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THE PARTISAN: CARL SCHMITT AND TERRORISM

ABSTRACT. The words terror and terrorism are used widely today and are used to denote an illegitimate act of violence. War, on the other hand is used as a more open concept, the legitimacy of every particular act is at least placed under limited debate. The issue of how our thoughts upon the legitimacy of violence are ordered by the framing of the legal concepts of terror and war is an important contemporary question. One way into this question is by giving an account of Carl Schmitt's theory of 'partisan war.' Introducing Schmitt's concept of the 'partisan' into Anglophone legal theory is the main aim of this paper.

KEY WORDS: Carl Schmitt, Hegel, international law, Iraq, partisan, recognition, terror, terrorism, war

INTRODUCTION

This article looks at Carl Schmitt's *Theory of the Partisan: A Commentary/Remark on the Concept of the Political*.¹ It will be argued that Schmitt's conception of the figure of the 'partisan' is relevant to the contemporary consideration of the problem of war, and in particular, acts of 'terror' and 'terrorism'. The theory of the partisan assists the philosophy of law in the framing and conceptualisation of war and violence within international law and international relations. Further, the theory points to the significance of

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¹ Schmitt, C (1963) *Theorie des partisenen: zwischenbemerkung zum begriff des politischen*, 5th edn. Dunker and Humblot, Berlin; Schmitt, C (2004) *The theory of the partisan: a commentary/remark on the concept of the political*. Goodson, AC tr. Michigan State University Press, Michigan.

particular non-state forms of violence in the formation of both the concepts of the political and the juridical. This paper will attempt to link Schmitt's theory into a contemporary legal-political context of 'terror'. This will involve giving an overview of Schmitt's main arguments and a consideration of what implications the theory of the partisan has for the contemporary legal understanding of the problem of war.

It will be argued that Schmitt's account of the partisan and relation of 'friend and enemy' renders problematic a distinction between 'war' and 'terrorism' that is continually drawn by the Westphalian tradition of international law. Schmitt's account helps to position these concepts within a global process of legal and political ordering built upon recognition, mis-recognition, antagonism and struggle. While Schmitt's account has much contemporary worth and relevance, his adoption of a pessimistic human anthropology and one-sided reading of Hegel's theory of recognition makes his account of war and terror somewhat limited. The limitations of Schmitt's account might be thought to open onto a central ethical concern related to war and terror: that of the attempt to comprehend oneself through the third.

THE ACT OF TERROR

One contemporary legal and political problem is that of acts of 'terror' or the phenomenon of 'terrorism'. A particular face of this phenomenon is the Islamic political organisation, a descendent of the late 19th and 20th century tradition of Islamic reformism or Islamic political resurgence.² An example of a contemporary Islamic political organisation that has carried out acts violence is that referred to as 'al-Qa'ida'.³ This organisation is popularly regarded

² See generally: Abu-Rabi, IM (1996) *Intellectual origins of Islamic resurgence in the modern Arab world*. SUNY Press, Albany; Esposito, JL (1992) *The Islamic Threat: Myth or Reality*. Oxford University Press, New York.

³ There are of course many forms of Islamic political organisations, the majority of which are non-violent. The term 'al-Qa'ida' is used here more as a symbolic representation of an organisation or loose connection of actors about which the 'West' knows relatively little. One must be careful not to fall into the trap of considering such a representation in terms of organisations such as 'SPECTRE' or 'CHAOS' being the stuff of James Bond films or television parodies such as 'Get Smart.'

as being responsible for the 2001 bombing of the Pentagon and World Trade Centre in the USA. Such an act of violence can be understood as non-state violence, or non-sovereign violence. The act was not carried out by a sovereign state but by a political or military organisation against both military and civilian targets within a foreign state. A number of general characteristics of such a terrorist organisation might involve the use of clandestine military operations and carrying out acts of violence using 'unconventional' or 'irregular' forms of warfare: for example, the use of commercial airlines as guided missiles. Such an organisation might be thought also to be immersed within a civilian population and as such not easily identifiable.

A parallel phenomenon, which is often referred to also as 'terrorism', at least by the popular media and various state agencies, is the ongoing violence occurring through violent acts of 'insurgency' or 'resistance' within the state of Iraq currently under occupation by the USA and its allies. This violence is also carried out by a number of non-state organisations drawing upon irregular or guerrilla warfare against both military and civilian targets. Here the term 'terror' is often used to describe the use of car and suicide bombs and also the occurrence of close street fighting against US forces. Little is known about the nature and forms of organisation of this resistance; however, it might be assumed that the parties involved include both Islamic and secular elements.

There is a tendency within the language and conceptions of the popular media, scholarship and statements of various Western governments (for example, the USA, Britain and Australia) that the acts of non-state violence are to be described by the terms 'terror' and 'terrorism'. Rhetorically, both forms of violence given in the examples above become grouped under the notion of the 'war on terror'. This terminology is significant, as the object against which a war is to be carried out is a concept or notion. This concept of 'terror' represents a sphere of violent action distinguished from the concept of war. Under this distinction, the act of terror is distinguished from 'war proper' and further, the act of

terror is, as opposed to war, assumed *prima facie* to be 'illegal' and 'illegitimate'.⁴

A legal question arises here, at least under general principles and conceptions of international law: what is the distinction between the act of war and the act of terror, and what is the relation between this distinction and the determination of one as 'legitimate' and the other as 'illegitimate'? Some assistance might be sought by thinking about the historical development of the conceptualisation and ordering of violence under European international law.

THE WESTPHALIAN ORDERING OF WAR

One important moment in the development of a concept of war under the tradition of European international law is the Westphalia

⁴ Take for example the power of the language of the General Assembly in the wake of the bombings in the USA in 2001. In Resolution 56, September 12, 2001, the General Assembly stated that it: 1. Strongly *condemns* the heinous acts of terrorism which have caused enormous loss of human life, destruction and damage in the cities of New York, host city of the United Nations, Washington, D.C., and Pennsylvania; 2. *Expresses* its condolences and solidarity with the people and Government of the United States of America in these sad and tragic circumstances; 3. Urgently *calls* for international cooperation to bring to justice the perpetrators, organisers, and sponsors of the outrages of 11 September 2001. 4. *Urgently calls* for international cooperation to prevent and eradicate acts of terrorism, and stresses that those responsible for aiding, supporting, or harbouring the perpetrators, organisers and sponsors of such acts will be held accountable. Note also *The Declaration on Measures to Eliminate International Terrorism*, UN General Assembly Resolution 49/60, December 9, 1994. 1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States; 2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society; 3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them. The principles of this resolution were affirmed in the International Convention for the Suppression of Terrorist Bombings, New York, January 12, 1998.

ordering of international relations following the Peace of Westphalia (1648) at the conclusion of the Thirty Years War (1618–1648). With regard to the emergence of the ‘Westphalia world’, Ian Hunter states:

