points than a statement that such a clear or a fixed division exists. For sake, of simplicity, I shall distinguish these as 'critical cosmopolitans' and 'critical post-structuralists' though there is no doubt that the individuals included would balk at the labelling, there is nevertheless enough substance in the distinction to make it worthwhile.

I want to suggest that the desire to distance critical IR theory from the exercise of US power has been driven by the similarities of the anti-sovereignty arguments used by political elites and by radical academics.⁵ 'Critical cosmopolitans' balk at the accusation that their support for human rights claims and humanitarian intervention has lent legitimacy to American military adventurism, particularly the war in Iraq, and therefore seek to legitimise their radical, or less militaristic, universalism through tarring their critics with the brush of Schmitt. 'Critical post-structuralists' use Schmitt

¹ Martti Koskenniemi, 'International Law as Political Theology: How to Read *Nomos der Erde*?', *Constellations*, 11:4, (2004), 492-511. Available at: <http://www.constellationsjournal.org/MKosk11%5B1%5D.4.pdf>

² See for example, the recently published edited collection of papers from a special workshop on the international political thought of Carl Schmitt at the Fifth ECPR International Relations Conference at The Hague, September 2004: Louiza Odysseos and Fabio Petito (eds) *The International Political Thought of Carl Schmitt: Terror, liberal war and the crisis of global order* (London: Routledge, 2007).

³ Koskenniemi, op. cit., 505-6.

⁴ For example, Michael Reisman, 'Sovereignty and human rights in contemporary international law', in G. H. Fox and B. R. Roth (eds) *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000); Ann-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004); Robert Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-first Century* (London: Atlantic Books, 2004); Robert Kagan, *Paradise and Power: America and Europe in the New World Order* (London: Atlantic Books, 2003); Fernando Tesón, 'Ending tyranny in Iraq', *Ethics and International Affairs*, 19:2 (2005), 73-89.

⁵ On this, see Christopher J. Bickerton, Philip Cunliffe and Alexander Gourevitch, 'Introduction: the unholy alliance against sovereignty', in Bickerton et al (eds) *Politics without Sovereignty: A Critique of Contemporary International Relations* (London: UCL Press, 2007), 1-19.

to overcome the problem that their critiques of liberal democratic views of sovereign power and democratic frameworks of law can tend to leave them without a clear critical position from which to oppose US power and the restrictions on civil liberties domestically. Rather than confront the dilemmas involved in their critique of the liberal frameworks of international and domestic law, critical post-structuralists use Schmitt to argue that the undermining of these legal frameworks is an example of the dangers of liberal universalism.

Critical Cosmopolitans and Schmitt

Richard Devetak has recently defended critical cosmopolitanism against 'statist' Schmittian theorists who suggest that liberal cosmopolitanism provides a blank cheque for US military interventionism.⁶ Liberal critical theorists are aware of the dangers of being tainted as apologists for Western militarism, as Devetak describes the problem:

While so many controversial wars are waged under the banner of liberal ideals associated with Kant, the Enlightenment and cosmopolitanism, critical international theory will need to ensure that its arguments are not co-opted by or aligned with such war-mongering.⁷

The unease of critical theorists about the implications of their support for military intervention was initially articulated by Ken Booth in his 'Ten Flaws of Just Wars', in the wake of the Kosovo war, which, at least to some, appeared to undermine the chances of constructing a new global constitutional order on the basis of human rights.⁸ In the wake of the post-9/11 Global War on Terror, critical cosmopolitan theorists were quick to condemn the resort to war, rather than law, in dealing with both the Taliban and Saddam Hussein.⁹

Nevertheless, critical cosmopolitans are aware that they are caught in a quandary in their attempts to base a critique of power on the same universalist discourse used in Washington and London to justify and legitimise it. While Schmitt famously argued that 'however invokes humanity wants to cheat',¹⁰ the critical cosmopolitans argue that while this may be true of the neo-conservatives in the White House they themselves only have pure intentions.¹¹ Critical theorists want to preserve the power

⁶ Richard Devetak, 'Between Kant and Pufendorf: humanitarian intervention, statist anti-cosmopolitanism and critical international theory, *Review of International Studies*, 33 (2007) Special Issue: Critical International Relations Theory after 25 years, 151-174, 156.

⁷ *Ibid.*, 152.

⁸ Ken Booth, 'Ten Flaw of Just Wars', in Ken Booth (ed.) *The Kosovo Tragedy: The Human Rights Dimensions* (London: Frank Cass, 2001), 314-24; see also Jürgen Habermas, 'Bestialität und Humanität', *Die Zeit*, 54:18, 29 April 1999. Franz Solms-Laubach trans available at: <http://www.theglobalsite.ac.uk/press/011habermas.htm>.

⁹ See, for example, Habermas' 2001 interviews with Giovanna Borradori in Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago: Chicago University Press, 2003); Mary Kaldor, *Global Civil Society: An Answer to War* (Cambridge: Polity, 2003).

¹⁰ Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 1996), 54.

¹¹ Of course, it could be argued that there is a sense of 'cheating' in respect of the fact that instead of focusing on the collective political subject that could potentially be an agent of emancipation and thereby materially-grounding the critique of the present, there has been an increased tendency to idealism. See the excellent critique of critical theory on these grounds by Beate Jahn, 'One Step

of moral frameworks of political theory but without being accused of justifying arbitrary power on the basis of universal norms.

There, is a second and related point, which more soul-searching critical cosmopolitans, such as Devetak, raise, that: '[i]f statist anti-cosmopolitans are right, critical international theory is anti-political (for its moral critique of politics)'; '[t]he inference is that contemporary exponents of critical theory, notwithstanding claims of secular rationalism, merely continue "religion by other means"'.¹² While Schmitt argued that political power and interests were concealed in the appeal to abstract universals such as 'humanity', the critical cosmopolitans, of course, want to argue that their use of abstract universal claims to 'human rights' are innately political and seek to challenge and disrupt the practices and ideological justifications of power.¹³

Some critical cosmopolitans are sensitive to the problems opened up by the desire to found a 'new nomos' on the basis of the universalism of the rights-based individual in a context where there is no constituted political framework to give content to those rights. Given this problem of grounding rights, they are aware that Schmitt poses a powerful critique, but they are also attracted to the possibility of critiquing Schmitt (read as the extreme anti-normative theorist with Nazi leanings) in order to substantiate their position. The most insightful normative theorists talk up the importance of Schmitt, the better to restore their radical credentials as critical theorists of international politics.

Schmitt is read defensively as arguing that there is no difference between the critical cosmopolitans and the neo-conservative liberal interventionists. The defence is then to equate Schmitt with the neo-conservatives in his inability to overcome the divide between ethics and politics. While the critical cosmopolitans accuse neo-conservatives of using liberal ethics to submerge and pervert the discussion of politics, Schmitt is held to totally ignore the importance of the ethical and normative in his extreme position of the 'autonomy' of the political sphere of 'friend and enemy'. Devetak, for example, argues that Schmitt's desire for the quarantining of the political from the ethical, in the autonomy of the political, is an impossible one. That, in fact, Schmitt was just as idealist or normative as those who seek to submerge the political in ethical universals. The result is that Schmitt is held to have a metaphysical conception of the state, immunising state power against critique on the basis of the legitimacy of national interests, in a way which is no different to the use of abstract universals. Devetak brings this home, stating: 'parodying Schmitt we might say, "Whoever invokes the national interest wants to cheat"'.¹⁴

In this reading, Schmitt's position is fundamentally the same, but in mirror-image form, of the neo-conservatives who advocate US imperialism dressed up as a 'war for humanity'. Firstly, Schmitt's position is held to be as blind to the victims of state violence, in the name of 'national interests', as neo-conservatives are to the victims of inter-state violence in the name of 'human rights'. Secondly, while the neo-cons

Forwards, Two Steps Back: Critical Theory as the Latest Edition of Liberal Idealism', *Millennium: Journal of International Studies*, 27:3 (1998).

¹² Devetak, 160; 166.

¹³ For a classic early statement of the case see Ken Booth, 'Security and Emancipation', *Review of International Studies*, 17:4 (1991), 313-327.

¹⁴ Devetak, 167.

might argue that humanitarian intervention against sovereignty is always right, Schmittian anti-cosmopolitans are held to argue that it is always wrong – the position of both is then equated and seen to be equally anti-political; i.e., not based on political debate or upon the needs of the people concerned. The correct solution, for Devetak, is the context-based, case-by-case approach based on critical Habermasian dialogue, rooted in the politics of civil society. Eschewing the dogmatism and idealism of either side of the ‘for and against intervention’ debate, and engaging in political dialogue on the specifics of the case, critical cosmopolitanism is held to come away with its ethics and its political radicalism intact.

Chris Brown similarly seeks to defend an ethical interventionism from accusations of uncritical universalism. He pursues a similar approach to Devetak, arguing, in this case, that Schmitt poses the most theoretically grounded and fundamental critique of ethical justifications for war and against the revival of Just War theory.¹⁵ To quote Brown:

In short, from Schmitt’s perspective, Just War has been turned into an archetypically liberal notion: the political basis of decisions to use force that was characteristic of the *jus publicum Europaeum* is replaced by a legalistic and moralistic account of the justification for force... This is, I believe, a quite compelling argument, and it defines the task for anyone who wishes to continue to use Just War notions in thinking about international relations, which I do...¹⁶

Brown wants to avoid normative theory being discredited by the use of Just War justifications for militarism. Like Devetak, he seeks to draw Schmitt into the same camp as the neo-cons and to draw out his distinction between them both. To do this, Brown argues that Schmitt stood opposed to any external or international attempts to limit war;¹⁷ and that therefore this approach which legitimised violence was just as unacceptable as the neo-con claims to use unlimited violence for ethical ends. Both Schmitt and the neo-cons are implicitly seen to be evading political and ethical responsibility. Marking out a ground for a morally informed practical political approach, Brown draws on the neo-Aristotelianism of Stephen Toulmin.¹⁸ Again, a case-by-case approach is advocated, evading the need for universal ethical claims and held up as recognizing the inseparability of politics and ethics.

For these international political theorists, who want to defend international intervention on moral grounds but to distinguish themselves as ‘critical’ in relation to US moral justifications for military intervention, Schmitt is talked up as a great theorist and then condemned as the logical end product of the rejection of liberal attempts to tame power through law and ethics. Schmitt’s role here is as the whipping

¹⁵ Chris Brown, ‘From humanized war to humanitarian intervention: Carl Schmitt’s critique of the Just War tradition’, in Odysseos and Petito, 56-69.

¹⁶ *Ibid.*, 65.