...(A)t the interstate level, the Westphalia order was dedicated not to the elimination of war – which it treats as a permanent feature of interstate relations – but to its regulation. On the one hand, by tying the European states into a system of reciprocally guaranteed security, and by treating territorial states as sovereign in relation to all other temporal or spiritual powers, Westphalia was designed to banish ideological wars of annihilation from the European heartlands. The system of pacts backed by great-power guarantors was not intended to preclude territorial infringements or conflicts, but to ensure that these would take the form of contests between ‘just enemies’ – rather than wars of extermination against heretics – thereby avoiding the cycle of outrage and revenge that had made the religious wars so savage and so difficult to end.⁵

Ushered in through the Westphalia ordering of legal and political relations was an emerging idea of the sovereign’s or the state’s *monopoly upon the legitimacy of violence*.⁶ Following the carnage of a long period of religious civil wars occurring in and across a number of states and principalities within central Europe, the notion of war was brought under a degree of legal and political ordering. ‘War’ became recognised between sovereigns as an act properly carried out only by the sovereign state, a right held by the sovereign alone and legitimated by sovereignty.⁷ Such a conceptual ordering was intended to preclude the reversion to the horror and terror caused by a multiplicity of religious and political actors claiming a legitimate right to war against their enemies.

In this respect the concept of war became associated with the ‘external’ affairs of sovereignty, it occurred in the relations between

⁵ Hunter, I. *Westphalia calling*, unpublished research paper, p. 11.

⁶ This notion is taken from Weber. See: Weber, M (1946) *Politics as a vocation*. In: Weber, M *From Max Weber: essays in sociology*, Gerth, HH and Wright Mills, C tr. ed. Oxford University Press, New York.

⁷ Under such conception the sovereign’s legitimacy of violence develops through the maintenance of a legal order in the interest of preserving internal ‘peace.’ Such a theorisation is present, among others, in the work of Grotius and Hobbes. Note the comment by Grotius in: Grotius, H (1964) *On the law of war and peace*, Kelsey, FR tr. Oceana Publications, New York, p. 138: ‘By nature all men have a right of resisting in order to ward off injury, as we have said above. But as civil society was instituted in order to maintain public tranquillity, the state forthwith acquires over us and our possessions a greater right, to the extent necessary to accomplish this end. The state, therefore, in the interest of public peace and order, can limit that common right of resistance.’

sovereigns and was related to their disputes over boundaries, territorial integrity and their respective claims and interests against each other. The conception operated to limit the occurrence of intra-state civil war and to attempt to render civil war as a purely 'internal' matter of the state. The sovereign's right to territorial independence and non-interference by another meant that the question of violence within the state became pushed out of the bounds of consideration of European international law. Groups and factions within a civil war were not necessarily considered under international law to possess rights similar to sovereign rights. The Westphalian system of legal and political ordering regulated the scope and operation 'war' and placed the existence and legitimacy of civil war outside of the sphere of 'war proper'.⁸

This conceptualisation continues to this day⁹ and is significant to the Anglo-European understanding of war under the United Nations framework. Under the UN Charter the body sets up a number of rights and legal obligations aimed at enabling the peaceful interaction of member states and the maintenance of peace and security between states.¹⁰ The Charter sets out the limitations upon the rights of sovereign states to war and the rights of the collective action of member states in the interest of protecting peace and security.¹¹ In many ways the Charter can be understood as a continuation of the Westphalian model of state sovereignty whereby its 'members' are sovereign states and it is a creation of an act (or multiple acts) of sovereignty.¹² Under the Charter 'war' is generally conceptualised as sovereign war and, while it is condemned by the ideals of 'peace'

⁸ A similar account of this history is given by Schmitt. See: Schmitt, C (1950) *Der nomos der erde im völkerrecht des jus publicum*. 3rd edn. Dunker and Humblot, Berlin, pp. 112–117. For an interesting historical account see: Tuck, R. (1999) *The rights of war and peace: political thought and the international order from Grotius to Kant*. Oxford University Press, Oxford.

⁹ Note the comment by Greig, DW (1976) *International Law* 2nd edn. Butterworths, London, p. 867: '.....(T)he modern state system, built as it was on the basis of the theory of state sovereignty, treated the right to wage war as inherent in the concept of sovereignty. As a resort to war was the right of every state, it was variously defined in the widest terms. In the opinion of Vattel, war was the condition in which nations prosecute their rights by force. According to Washington, J., of the US Supreme Court in *Bas v Tingy*, war was "an external contention by force between.... two nations"'.
¹⁰ *United Nations Charter*, Chapter 1, Article 1.
¹¹ *Ibid.* Chapters 6, 7, and 8.
¹² *Ibid.* Chapter 1, Article 2; Chapter 2, Articles 3 and 4.

and ‘security’, it remains a sovereign right attached to the recognition of statehood. As such war is conceived in the terms of the ‘use of force’ by states or member states, which the Charter seeks to limit and regulate.¹³

This Westphalian style ordering of the war is not absolute. There exists a tension within the Charter between the sovereign rights of the state and the notion of ‘human rights’, which, under specific circumstances, circumscribe sovereign rights to independence and allows the possibility of a ‘humanitarian war’ against a member state.¹⁴ Through the notion of human rights and the wider notion of ‘humanity’ there exists under international law a moral, ethical and legal ground for war that is beyond the sovereign state. This ground allows the act of war against a state in the name of human rights and limits the traditional Westphalian ordering whereby the sovereign gives up a number of rights so that it might exist in community with its others and ‘humanity’ at large. Under this notion, and perhaps as this notion is expanded to its logical limit, the operation of an international law with effective structures of adjudication and enforcement causes a change in the concept of war.¹⁵ Opposed to the Westphalian conception, war is no longer spatially limited, it is universal and grounded not upon forms of political organisation bound to particular territories, but, rather, the concept of war occurs under a global legal framework with universal application and

¹³ Only then those actors recognised as ‘states’ under international law possess a ‘right’ to war. One popular definition of ‘statehood’ is expressed in the *Convention on the Rights and Duties of States (Montevideo Convention)* December 26, 1933. Note Article 1: ‘A state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states.’

¹⁴ *UN Charter Preamble*. On the tension within international law between the notion of state sovereignty and the notion of human rights in relation to war see generally: Beitz, C (1979) *Political theory and international relations* Princeton University Press, Princeton; Walzer, M (1977) *Just and unjust wars*. Basic Books, New York; Tesón, FR (1988) *Humanitarian intervention: an inquiry into law and morality*. Transnational Publishers, New York; Frost, M (1986) *Towards a normative theory of international Relations*. Cambridge University Press, New York; Mosely, A and Norman, R (eds) (2002) *Human rights and military intervention*. Ashgate, Aldershot.