¹⁷ Habermas makes a similar point with regard to Schmitt: ‘...it was Schmitt’s opinion that the substance of the political, the self-asserting of the identity of a Volk or of a movement, will not let itself be tamed by norms, that every attempt at domestication through law, must accrue to moral savagery’, in Habermas, ‘America and the World (interview)’, *Logos*, 3:3 (2004). Available at: http://www.logosjournal.com/habermas_america.htm.

¹⁸ See, Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (Chicago: University of Chicago Press, 1990).

boy; as a warning to those who seek to critique critical, liberal and normative international relations theorizing.

In fact, I don't think it would be going too far to say that there is an implicit threat that to use Schmitt uncritically, would be to fall into the far greater error of being an apologist for the crimes of sovereign states against their own people, with Schmitt implicitly condemned for condoning or marginalising the Holocaust, seeing the key crime of the Second World War as the undermining of the European order in the Allied aerial bombing of German cities to force an unconditional surrender.¹⁹ This, I argue, is an opportunist use Schmitt to close down debate and to legitimise a critical cosmopolitan position morally rather than intellectually. By this, I mean that Schmitt is used defensively, to limit critiques of their position and to close down or narrow discussion, privileging the ethical need for an alternative, in the spirit of 'something must be done', and downplaying the political poverty of their evasive position of 'case-by-case' consideration. The more critical cosmopolitan theorists are put on the defensive, over the gap between their normative aspirations and the real world of American military and political dominance, the more their 'interest' in critiquing Schmitt has appeared to revive.

Critical Post-Structuralists and Schmitt

Schmitt's post-structuralist advocates seek to use Schmitt just as opportunistically, as a prop for the weakness of their critical case and indistinctness of their theoretical position. Critical post-structuralist theorists face similar problems to critical cosmopolitan theorists in differentiating their critique of the Westphalian order, founded on sovereign rights, from that of neo-conservative thinkers. If critical post-structuralists oppose the idea of sovereignty and oppose the state-based international law which reifies and legitimises sovereign statehood, it is difficult to find a clear alternative position from which to critique an alleged US imperial order (especially when the universalism of an alternative, cosmopolitan, human rights based order is seen as equally oppressive).

Instead of posing alternatives (at least implicit in the critical theory tradition), the post-structuralist position tends to describe the 'how' - the mechanisms of power and US hegemony - focusing on description rather than critical analysis. Schmitt tends to be used descriptively, to argue that liberal practices of power must inevitably be dehumanising and oppressive whether practiced at the level of the state or in the global arena. Their use of Schmitt helps to add urgency and power to their description of, and opposition to, an apocalyptic project of global hegemony. Whether this is described as a 'liberal project' or as an American project, the focus describes today's Global War on Terror as a new 'global war' or a 'total war' against a dehumanized foe: a deterritorialized war without end. This is a war where traditional 'Westphalian' distinctions between 'inside and outside', war and peace, combatant and civilian, and army and police, become eroded: where international law and civil liberties are sacrificed to a permanent state of exception.²⁰ The Global War on Terror '(re)creates

¹⁹ This comes across strongly in Michell Dean, 'Nomos: Word and myth', in Odysseos and Petito, 242-58, esp.253-4; and in Brown, op. cit., 63

²⁰ See, for example, the majority of the papers in the Odysseos and Petito collection, especially, Alain de Benoist, 'Global terrorism and the state of permanent exception: The significance of Carl Schmitt's thought today', Ibid., 73-96; Gary L. Ulmen, 'Partisan warfare, terrorism and the problem of a new

fearful and disciplined subjects both inside and outside liberal polities'.²¹ As Linda Bishai and Andreas Behnke proclaim:

...liberal war is ultimately an ontological war, a war against a different form of being, rather than a war against a strategic enemy... [L]iberalism identifies violence as the by-product of the continued presence of "otherness" in the international system. Consequently, instead of limitation, its goal is elimination.²²

Schmitt becomes re-read as a pluralist post-structuralist, warning against the dictatorial hegemonic power of American liberal empire.²³ The post-structuralist critique of sovereign power is transferred to a critique of America as the hegemonic sovereign of the international sphere. Extensions of, and, more often, the undermining of international legal agreements are seen, therefore, as sovereign acts of deciding upon the exception and of normalising the power of exception.²⁴ Paradoxically, Schmitt, the founding theorist of a 'geo-political' framework of international relations, is essentially conscripted to fight a moral critique of 'power', 'empire, or 'the liberal project', which is seen as steamrolling over resistance on the grounds that it is not valid; that those who resist should be 'eliminated' as 'inhuman' or 'criminal'.

Schmitt vs the Epigones

Major problems arise in the use of Schmitt's work by 'critical' theorists seeking to demarcate their moral critiques of the status quo as theoretically and substantially grounded in the face of the moralisation of international politics and the transition of the international discourse of power from that of national interests to human-centred, victim-centred, practices of empowerment in the face of the barriers of sovereign rights. Both critical post-structuralists and critical cosmopolitans provide highly idealist readings of Schmitt. Critical post-structuralists tend to downplay Schmitt's ontological view of the relationship between sovereign power and legal rights, taking his presentation at the superficial level of Schmitt's contingent descriptions, portraying Schmitt as an idealist anti-universalist. Critical cosmopolitans provide an even more contingent reading of Schmitt, this is highlighted in the fact that they swing from reading him as an uncritical statist, anti-interventionist and arch defender of sovereignty to being the theorist of unlimited intervention, having a laissez faire

nomos of the earth', Ibid., 97-106; Linda S. Bishai and Andreas Behnke, 'War, violence and the displacement of the political, in Odysseos and Petito, 107-123; Louiza Odysseos, 'Crossing the line? Carl Schmitt on the "spaceless univesalism" of cosmopolitanism and the War on Terror', Ibid., 124-43.