¹⁵ See Habermas, J (1997) Kant’s Idea of Perpetual Peace, With the Benefit of Two Hundred Years Hindsight. In: Bohman, J and Lutz-Bachman, M (eds) Bohman, J tr. *Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal*. MIT Press, Cambridge Mass; and Habermas, J (2001) The Postnational Constellation and the Future of Democracy. In: Habermas, J (ed) *The Postnational Constellation: Political Essays* Pinsky, M tr. Polity Press, Cambridge.

universal validity. Further, war becomes no longer the enactment of sovereign political will, but the operation of global 'police action' as a means of punishing wrongs (crimes against humanity) or enforcing action in accordance with international law.¹⁶

Within this tension, however, the concept of war is still premised upon the sovereign state body and action of the sovereign state. Short of a form of global or international sovereignty with a self-dependant military or police force, war carried out in the name of human rights or international law takes place as an act of state sovereignty, and relies upon state-based military organisations and state constitutional requirements.¹⁷ Here the right to violence and right to carry out properly an act of what is understood as 'war' is still an act carried out by particular states. While reasons for their actions might be the defence of 'humanity', under the present structure of international law, not all humans can carry out 'war'; 'war' is a privilege of states.

What emerges in this brief discussion is the relation between the concept of war and a question of political and legal ordering. In this relation the concept of war itself is tied to questions of political and legal legitimacy. The determination of the boundaries of what constitutes 'war' is tied to the question of which actors are understood to have legal and political legitimacy. The distinction within the concept of war generally between 'war', 'civil war', 'terrorism', and 'crime', while involving distinctions in the manner, form and scale of violence involved (technological, logistical, strategic) is one which is dependent upon a recognised or assumed legitimacy of the actors involved. Part of the question turns upon what acts of violence come under the 'concept of war' and what acts are excluded from this.¹⁸

¹⁶ See also: Douzinas, C (2002) *Postmodern Just Wars: Kosovo, Afghanistan and the New World Order*. In: Strawson, J (ed) *Law After Ground Zero*. Glashouse Press, London.

¹⁷ See: Derrida, J (1994) *Specters of Marx: The State of Debt, the Work of Mourning and the New International*, Kamuf, P tr. Routledge, New York; and Derrida, J (2001) *On Cosmopolitanism and Forgiveness*, Dooley, M and Hughes, M tr. Routledge, London.

¹⁸ The treatment of the London bombings in July 2005 by most media and commentators is a prime example of this framing. While Britain is carrying out a war in Iraq, the bombings of the London underground have been portrayed as having little to do with this war and have been thrown into the empty conceptual basket of 'terrorism.' Few commentators have bothered to think of the bombings as acts of 'partisan war' directly linked to Britain's ongoing aggressive war against Iraq.

The question of what is to be brought within and what is to be excluded from the concept of war is a site of contestation. One tension that is related to the question of an 'internal' versus 'external' war occurs with regard to the 'form' or 'manner' of fighting or violence. Under the Westphalian conception of state war other forms of non-state or non-sovereign violence in which the manner of fighting or warfare is 'irregular' (not carried out by an army in uniform, for example: guerrilla warfare, sabotage, terrorist bombing) might not be considered to fit within the sphere of 'war proper'. Rather, these acts are often characterised or understood to belong to the related field of 'civil war' or 'revolution' or considered as acts of 'insurgency' or 'terrorism'. Such acts as carried out not by states are more likely under international law to be looked upon not as acts of 'war' but as acts of 'civil disorder' or as 'criminal' acts. Viewed in this light acts of terror operate to challenge the state's monopoly upon the legitimacy of violence. Under this logic it is not so difficult to see why the 'international community' would denounce acts of terror, which stand outside the sphere of 'war proper' as acts of illegal and illegitimate violence and as criminal acts.

Should legal thinking be bound by this conceptualisation? If it can be shown that the conceptual distinction between war and terror is problematic, might not there be a demand upon legal thinking to consider terrorist acts legitimate in the same way that a sovereign act of violence contains a degree of legitimacy? In journeying down this line of intellectual inquiry it is worth looking at the work of Carl Schmitt and, in particular, his *Theory of the Partisan*.

THE EMERGENCE OF THE PARTISAN

Written in the 1960s Schmitt's theory of the partisan develops in the context of a changing dynamic within the sphere of war. For Schmitt, this change involved something of an emphasis upon forms of 'irregular' or 'guerrilla' warfare fought very successfully by non-sovereign actors against traditional, uniformed armies of 'Western' states. This form of warfare (which involved secrecy, the mixing of military forces with the civilian population, and the use of 'terror' against military and civilian targets) was present in the anti-colonial wars against the French in Indochina (1946–1954) and Algeria (1954–1962). For Schmitt this form of warfare had developed during World War II (1939–1945) in Europe, particularly against the German invasion of the Soviet Union, and had

occurred earlier with the Chinese communists (and nationalists) against the invading Japanese army (1932–1945).¹⁹ For Schmitt the initial moments of this form of non-sovereign violence occurred successfully in the Spanish Guerrilla War (1808–1814) against Napoleonic France²⁰ and came to be theorised through thinkers such as Carl von Clausewitz and Lenin. Schmitt referred to this form of fighter as the ‘partisan’: a figure who, becoming increasingly prevalent, placed under question the traditional European concept of war and who prompted a re-examination of the concept of the political.

It should be noted that Schmitt’s catalogue of the precedents of partisan warfare is somewhat selective. In his account the emergence of partisan war is described as a European phenomenon, which was to spread to Asia and South America only upon the back of European Marxist-Leninist, revolutionary thought. Further, while his account extends to the anti-colonial and revolutionary violence of the 20th century, Schmitt’s favoured image of the partisan and its inherent legitimacy is bound-up with something of a romantic conception of the peasant who defends a concrete notion of right linked to homeland or territory against the invader who claims a universal moral or legal legitimacy.²¹ In this sense the perfect image of the partisan was, for Schmitt, the Spanish peasants fighting against invading Napoleonic armies.

¹⁹ Schmitt, *Theory of the Partisan*. At p. 8 Schmitt states: ‘Serious partisan battles have been raging in large (-scale) areas of the world for 30 years now. They began already in 1927, before World War II, in China and other Asian countries that would later take up arms against the Japanese invasion of 1932–1945. During World War II, Russia, Poland, the Balkans, France, Albania, Greece, and other regions became arenas for this kind of war. After it the partisan struggle continued in Indochina, where the Vietnamese communist leader Ho Chi Minh, and the victor of Dien Bien Phu, General Vo Nguyen Giap, were particularly effective against the French colonial army.’