²¹ Odysseos, op. cit, 138.

²² Bishai and Behnke, op. cit., 117; 120.

²³ See, for example, Chantal Mouffe, 'Carl Schmitt's warning on the dangers of a unipolar world', in Odysseos and Petito, 147-153; Fabio Petito, 'Against world unity: Carl Schmitt and the Western-centric and liberal global order', in Odysseos and Petito, 166-184; and for more extreme versions, Mika Ojakangas, 'A terrifying world without an exterior: Carl Schmitt and the metaphysics of international (dis)order, in Odysseos and Petito, 205-221; Sergei Prozorov, 'The ethos of insecure life: Reading Carl Schmitt's existential decisionism as a Foucauldian ethics', in Odysseos and Petito, 222-241.

²⁴ The current fashion for finding the 'exception' makes the 'exception' another word for power and a description of power an implicit critique, while, for Schmitt: '...not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception. What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order', see Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: Chicago University Press, 1985), 12.

approach to political violence and conflict and arguing against the possibility of its restraint.²⁵ These readings do nothing to contribute to the use of Schmitt to understand the changing nature of the current world order. Firstly, I will address the critical-poststructuralist reading of Schmitt, beginning with highlighting the need to separate Schmitt's ontological framework in *Nomos* from the contingent political conclusions which he draws from it, I then turn to the critical cosmopolitan approach which has an equally superficial approach to his work.

The idealism of the Post-Structuralists

Schmitt was writing during the intense inter-imperialist rivalry of the inter-war period and *Nomos* was published in the wake of the destruction of the Second World War. His writing is essentially a call for peace amongst Western powers and agreement on a division of the world,²⁶ a call for the restoration of the moral authority of imperialism, with *Nomos* being an elegy for, and renegotiation of, a lost past. It is for this reason that Schmitt continually highlights the problematic and divisive nature of inter-imperialist rivalry, sharpened by clashes over universal moral claims, which made it impossible to legitimise a working arrangement. His call for a restoration of the political, is for an honest 'pact amongst thieves' focused on clarity of interest in maintaining world order rather than having to defend themselves against imperial 'equals'.

There is a tendency to see America as undermining European unity, which is a one-sided reappraisal of the past. European decline was already manifest in the playing out of the First World War within Europe and the breaking down of the European 'amity lines' that were racially as well as territorially institutionalized.²⁷ Schmitt is correct to argue that European inter-imperialist rivalries were ameliorated through the ability to recognise the special territorial status of European soil in distinction to the 'free soil' of the non-Europeanised world which was 'open for European land-appropriation'.²⁸ It was the territorial closing off of Africa and the impossibility of German imperial expansion 'beyond the line' which broke the unity of Europe. The unlimited war that had been 'bracketed off' came to Europe, literally, in the British and French use of colonial troops. His focus on America closing down this space, rather than on internal European divisions is therefore somewhat one-sided.²⁹ In truth, America was as much the benefactor as the cause of European decline. Of course, it suited European elites to

²⁵ They draw out the problematic nature of critiques of 'Realism' in contemporary IR, which is paradoxically condemned for both defending sovereignty and non-intervention and for defending war and militarism, reflecting the way in which moralizing has replaced political theory in the discipline.

²⁶ In many ways *Nomos* reproduces the assumptions behind Kautsky's September 1914 article, 'Ultra-Imperialism', in the possibility of an inter-imperialist alliance sustaining world peace and evading 'the colonial danger'. Available at: <http://www.marxists.org/archive/kautsky/1914/09/ultra-imp.htm>.

²⁷ Schmitt, *The Nomos of the Earth: in the International Law of the Jus Publicum Europaeum* (New York: Telos, 2003), 219.

²⁸ Schmitt, *Nomos*, 148; see also 183. A strikingly similar point about the importance of colonial expansion was made by Vladimir I. Lenin, *Imperialism: The Highest Stage of Capitalism*.

²⁹ Although it is implicit that the collapse of the European order after the 1885 Congo conference was essentially a matter of European division: 'Toward the end of the 19th century, European powers and jurists of European international law not only ceased to be conscious of the spatial presuppositions of their own international law, but had lost any political instinct, any common power to maintain their own spatial structure and the bracketing of war.' Schmitt, *Nomos*, 224.

focus on the role of this ‘upstart’ power in the post-war peace settlements and the shaping of a new international order, rather than look for failings closer to home.³⁰

Schmitt’s contingent political perspective is apparent in his tendency to see American claims to universalism as responsible for the unlimited nature of conflict in the 20th century. Clearly, the barbarism and destruction of the First and Second World Wars were not caused by a dispute over jurisprudence. In fact, it was the extent of the destruction and loss of life which led the victorious powers to seek to legitimise their case through attempts to bring law into war retrospectively with the public indictment of the former German Kaiser, Wilhelm II, and the inclusion of the war guilt article, Art.231, in the Versailles Treaty, and later the Nuremberg and Tokyo tribunals. ‘Total war’ of the 20th Century was the product of inter-imperialist rivalry, a product of war between technically and industrially advanced states, which meant that the destructiveness of war on the European continent was qualitatively different from war in the past.