²⁰ *Ibid.* at p. 4 Schmitt states: ‘The partisan of the Spanish Guerrilla War of 1808 was the first who dared to wage irregular war against the first regular modern army. In autumn 1808, Napoleon had defeated the regular Spanish army; the real Spanish Guerrilla War began only after the defeat of the regular army.’ And at p. 5: ‘A spark flew north from Spain at that time. It did not kindle the same flame that gave the Spanish Guerrilla War its world-historical significance. But it started something whose continuance today in the second half of the 20th century changed the face of the earth and its inhabitants. It produced a *theory* of war and of enmity that culminates in the theory of the partisan.’

²¹ See: Müller, JW (2003) *A Dangerous Mind: Carl Schmitt in Post-War European Thought*. Yale University Press, New Haven, pp 144–150.

Part of the rationale of Schmitt's selectivity and inclusion of anti-Napoleonic warfare and exclusion of, for example, Arab anti-Ottoman revolt, may be understood by Schmitt's attempt to position the figure of the partisan against a tendency of international law in the 20th century to move away from traditional lines of European state-based warfare and the *justis hostis* towards more abstract, universal conceptions of war, framed around the notion of humanity. In a sense, the partisan represents for Schmitt the last struggle against the universalisation of law and ethics within international law led by the USA and Britain, which had eroded traditional European statehood. Yet, Schmitt's recognition of the development of partisan warfare, through Marxist revolutionary struggle and anti-colonial warfare, occurs as an implicit recognition of the limitation of his original anti-universalist conception. The figure of the partisan becomes transformed through its participation in a discourse of the universalist moral, legal and ethical claims. The partisan becomes any figure who adopts violence for a political, or even a political-religious end. In this sense, a contemporary reading of Schmitt's theory of the partisan may avoid his initial selectivity.

With regard to the concept of war at the turn of the 20th century Schmitt states:

The Congress of Vienna (1814–1815) re-established also, in the framework of a general restoration, existing concepts of European martial law. It was one of the most astonishing restorations in all of world history. It was so immensely successful that this code of law of the contained [*gehegten*] continental land warfare still governed the European conduct of the continental land war in World War I (1914–18). It is still called *classical* martial law, and it has earned this name. For it recognizes clear distinctions, above all between war and peace, combatants and non-combatants, enemy and criminal. War is conducted between states by regular armies of states, between standard bearers of a *jus belli* who respect each other at war as enemies and do not treat one another as criminals, so that a peace treaty becomes possible and even remains the normal, mutually accepted end of war. Faced with this classical regularity, and so long as it possessed actual force, the partisan could only be a marginal figure, and so he remained throughout World War I (1914–1918).²²

Further, that:

Two kinds of war are particularly important and in a sense even related to partisanship: civil war and colonial war. In the partisanship of our own time, this context is almost its specific characteristic. Classical European international law marginalised these two dangerous forms of war and enmity. The war of *jus publicum Europaeum*

²² Schmitt, *Theory of the Partisan*. *supra* n. 1, p. 6.

was a war between *states*, conducted by one regular army against another. Open civil war counted as an armed uprising, which was suppressed with the help of a state of siege [*Belagerungszustand*] by the police and the troops of the regular army, if it did not lead to recognition of the insurgents as a warring party. The colonial war wasn't out of sight of the military science of European nations such as England, France and Spain. All of this, however, in no way compromised the status of regular state war as the classical model.²³

In contrast to the classical model of regular European inter-state war Schmitt saw the war of the partisan as a form of war of increasing importance. A concept of war would need to take into account this emerging phenomenon, which could be no longer regarded as a mere 'exception' to regular warfare. Schmitt attempts to provide something of a definition of the notion of the partisan. He points to four criteria: irregularity, increased mobility, the tellurian character, and intensity of political commitment.²⁴

For Schmitt, the partisan carries out an irregular form of fighting; this is of course defined through negation of whatever counts as 'regular' warfare, but at least it might be thought to involve not wearing a military uniform, not carrying weapons openly, using secrecy, sabotage and so on.²⁵ The partisan is characterised by agility, speed, surprise attack and increased mobility, which increases with the further mechanisation and motorisation of warfare.²⁶ Further, the tellurian character is important for the partisan, it involves the partisan's relation to the earth, to the population and to the geographical specificity of the region, which is the sphere of warfare.²⁷ In this sense, the partisan is primarily defensive in character and, for Schmitt, the nature of the partisan changes somewhat when the partisan takes on a world revolutionary form and when the concept of 'justice' tied to one portion of the earth, land, soil, becomes a more abstract concept.²⁸ Finally, and perhaps most importantly, what characterises the partisan is, for Schmitt, a certain 'political character.' The intense political character is crucial as it distinguishes the partisan from other fighters, from the thief and criminal, or the pirate, for whom violence is carried out only for private enrichment.²⁹

²³ *Ibid.* p. 7.

²⁴ *Ibid.* p. 14.

²⁵ *Ibid.* p. 9–10.

²⁶ *Ibid.* p. 11.

²⁷ *Ibid.* p. 13.

²⁸ *Ibid.*

²⁹ *Ibid.* p. 10.

Schmitt notes that the partisan fights on a political front and it is precisely this character that brings to the fore the original sense of the word ‘partisan’.³⁰

For Schmitt, while some forms of international law have taken small steps to address the position of irregular fighters,³¹ on the whole the juridical response to the phenomenon of the partisan has been to ignore the facts on the ground, to ‘criminalise’ the partisan and to re-affirm the classical conception of European inter-state war fought by regular armies.³² In Schmitt’s story of the theorisation of the notion of the partisan two figures are of central importance: Clausewitz and Lenin.

THE THEORY OF THE PARTISAN

Schmitt notes that Clausewitz’s formula of ‘war as the continuation of politics’ (*Krieg als der Fortsetzung der Politik*)³³ is the theory of the partisan in a nutshell and that this theory was extended to its logical limit by Lenin and Mao.³⁴ For Schmitt, the development of the theory of the partisan as moving beyond a form of military classification towards a properly ‘political theory’ came about through an intellectual climate in Berlin in the early 19th century.³⁵ In one sense it was a development of the Prussian *Landsturm* edict (1813), lasting

³⁰ *Ibid.*

³¹ *Ibid.* pp. 21, 22, 26.

³² *Ibid.* p. 25.

³³ See: Clausewitz, C (1984) *On War* Howard, M. and Paret, P. tr. ed. Princeton University Press, Princeton.

³⁴ Schmitt, *Theory of the Partisan supra* n. 1, p. 5. Compare this to Schmitt’s comment in Schmitt, C (1996) *The Concept of the Political* Schwab, G. tr. University of Chicago Press, Chicago. In the earlier work Schmitt argues that war for Clausewitz is the *ultima ratio* of the friend–enemy grouping ; that is, the possibility and fundamental character of the political. At pp. 34–35 he states: ‘The military battle itself is not the “continuation of politics by other means” as the famous term of Clausewitz is generally incorrectly cited. War has its own strategic, tactical, and other rules and points of view, but they all presuppose that the political decision has already been made as to who the enemy is. War is neither the aim nor the purpose nor even the very content of politics. But as an ever present possibility it is the leading presupposition which determines in a characteristic way human action and thinking and thereby creates a specifically political behaviour.’

³⁵ Schmitt, *Theory of the Partisan supra* n. 1, pp. 32–33.

only for 3 months before its revocation, which under Prussian royal edict prepared for a partisan war against Napoleon.³⁶ This ‘*Magna Carta* of partisanship’³⁷ called for all citizens to obey no orders from the enemy and, instead, to resist the intruding enemy with whatever means were at hand.³⁸ For Schmitt, the ideas behind this short-lived document, which ‘legitimated the partisan in the interest of national defence’,³⁹ became theorised by intellectuals in Berlin.

This intellectual climate included the young Clausewitz who, in a correspondence with Fichte, and in his lectures at the military academy, spoke of the possibilities of this political form of guerrilla and insurrectional war of the *Parteigänger* – ‘conducted by a people in its own fields [*Fluren*] on behalf of their freedom and independence’.⁴⁰ Schmitt notes that Clausewitz’s conception was limited by the still prevalent classical conception of war in his thought, and that the theory of the partisan was to be developed and radicalised as a political theory by Lenin.⁴¹ In this move the shift in the conception of the partisan from being primarily defensive to that of taking part in a revolutionary civil war became significant.

Schmitt argues that Lenin was the first person who consciously conceived of the partisan as an important figure of national and international civil war.⁴² Schmitt states:

What Lenin learned from Clausewitz, and he learned it well, was not just the famous formula of war as the continuation of politics. It involved the larger recognition that in the age of revolution the distinction between friend and enemy is the primary distinction, decisive for war as for politics. Only revolutionary war is true war for Lenin, because it derives from absolute enmity. Everything else is a conventional game.⁴³

Further, that:

The war of absolute enmity knows no containment. The consistent realization of absolute enmity provides its meaning and justice. The only question therefore is: is there an absolute enmity and who is it *in concreto*? For Lenin the answer was

³⁶ *Ibid.* p. 29.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.* p. 30.

⁴⁰ *Ibid.* pp. 31–32.

⁴¹ *Ibid.* p. 32.

⁴² *Ibid.* p. 34.

⁴³ *Ibid.* p. 35.

unequivocal, and his superiority among all other socialists and Marxists consisted in his seriousness about absolute enmity. His concrete absolute enemy was the class enemy, the bourgeois, the western capitalist and his social order in every country in which they ruled. The knowledge [*Kenntnis*] of the enemy was the secret of Lenin's enormous strike power. His comprehension of the partisan rested on the fact that the modern partisan had become the irregular proper and, in his vocation as the executor of proper enmity, thus, the most powerful negation of the existing capitalist order.⁴⁴

For Schmitt the importance of Lenin's reformulation lies in the sense that today the partisan's 'irregularity' does not refer simply to the military line or formation, as it did in the 18th century when the partisan was merely a lightly armed troop standing in contrast to the uniformed regular troop.⁴⁵ Rather, for Schmitt, the irregularity of the class struggle does not call into question the military line only, but the whole edifice of political and social ordering.⁴⁶ He notes that in Lenin this new reality was raised to a philosophical consciousness whereby the alliance of philosophy with the partisan unleashed new, unexpected and explosive forces.⁴⁷ Under this formulation, the traditional legal ordering of states and state violence is put under threat by a global partisan civil war guided by conceptions of what is 'good and just'.⁴⁸

This movement is central to Schmitt's theory of the partisan, the development of the partisan from a technical-military conception to a political conception: a reformulation of what underlies the concept of the political. By linking the military partisan to revolutionary consciousness the traditional conception of political organisation via a system of sovereign states is put under question. When the partisan is guided by the effort to negate the absolute enemy, the traditional 'game' of ordering the monopoly upon the legitimacy of violence via inter-state recognition is put under threat. Further, the notion of the absolute enemy is not confined by territorial boundaries, European or colonial. The enemy (or enemies) occurs across a number of states and opens onto the possibility of global civil war.

By drawing attention to the military operation of the partisan and its relation in the theorisation of the political by a figure such as

⁴⁴ *Ibid.* p. 36.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* p. 35.

Lenin and as developed by figures such as Mao and Ho Chi Minh, Schmitt has picked up on a theme or notion that proves to be highly significant to the understanding of war and politics in the 20th and 21st centuries. One would be foolish to think that this conception has little relevance in the present or for the future. It would be naive to assume that ‘after the cold war’ such a structuring of the political by absolute enmity and the operation of war as global civil war between partisans has faded into irrelevance. Such an assumption is perhaps ‘easier’ for international law as it means it does not have to give up its traditional categories of legal-political structuring and the demarcation between war and peace.

Schmitt’s conception of the theory of the partisan’s opening onto global civil war and upsetting of traditional categories of international law does not wash away the role of the state.⁴⁹ He notes that the partisan, as an irregular fighter, is always dependent in some way upon a regular power.⁵⁰ This dependency occurs through economic and military assistance and through political recognition. In this respect the position of the partisan is linked to a relation with an ‘interested third party’.⁵¹ For Schmitt, the interested third party offers not only money, munitions and material assistance but, further, offers a form of political recognition, which is required by the partisan if the partisan is to avoid falling into the sphere of the ‘unpolitical’: that is, the sphere of the ‘criminal’, including the thief and the pirate.⁵² Schmitt argues that in the longer view of things the ‘irregular must legitimise itself through the regular’⁵³ and for the partisan this involves only two possibilities: recognition by an existing regular, or establishment of a new regularity by its own force.⁵⁴

For the partisan neither of these two options is unproblematic. Schmitt notes that when dependent upon the recognition of powerful political actors, the partisan is bound into a global political

⁴⁹ It should be noted that I am leaving out a number of other consequences that Schmitt elaborates with regard to aspects of space and technology. For reasons of length I have also left out Schmitt’s discussion of Mao and Raoul Salan. These figures raise interesting issues in the development of Schmitt’s theory but do not alter his general theory considerably.

⁵⁰ Schmitt, *Theory of the Partisan*, *supra* n. 1, p. 52.

⁵¹ *Ibid.* p. 53, Schmitt takes this term from Rolf Schroer.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

context. In a sense, the partisan becomes something of a pawn within a larger power's own aggressive aims.⁵⁵ In this context Schmitt notes:

At this point the partisan ceases to be essentially defensive. He becomes a manipulated cog in the wheel of world-revolutionary aggression. He is simply sent to the slaughter, and betrayed of everything he was fighting for, everything the telluric character, the source of his legitimacy as an irregular partisan, was rooted in.⁵⁶

For Schmitt, under this conception, the partisan operates within a wider political context of friend and enemy. In being dependent upon an interested third party so as not to sink into the realm of criminality, the partisan presupposes not only an enemy but also a friend.⁵⁷ Situated within this context of a multiplicity of potential friends and enemies the partisan is forced to decide who constitutes the 'real enemy'.⁵⁸ Such decisions are not set in stone, yet this decision becomes in many ways the central decision for the partisan and leads to, as Schmitt tries shows with the example of Raoul Salan,⁵⁹ the fine line of distinction between the recognition of a hero or the condemnation of a criminal.