The destruction of the *Jus Publicum Europeaum* was not a product of alien undermining in the form of American power or of American jurisprudence, it was destroyed from within. The political elites of Europe could not draw the line between competition for ‘land appropriation’ overseas and competition between sovereigns on European soil. For Schmitt, and this is the key to his modern appeal, this past is redescribed in terms of the problem of America. At the descriptive level European power is often seen as undermined by the universal claims of American power. It is at the level of description, where the enemy was demonised as ‘inhuman’ and war unlimited because it was fought under the framework of ‘universal liberalism’ that most attention has been focused.

The inability of the Westphalian peace to hold in Europe was a reflection of the social and economic tensions which could not be contained within the existing territorial boundaries. As Lenin argued, once the world was divided up, inter-imperialist rivalry could only take the much more destructive form of the redivision of the world.³¹ What the critical theorists take from Schmitt is the contingent reading that universalist claims lead to unlimited war and the transformation of the enemy into a ‘criminal’. The critical cosmopolitans read Schmitt idealistically without linking his ontological framing of the context to his specific conclusions. Without these mediations, Schmitt is read as arguing against universalism per se, as if universal claims automatically equated with barbarism while claims based on particularist national interests were somehow more civilised. This is a superficial reading of Schmitt’s work, focusing on his contingent conclusions, neglecting the ontological grounding of the relation between sovereign power and law, which does not itself distinguish between universal and particular claims in this idealist way.

³⁰ This sense of loss of the old world of the unity of European peoples, often seen as undermined by American power, can be seen in much of international relations and political theorising of the period, see, for example, the early work within the English School and for an example of how this division was held to make more difficult the negotiation of European imperial decline, John Plamenatz, *On Alien Rule and Self-Government* (London: Longmans, 1960).

³¹ Lenin, *Imperialism*. Schmitt’s political perspective that this redivision could be managed and restricted to the overseas territories, while maintaining peaceful relations on the European continent, should not detract from his methodological insights.

Schmitt is ill-suited, apart from descriptively, to the essentially descriptive, critical post-structuralist ‘critique’ of empire, with US hegemonic sovereignty, equipped with ‘decisionist’ power and normalising the state of exception. Schmitt’s ontological focus does not lead to a critique of US ethical and legal universal claims on the basis that they constitute a new US global order, but precisely because they do not constitute a new global order or *nomos*. Schmitt’s *Nomos* is about order based on the realities of power; about the sovereign content which gives meaning to law as an institution of territorial ordering. Without a global sovereign law and the ordering of power (inter-imperialist) relations must be based on pluralism rather than universalism. It is not a matter of whether power or universalism are in themselves bad or good, but that separating international law from power-political relations is destructive of order.

Like Schmitt’s theoretical descendents in the political realist and English School approaches, Schmitt’s concern is order, and therefore about conflict and its management. He argues that politics is at heart about conflict (the distinction between ‘friend and enemy’) and how to handle it. For Schmitt, the management of conflict becomes easier the more transparent the relations of power are and the more ‘objective’ our understanding of them. His critique of liberal universalism is materially, objectively, grounded in the fact that there is no political unity of mankind; there is no world unity and attempts to achieve such a unity through ‘ideological short-circuits’ can only suggest ‘fictional unities’.³² His critique of liberalism (both in the domestic and the international realms) is that it artificially seeks to abolish conflict without being able to practically contain it.³³ Of course, at some future point conflict might be eliminated:

A world in which the possibility of war is utterly eliminated, a completely pacified globe, would be a world without the distinction of friend and enemy and hence a world without politics... For the definition of the political, it is here even irrelevant whether such a world without politics is desirable as an ideal situation.³⁴

However, in a world where states exist as autonomous political subjects (i.e. where more than one state exists) there is always the possibility of conflict and of war. In which case, any claim to represent the ‘interests of humanity’ could only be an ideal, contingent, one, that would be dependent on there not being a disagreement; i.e., on there not being the politics of friend and enemy. Once politics returns, ‘humanity’ disappears; by definition: ‘Humanity is not a political concept.’³⁵

Schmitt seeks to make similar points about international law. That beyond administrative matters, where there is the possibility of a genuine global consensus, international law can only be contingent unless there was a global sovereign capable of enforcing it, in which case it would not take the form of international law but

³² Schmitt, *Nomos*, 335.

³³ See his critique of liberal parliamentary democracy, Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge, Mass: MIT Press, 1988), esp. 12.

³⁴ Schmitt, *Concept of the Political*, 35.

³⁵ *Ibid.*, 55.

domestic law. Schmitt recalls Hobbes' fundamental political ontology, reflected in the injunction that there can be no law without a sovereign.³⁶

Schmitt's critique of the revival of Just War theory was not that it presaged a new empire of America, although he was clear that it served US policy-interests in promoting its ambitions,³⁷ but that it created and reflected a sphere of international disorder rather than one of order. Just War approaches could not bring order unless there was a global sovereign capable of ruling on and giving content to the concept. In a world with no global sovereign and no consensus over 'justice' and law, approaches based on 'justice' institutionalised disorder and conflict rather than order and the mitigation of conflict. Just War assumptions made negotiation between equals impossible and prevented limited war.³⁸

Therefore Schmitt's critique of universal claims was not based on a moral critique of power or of sovereignty, but on a materialist understanding of the divided nature of global politics. If America had the power to territorially ground sovereign global power this would not be problematic. The point is precisely the opposite, that this universalistic version of international law was abstract and, in fact, powerless to create order. As the excellent Italian theorist (seemingly little read in the UK), Alessandro Colombo, notes, with regard to Just War: 'In comparison to its medieval precedent, it lacks reference to a concrete institutional order, an adequate bearer of such an order (as the Church was before the civil wars of religion) and also a substantive idea of justice.'³⁹ Schmitt was not against universalism per se, but illegitimate or fictional universalism, as an idealised form without material content.