REMARKS ON THE POLITICAL

The subtitle to Schmitt's *Theory of the Partisan* is 'A Commentary/Remark on the Concept of the Political.'⁶⁰ In one sense, his account can be read as an addition to or further extrapolation upon his earlier work *The Concept of the Political*, where he locates the categories of 'friend and enemy' as the fundamental categories of the 'political'.⁶¹ In this earlier work Schmitt distinguishes the concept of the political from the state⁶² and re-affirms the Hegelian distinction between civil society and the state.⁶³ In this work however, the

⁵⁵ *Ibid.* p. 52.

⁵⁶ *Ibid.* – It is difficult to tell if Schmitt's comment here is more directed at anti-colonial struggles manipulated by the Soviet Union and China or whether it refers to the theory of the partisan more generally.

⁵⁷ *Ibid.* p. 65.

⁵⁸ *Ibid.* p. 61.

⁵⁹ *Ibid.* p. 43.

⁶⁰ The German reads: *Zwischenbemerkung zum Begriff des Politischen.*

⁶¹ Schmitt, *Concept of the Political supra* n. 1, p. 26.

⁶² *Ibid.* p.19.

⁶³ *Ibid.* pp. 71–72.

primary political form under his consideration is that of the state. It is the decision of the state that determines the friend–enemy distinction.⁶⁴ Schmitt argues:

The state as the decisive political entity possesses an enormous power: the possibility of waging war and thereby publicly disposing of the lives of men. The *jus belli* contains such a disposition. It implies a double possibility: the right to demand from its own members the readiness to die and unhesitatingly to kill enemies. The endeavour of a normal state consists above all in assuring total peace within the state and its territory. To create tranquillity, security, and order and thereby establish the normal situation is the prerequisite for legal norms to be valid. Every norm presupposes a normal situation, and no norm can be valid in an entirely abnormal situation.

As long as the state is a political entity this requirement for internal peace compels it in critical situations to decide upon the domestic enemy.⁶⁵

This position is not done away with via the theory of the partisan. Rather, Schmitt draws attention to how the state itself is caught within the concept of the political and the operation of the friend–enemy distinction. While the state struggles to create a space of security and order within its own territory, it is constantly embroiled within a wider sphere of global civil war, of which it is both an actor and a site of contestation between actors. Under the theory of the partisan, the state’s internal enemy is not confined to the state itself, but is understood as a partisan within a global civil war between friends and enemies.⁶⁶ In this respect the state is at once an ‘actor’ within global conflict, an ‘object’ that warring actors seek to possess or control, and a ‘territory’ within and upon which wider struggles of the political are played out.

The tension between the traditional European conception of state war and political ordering and partisan war (irregular war, civil war, revolutionary war), which states seek to bring under a regime of legal and political ordering by de-legitimizing, and criminalising, is situated within a wider dynamic. In this dynamic both traditional states and forms of non-sovereign political-military organisation are conceptualised as partisans within a context of global intra-state civil war.

⁶⁴ *Ibid.* p. 30.

⁶⁵ *Ibid.* p. 46.

⁶⁶ One reason for Schmitt’s ‘relativisation’ of the position of the state might have to do with the treatment of the ‘Prussian–German state’ at the conclusion of WWII. In *The Theory of the Partisan* at p. 28 Schmitt cites the order of the Allied Military Authority which states: ‘Article 1. The Prussian state with its government and its entire administrative apparatus is herewith dissolved.’

Here, the categories of regular and irregular, legitimate and illegitimate/criminal are grouped around the friend–enemy distinction and the process of recognition, mis-recognition, legitimation and legal ordering by dominant powers. Under this adjustment of the concept of the political Schmitt might be seen to have reformulated a Hobbesian conception of law and politics. Through the notion of the partisan the ‘war of all against all’ becomes *a war of some against some*.

Schmitt’s re-conceptualisation of the sphere of the political under the theory of the partisan has relevance to the thinking of a number of categories within contemporary international law. The theory of the partisan helps to problematise the issue of the legitimacy of violence and the sharp distinction between an act of state war and an act of terror. In drawing attention to how the partisan relies upon an interested third party to provide it with legitimacy and ensure that it does not enter the realm of the unpolitical and criminal, Schmitt draws on and extends an interpretation of Hegel’s theory of recognition (*Anerkennung*). While Hegel’s notion of recognition, which can be understood as ‘(mis)recognition’,⁶⁷ involves a number of elements, part of Hegel’s legal conception of the process of recognition, extending through the *Philosophy of Right*,⁶⁸ points to how actors and institutions come to gain legal legitimacy (thus independence and a sphere of ‘freedom’) through the recognition of particular ‘forms’. Some of the dominant legal forms involve legal personality, property and statehood.⁶⁹

For Hegel, the question of what forms come to be dominant and what content is brought under them is a question of recognition within legal, social, ethical and political contexts. One can radicalise Hegel’s legal theory of recognition by interpreting the formation and recognition of legal form in combination with the process of ‘struggle for recognition’, which is contained in chapter four of Hegel’s *Phenomenology of Spirit*.⁷⁰ One can take a political or sociological reading of this infamous passage, which treats the violent struggle of

⁶⁷ This term is taken from Gillian Rose. See Rose, G (1981) *Hegel Contra Sociology*. Althone, London.

⁶⁸ Hegel, GWF (1991) *Elements of the Philosophy of Right*, Wood, AW (ed) Nisbet, HB (tr) Cambridge University Press, Cambridge.

⁶⁹ Note that under the structure of the *Philosophy of Right* the state occurs as an ‘ethical form’ and as the emergence and/or potential realisation of *Sittlichkeit*. This distinguishes this ‘legal form’ of the state from legal personality and property.

⁷⁰ Hegel, GWF (1977) *The Phenomenology of Spirit*, Miller, AV (tr) Oxford University Press, Oxford.

recognition between actors⁷¹ and the resulting situation of mastery and slavery (*Herrschaft und Knechtschaft*) and run this back through the question of the (mis)recognition of legal forms and the process of legal-political ordering. Under such a reading, the determination of legal and political ordering becomes a question of violent struggle where certain actors come to dominate and other actors are ‘criminalised’ through their lack of recognition.

One can argue that, for Schmitt, such a process underlies, at least in part, the process of recognition of the partisan by international actors and under international law. Under this conception what characterises the ‘legitimacy’ of the violence carried out by the partisan is purely a Hegelian question of recognition, which is modified into Schmitt’s fundamental relation of friend–enemy. With regard to the contemporary legitimacy of the ‘Islamic terrorist’ such a conception is certainly not far-fetched. One must only look back to the 1980s and the political legitimacy given to what was then called the ‘Mujahideen’. Then, sponsored by the USA, young, predominantly Arab, Muslim men were encouraged to travel to Afghanistan and carry out a partisan war of liberation against the ‘communist’ and ‘atheist’ occupying army of the Soviet Union. Twenty years later, under a changed global political power structure, very similar Muslim men⁷² who have travelled to Afghanistan, or to the USA or to Iraq as ‘Mujahideen’ are treated as the enemy, if not the ‘absolute enemy’ and are criminalized, condemned as ‘terrorists’ and locked-up indefinitely in prison cells.

⁷¹ One such a reading focussing upon violence and struggle is given by Kojève. See Kojève, A (1980) *Introduction to the Reading of Hegel* Nichols, JH (tr) Cornell University Press, Ithaca. See also the interpretation given by Axel Honneth for a more theoretically stable interpretation: Honneth A (1995) *The Struggle for Recognition: The Moral Grammar of Social Conflicts* Anderson, J (tr) Polity Press, Cambridge. This interpretation by Kojève, while well known and having importance, is very limited. One should be cautious not to reduce the complexity of Hegel’s theory to this interpretation. Kojève’s reading is not merely sociological or political it is also ‘anthropological’, linking the struggle for recognition with a particular, violent, account of human nature. Such an interpretation resists the radical moment of dialectical transformation present in Hegel’s account. The relevance here is that Schmitt, in my opinion, takes a similarly shallow interpretation of Hegel’s theory of recognition, thus reducing a dynamic dialectic a static anthropological account of human nature. Such an account forecloses on futural ethical possibility and hope.

⁷² This is not to disregard the role of Muslim women in recent partisan wars, for example in Chechnya, Palestine, and Iraq.

For many of these ‘Mujahideen’ the object of their global revolutionary civil war has not changed. However, for ‘Western’ conceptions of legal and political ordering such an object no longer fits within global political aims and hence is no longer recognised.⁷³ While this ‘friendship’ was widely known and even the subject of a Hollywood film,⁷⁴ who in the ‘West’ dares to call these people ‘friends’ today? Apart from perhaps a small band of human rights lawyers, even ‘the Left’ refuses this question of political and ethical recognition and, instead, chooses to side with ‘the Right’ and forms of ‘pro-capitalist’ legal and political organisations in the (mis)recognition of these partisans as the ‘enemy’.

A CAUTIONARY APPROACH TO SCHMITT

Schmitt’s theory of the partisan presupposes his ‘categories of the political’, the distinction between friend and enemy. While Schmitt’s thinking might be described as something of a Hobbesian–Hegelian theorisation of law and politics there are certain religious or theological elements to his thought, which demand treating his conception of the political and, thus, his theory of the partisan, with a degree of caution.⁷⁵ For Schmitt the enemy, like those situated within a Hobbesian state of nature, is not merely a competitor but an adversary who intends to negate the opponent’s way of life.⁷⁶ The concepts are to be understood in their ‘concrete and existential’ sense,⁷⁷

⁷³ The power of this conception of recognition tied to the friend–enemy distinction manifested most powerfully with the example of Saddam Hussein. It was not his transformation from friend to enemy that was so amazing, rather, it was the chillingly Orwellian manner in which this change was erased from the minds of those who supported a war against Iraq in the name of ‘human rights’ and ‘weapons of mass destruction.’

⁷⁴ See: *Rambo III*, MacDonald, P. dir. (1988).

⁷⁵ Note that there is no space here to go into a more scholarly critique of Schmitt’s work, for example: Schmitt, C (1998) *Political Theology: Four Chapters on the Concept of Sovereignty* Schwab, G (tr) MIT Press, Cambridge. It should be noted however that Schmitt’s theory of partisan war can be discerned within his work on international law and the framing of the legal concept of war by international law presented in: Schmitt, C (1950) *Der Nomos der Erde: im Völkerrecht des Jus Publicum Europaeum*, Dunker und Humblot, Berlin. This major work of Schmitt would need to be seen as a transition or linking-point between Schmitt’s earlier conception of the political in *The Concept of the Political*, and his later conception of non-state or partisan war in *The Theory of the Partisan*.

⁷⁶ Schmitt, *Concept of the Political*, *supra* n. 1, p. 27.

⁷⁷ *Ibid.* p. 27.

whereby the enemy exists not merely through hatred but only when one fighting collectivity confronts another fighting collectivity.⁷⁸ In this sense, he argues that the categories receive their real meaning through their reference to the possibility of real killing.⁷⁹

For Schmitt the friend–enemy grouping draws its power from the possibility and threat of war between groups and peoples. The situation of war is an existential condition fundamental to the determination of the political. This conception shares similarities with the occurrence of war as the presupposition of politics and law in Hobbes, and war’s operation as an existential political and ethical ‘necessity’ in Hegel. The conception is also close to an interpretation of Hegel’s theory of recognition as given by thinkers like Kojève who stress the role of threat, violence and struggle in the formation of human identity. For Schmitt, the centrality of the threat by and violent negation of the other, as occurring in war, is fundamental to his conception of the political. He states:

War is neither the aim nor the purpose nor even the very content of politics. But as an ever present possibility it is the leading presupposition which determines in a characteristic way human action and thinking and thereby creates a specifically political behaviour.⁸⁰

This conception and the friend–enemy grouping, for Schmitt, is derived from an openly religious, and perhaps Catholic, political conception, which presupposes the notion of original sin. Schmitt cites a number of theorists, whose political theories are connected to theological dogmas of sin,⁸¹ noting that the fundamental theological dogma of evilness in the world and in man leads, just as does the distinction of friend and enemy, to a categorisation that renders impossible any undifferentiated optimism of a universal conception of man.⁸² Schmitt argues that Machiavelli, Hobbes and Fichte presuppose a pessimistic conception of man and argues that ‘The methodical connection of theological and political presuppositions is clear.’⁸³ For Schmitt, all genuine political theories presuppose man to be evil.⁸⁴

⁷⁸ *Ibid.* p. 28.

⁷⁹ *Ibid.* p. 33.

⁸⁰ Schmitt, *Concept of the Political*, *supra* n. 1, p. 34

⁸¹ *Ibid.* pp. 64–65. Schmitt’s list includes: Bossuet, Maistre, Donoso Cortés and Friedrich Julius Stahl.

⁸² *Ibid.* p. 65.

⁸³ *Ibid.* p. 65.

⁸⁴ *Ibid.* p. 61.