His point was not that there was a new *nomos* of American hegemony but that America was strong enough to undermine the old European order but not strong enough to found a new global one. The world was still divided, but with no agreement on methods of international regulation. The interwar order of the League of Nations may have proclaimed a global order but it reflected merely the destruction of the old spatial order into 'spaceless universalism, and no new order took its place'; the League conferences could not create genuine enforceable law 'because they had neither the content of the old, specifically European spatial order nor the content of a new global spatial order'.⁴⁰ The US could undermine the old order, but the League, excluding the main powers, America and the Soviet Union, could not give content to a new order.⁴¹

It was this disjunction between universal form and territorially limited power to rule that divorced law from politics and prevented law from facilitating and institutionalising international order; instead, law became a political tool and shared imperialist interests in stability were sacrificed as war became potentially arbitrary and unlimited. Schmitt's critique was that international law, as a mechanism for

³⁶ Ibid., 67.

³⁷ Schmitt, *Nomos*, 118.

³⁸ Ibid., 321.

³⁹ Alessandro Colombo, 'The "realist institutionalism" of Carl Schmitt', in Odysseos and Petito, 21-35, 32-3.

⁴⁰ Schmitt, *Nomos*, 192

⁴¹ Ibid., 245

institutionalising a consensus among the Great Powers, was destroyed in its reduction to a political weapon, as an ethical statement or wish to ‘abolish war’.

The idealism of the Critical Cosmopolitans

Where critical cosmopolitans entirely misread Schmitt in an idealist manner is in seeing him as an advocate for the defence of state sovereignty in the abstract rather than in the concrete. Schmitt consistently points out in his work that he is not interested in abstract concepts but ‘the concrete application’:⁴²

...all political concepts, images and terms... are bound to a concrete situation... and they turn into empty and ghostlike abstractions when this situation disappears. Words such as... sovereignty... are incomprehensible if one does not now exactly who is to be affected, combated, refuted, or negated by such a term.⁴³

Schmitt is interested in sovereignty not as an abstract principle but as a specific political content capable of ordering society. This makes Schmitt no more likely to defend sovereignty in the abstract than to defend rights of political equality in the abstract. He makes the point that rights of citizenship, to be meaningful, have to depend on having a pre-existing content of equality:

Universal and equal suffrage is only, quite reasonably, the consequence of a substantial equality within the circle of equals and does not exceed this equality. Equal rights make good sense where homogeneity exists... Matters that are dealt with by the methods of an empty equality would also become insignificant. Substantive inequalities would in no way disappear from the world and the state; they would shift into another sphere.⁴⁴

The granting of rights of citizenship, or of sovereignty, where there is not the content to guarantee autonomy, for Schmitt, undermines the legal and political order and creates a fictional order without substantive content. Schmitt was not in favour of the extension of the rights of sovereignty beyond the European powers. To read the *Jus Publicum Europaeum* as a defence of the post-1945 order of sovereign equality and non-intervention is to violently misread Schmitt for the purposes of portraying him as an idealist and principled non-interventionist.

Schmitt was opposed to the extension of the European order, where international law was the property of ‘civilized states’, beyond the inevitable recognition of the rise of Japan as an Asiatic ‘Great Power’.⁴⁵ He argues that the extension of international law to recognise non-European states as sovereign equals toward the end of the 19th century was a sign that Europe ‘had lost the consciousness of the spatial structure of its former order’ destroying the old order:⁴⁶

⁴² For example, Schmitt, *Political Theology*, 6.

⁴³ Schmitt, *Concept of the Political*, 30-31.

⁴⁴ Schmitt, *Crisis of Parliamentary Democracy*, 10; 12.

⁴⁵ Schmitt, *Nomos*, 230-31.

⁴⁶ *Ibid.*, 233.

What appeared in its place was no “system” of states, but a collection of states randomly joined together by factual relations – a disorganized mass of more than 50 heterogeneous states, lacking any spatial or spiritual consciousness of what they once had in common, a chaos of reputedly equal and sovereign states and their dispersed possessions, in which a common bracketing of war no longer was feasible, and for which not even the concept of “civilization” could provide any concrete homogeneity.⁴⁷

For Schmitt, it was clear that the concept of equality was being extended where there was no substantive equality of relations. While the equality of the Great Powers was seen as essential to the imperial order, the extension of formal equality could only destabilise this order. One example Schmitt gives is of the League of Nations impotence when Italy invaded and annexed Ethiopia, a League member and recognised sovereign state. The League initially applied but then lifted sanctions against Italy, for Schmitt the problem was in extending sovereign equality ‘beyond the line’ rather than with Italian imperialist aggression.⁴⁸

Schmitt is interested in sovereignty as the concrete content of the law and of territorial order domestically and internationally, not as merely the legal form of these relations. Where there is a gap between legal form and political content he argues that jurisprudence and policy-making based on the legal form can only be destructive of order. The extension of the rights of sovereignty and of sovereign equality beyond the Great Powers, therefore, indicated the break down of order based upon the *Jus Publicum Europeaum*. It is for this reason that the 1823 Munroe Doctrine is seen as a fundamental break; in effect the law became the subject of and reflection of, inter-imperialist rivalry, as the rights of sovereignty were extended to the states of the Western hemisphere under US power. The sovereignty of the Latin American states was a fictional sovereignty, sovereignty in form but not content, as this sovereignty was contingent on US power:

Territorial sovereignty was transformed into an empty space for socio-economic processes. The external territorial form with its linear boundaries was guaranteed, but not its substance, i.e., not the social and economic content of territorial integrity.⁴⁹

For Schmitt, the Munroe Doctrine was a challenge to the European legal order but was not a fatal one. Even though law and politics became formally separated, underlying this was a settled framework of power relations. The mediation between form and content, through US power was still clear: the US was capable of giving the doctrine a political content. The Doctrine was not merely an idealist wish or aspiration, it was a reflection of the balance of power. While not being problematic for international power relations, the Munroe Doctrine demonstrated the liberal logic of extending international law and the rights of sovereignty in ways that would increasingly become problematic. Schmitt’s principle concern was over the extension of the rights of sovereignty to European colonial possessions overseas. He sought to balance European Great Power rivalries through the amicable division and redivision

⁴⁷ Ibid., 234.

⁴⁸ Ibid., 242-3.

⁴⁹ Ibid., 252.

of overseas territories in ways which could avoid inter-imperialist rivalry leading to European war.

Far from supporting the rights of sovereignty and of non-intervention in the abstract, Schmitt opposed the fictional grants of sovereignty to colonial and overseas territories, fearing that the struggle over colonial possessions would automatically involve the 'European motherland' in inter-imperialist conflict within Europe.⁵⁰ This is precisely what happened, and, of course, Schmitt, writing in hindsight in 1950, is seeking to explain the inability of European imperialist powers to avoid 'total war' in terms of failed jurisprudence (as discussed above). Nevertheless, it is clear that Schmitt is no defender of state sovereignty against US or any other kind of 'imperialism'. To read Schmitt in these terms would be to totally ignore the fundamental ontological framework of Schmitt's focus on the relations between law and politics at the international level. In fact, as is much more widely understood, his stand that aggressive war should not (and could not) be made an enforceable crime, makes it clear that he stood fundamentally opposed to any liberal legal formalism, which could only be a moral judgement on the operation of power relations.

Schmitt was the forerunner of political realism, as exemplified in the work of Hans Morgenthau, E. H. Carr and Hedley Bull.⁵¹ Like all three of these later writers, he appreciated that while power relations could not be legislated or wished away, they could be managed. This is where Chris Brown's judgement is fundamentally misleading:

His account of the *jus publicum Europeum* and the notion of war as a duel, something that can be bracketed as between *justis hostes*, is specifically based on the notion that the use of force does not have to be justified to any external authority or to oneself. This is an essential feature of the 'humanized war' that Schmitt endorses as an alternative to the horrors of Just Wars. Although he does not put the matter in this way, he is effectively offering us a devil's bargain; accept that violence is simply part of human existence – forget the attempt to require that violence be justified – and in exchange you will have a world where violence will actually be more controlled and less dangerous... [i.e.,] that the attempt to control and limit the role of violence in human affairs is necessarily futile and counter-productive... a normative position that deserves to be rejected.⁵²

Here (as suggested above), Schmitt is seen as the mirror-image of the neo-conservative view that unlimited violence is ethically grounded, arguing that unlimited violence cannot be ethically limited. Brown uses the same framework as Devetak but reads Schmitt as the advocate of intervention rather than of non-

⁵⁰ Ibid, 219-221.

⁵¹ See, for example, Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Palgrave-Macmillan, 1995); E. H. Carr, *The Twenty Years Crisis, 1919-1939: An Introduction to the Study of International Relations* (Basingstoke: Palgrave, 2001); Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (New York: Knopf, 1978).

⁵² Brown, op. cit., 66-7.

intervention.⁵³ Nevertheless, the conclusion is the same: Schmitt provides no basis for normative judgement or for external political management of the use of violence.

Schmitt was against Just War doctrine and argued that its use, in the current context, threatened to draw Great Powers into conflict with each other. Clearly, portraying an inter-imperialist rivalry in terms of absolute values of right and wrong, good and evil, could lead to an intensification of the struggle and the undermining of negotiations and the possibility of unleashing terrible levels of destruction.⁵⁴ This, however, is a merely contingent point: for example, the Cold War rivalry was fought in terms of absolute values but still had a negotiated nature,⁵⁵ fought out in third world states, very much in the manner normatively advocated in Schmitt's *Nomos*.

Schmitt's fundamental ontological critique of Just War doctrine was that in a divided world, who decides what is just? Justice could have no meaning outside power relations. For Schmitt though, unlike for a post-structuralist, this was not a critique of the concept of justice but a way of understanding how it could either operate to maintain order or to undermine it. Schmitt's concern was reading the development of international law in the context of inter-imperialist conflict. Like Hedley Bull he had a fine and balanced grasp of the distinctions between the contexts in which Vittoria and Grotius developed Just War approaches to limit war and the 20th century revival of their work in a context which extended the possibilities of conflict.⁵⁶

Schmitt was not concerned with limited colonial wars or limiting the destructiveness of proxy rivalries fought out overseas but with the bigger picture of global order between Great Powers, where he normatively hoped for the emergence of a balance of power between 'several independent *Großräume*'.⁵⁷ Clearly, Just War ideals could only be a barrier to any new pluralist order in which there were conflicting interests. Nowhere does Schmitt suggest that violence or conflict will always find their own solution which will be the least disruptive or that the use of force does not have to be justified. In the wake of two World Wars and the destruction of the 'civilized' European order, this would be an untenable reading of his work. On the contrary, war could only be understood and possibly ameliorated by understanding conflict in political terms: 'it would be senseless to wage war for purely religious, purely moral, purely juristic, or purely economic motives'.⁵⁸ For Schmitt: 'The justification of war does not reside in its being fought for ideals or norms of justice, but in its being fought against a real enemy.'⁵⁹ Schmitt's re-reading of the 20th century considers that

⁵³ The sharp disjunctions in opportunist readings of Schmitt indicate that those who use Schmitt as a 'straw man' to legitimise their positions have little concern with Schmitt's actual analysis.

⁵⁴ Schmitt, *Nomos*, 321.

⁵⁵ The contingent nature of these points are addressed in Brown's critique of Booth's 'Ten Flaws of Just Wars', in Brown op. cit., 58.

⁵⁶ Hedley Bull, 'The Grotian Conception of International Society', in Herbert Butterfield and Martin Wight (eds), *Diplomatic Investigations: Essays in the Theory of International Relations* (London: George Allen & Unwin, 1966), 51-73.

⁵⁷ Schmitt, *Nomos*, 355.

⁵⁸ Schmitt, *Concept of the Political*, 36.

⁵⁹ *Ibid.*, 49.

Germany was not the ‘real enemy’ of the US and that the US had undermined traditional mechanisms of Great Power ordering of the world.⁶⁰

Conclusion

Ironically, while there has been a vast increase in the interest and use of Schmitt in contemporary IR, the analysis above suggests that very little of this work has been focused on how Schmitt’s approach can help us understand the world today. The critical theorists who have driven the Schmitt ‘revival’ have been drawn to Schmitt’s descriptive power and have focused on his contingent descriptions rather than his ontological framing. Whether Schmitt is portrayed as a universalist or a particularist, as an advocate of empire or of sovereignty, of intervention or of non-intervention, the readings have been based on selective descriptive appropriations of his work with very little regard to his underlying ontological focus on the relation between power and meaning, the legal form and the underlying power-political content.⁶¹

I want to suggest that, in this respect, Schmitt’s revival has been a product of the poverty of critical IR theorising. Driven by the ‘cultural’ and ‘normative’ turn, the ‘critical’ critics of sovereignty and the ‘socially constructed’ divide between the ‘domestic’ and the ‘international’ have been unwilling to confront the problems when their critique of liberalism is translated into the real world of international hierarchy under US dominance. Ironically, the focus of the ‘critical’ critics is a barrier to using Schmitt in a way that can usefully throw some light on the changing nature of international law and international policy discourse.

A focus on Schmitt’s ontological framework of grasping the grounding of law in sovereign power, rather than his normative conclusions about the dangers of inter-imperialism can lead to some useful insights in a world very different from that of the mid-20th century. The management of inter-imperialist rivalry, the fundamental concern of Schmitt’s *Nomos* is not a question at present. Uncertainty over international law, the meaning of war and the rights of sovereignty is not due to competing frameworks of law represented by leading Great Powers. There is no clearly grounded theoretical or political divide between US opposition and European support for UN Charter law.⁶² Today we are not witnessing the clash of grand political subjects which threatens to result in politicising law and undermining the framework of international order.

The international order is not in a comparable crisis to that of the inter-war years and World War Two. The crisis is one largely at the level of jurisprudence and political theorising. The revival of Just War theorising and its reflection in ‘The Responsibility to Protect’ or the International Criminal Court and the revival of ad hoc tribunals for former Yugoslavia and Rwanda or the denial of Geneva convention rights to the

⁶⁰ For an excellent analysis of Great Powers and international law see Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004).

⁶¹ As, I trust is clear from the above, I’m not interested in Schmitt’s normative conclusions, which to my mind (and for what it is worth) are clearly reactionary, but in disinterring his ontological and methodological approach to the relationship between law, ethics and the political.

⁶² Even Kagan moderated his celebrated ‘Mars vs. Venus’ view of the US/Europe divide, Kagan, ‘America’s Crisis of Legitimacy’, *Foreign Affairs*, 83:2, (2004), 65-87.

Unlawful Combatants at Guantanamo do not reflect a fundamental crisis of international spatial ordering. Ironically, today there is little gap between sovereign power and legal content, the legal question mark over sovereign equality for the post-colonial state reflects the breakdown of the Cold War balance of power and the removal of barriers to once again ‘drawing a line’ between the imperial powers and the ‘colonial’ world.⁶³ The extension of international law does not reflect the universalism of the US challenge to European hegemony but the questioning of the juridical and political equality of the post-colonial ‘pre-modern world’ alleged to be populated by unequal ‘quasi-states’ seen to be ‘failed’ or ‘failing’.⁶⁴

⁶³ See, David Chandler, ‘International Justice’, *New Left Review*, 2:6, (2000), 55-66.

⁶⁴ Cooper’s *The Breaking of Nations* reflects the shift away from universal applications of international law and the increasingly bifurcated world order, the double standards which are now alleged to be applicable between the ‘postmodern’ and the ‘pre-modern’, which, if anything, reflect the limited nature of inter-imperialist rivalry. The classic text framing post-Cold War IR as a challenge to views of universal sovereign equality is Robert Jackson, *Quasi-states: Sovereignty, International Relations and the Third World* (Cambridge University Press: Cambridge, 1990). See also the concluding chapters of Simpson op. cit. on the reassertion of Great Power prerogatives.