It is perhaps important not to over-state this conception. For Schmitt the political relation between friend and enemy, like the moral relation of good and evil, might represent merely something of a law or logic of structure, where one term gains meaning only through its distinction from the other. Thus in Schmitt's polemic against liberalism, political and moral categories become useless when they presuppose an anthropological optimism and ignore the importance of the categories of evil and enemy. Such ignorance leads to a theory which is one-sided and false, or a theory that hides its real political motivations.⁸⁵ Yet this presupposition of good and evil, friend and enemy, even when read as a law of structure, might be criticised for its solidity and fixity, in that it lacks the potential for any real dialectical transformation. In one sense, while the pairing of friend–enemy, the determination of one through a negative relation to other, replicate a conception outlined in Hegel's *Logic*⁸⁶ between Being (*Sein*) and Nothing (*Nichts*) something is missing, namely, Becoming (*Werden*): the moment of production and transformation that occurs through negativity and the power of the negative.⁸⁷ While the relation of friend and enemy become themselves through their negative relation, nothing is ever really transformed; there is no moment of *Aufheben*.

One reason for this might have to do with the influence of Hegel's conceptions of war and international relations, outlined in the later chapters of the *Philosophy of Right*, upon Schmitt's conception of war and the political.⁸⁸ In these passages Hegel's conception of war contains no political resolution or reconciliation. This is instead deferred to a notion of world spirit linked later to conceptions of 'providence'.⁸⁹ At a political, legal and ethical level, war is not overcome or transcended and states remain in a condition of ongoing threat and negativity towards one another. In these passages Hegel

⁸⁵ *Ibid.* p. 64 and 70–72.

⁸⁶ Hegel, GWF (1969) *Science of Logic* Miller, A. (tr) Allen and Unwin, London.

⁸⁷ *Ibid.* pp. 82–83. On the importance of this movement see also: Bloch, E (1962) *Subject-Object: Erläuterung zu Hegel* Surkamp Verlag, Frankfurt am Main; Nancy, J (2002) *Hegel: The Restlessness of the Negative*. Smith, J and Miller, S (tr) University of Minnesota Press, Minneapolis.

⁸⁸ Hegel, *Philosophy of Right supra* n. 68, § 321–340.

⁸⁹ On the question of this reconciliation one would need to consider the difficult relation between Hegel's concepts of Spirit (*Geist*), world history and the Absolute. See also Hegel, GWF (1975) *Lectures on the Philosophy of World History: Introduction, Reason in History* Hoffmeister, J (ed) Nisbet, HB (tr) Cambridge University Press, Cambridge.

seems to insist on following his comments in the *Preface* of philosophy's role to comprehend the present and not proscribe what it ought to look like.⁹⁰ This is coupled with Hegel's polemic against the possibility of Kant's notion of overcoming war through a federation of states guided by peace.⁹¹ In an addition, Hegel states:

Perpetual peace is often demanded as an ideal to which mankind should approximate. Thus, Kant proposed a league of sovereigns to settle disputes between states, and the Holy Alliance was meant to be an institution more or less of this kind. But the state is an individual, and negation is an essential component of individuality. *Thus, even if a number of states join together as a family, this league, in its individuality, must generate an opposition and create an enemy.*⁹²

One might argue that much of Schmitt's conception of war, friend and enemy and the political stem from this Hegelian conception of the position of war. For Hegel, the role of enmity is crucial as the threat of war and the negative relation of one state to another operate to reaffirm the citizens' conception of their existence as being the ethical life (*Sittlichkeit*) of the state.⁹³ This sense of a positive political significance of the negativity of war is taken up by Schmitt.

In another sense, Schmitt's conception of the relation of negativity in the production of identity resembles something of the struggle for recognition outlined in chapter four of Hegel's *Phenomenology of Spirit*. Under certain readings it is the violent struggle to the death that gives the actors their meaning as they define themselves and their very being through a negative relation to each other. But this notion of violent struggle *is only one side of the process of recognition* and it is the side of failure, of self-centredness, of one's epistemic and hermeneutical limitation. What is just as important is the other side, the possibility in which each actor comprehends itself through its relation of mediation through the other. This occurs through the position of mediation acting as a *third*, where each sees itself as the middle term through which the other becomes itself. Here each recognises itself only in recognising

⁹⁰ Hegel, *Philosophy of Right*, *supra* n. 68, p. 22–23.

⁹¹ See: Kant, I (1991) Idea for a Universal History With a Cosmopolitan Purpose. In: Kant, I. *Kant Political Writings* Reiss, H (ed) Nisbet, HB (tr) 2nd edn. Cambridge University Press, Cambridge; Kant, I (1991) Toward Perpetual Peace: A Philosophical Sketch. In: Kant, I. *Kant Political Writings* Reiss, H (ed) Nisbet, HB (tr) 2nd edn, Cambridge University Press, Cambridge.

⁹² Hegel, *Philosophy of Right* *supra* n. 68, § 324, Addition. My italics.

⁹³ *Ibid.* § 324.

the other and, in this moment of mutual recognition, self-consciousness finds its satisfaction (or its fulfilment) only in the self-consciousness of another.⁹⁴ In the movement between these two sides, of success and failure, resides much of the basis of Hegel's ethics, and this dialectic can be traced through the ethical, legal and political forms of Hegel's *Philosophy of Right*.⁹⁵

There is a possibility that Schmitt's categories of friend and enemy stem from or represent these two sides of the process of recognition in chapter four of the *Phenomenology of Spirit*. However, Schmitt's treatment of the friend–enemy grouping remains relatively static, and resists the speculative philosophical and ethical possibilities opened by the process of recognition. This process, while not being unrealistic, attempts to overcome moments of cognitive and ethical limitation by transforming the individual's conception of self and its relation to its world and its many others. In this respect, one might suggest Schmitt's conception remains fixed in something of a Zoroastrian or Manichean conception of the universe and resists the speculative conception of self, ethics and action present in the teachings of Jesus and, also, in Muhammad. In such a speculative conception the divine can only be known *through real ethical acts of love* directed at all aspects of humanity. This, *as process*, effects *a transformation in both humanity and the divine*. By excluding this element of recognition, the moment of successful mutual recognition, the work of speculative love, Schmitt offers a one-sided account of the political and an overly pessimistic view of war.

CONCLUSIONS

With respect to the theory of the partisan Schmitt's conception of the political, via the categories of friend and enemy, remains important to

⁹⁴ Hegel, *Phenomenology of Spirit*, *supra* n. 70, § 175, 184

⁹⁵ On differing accounts of how this occurs see: Williams, RR (1997) *Hegel's Ethics of Recognition*. University of California Press, Berkeley; Theunissen, M (1991) The Repressed Inter-Subjectivity in Hegel's Philosophy of Right, Watkins, W (tr). In: Cornell, D, Rosenfeld, M and Carlson, DG (eds) Watkins, E (tr) *Hegel and Legal Theory*. Routledge, New York; Rose, G (1981) *Hegel Contra Sociology*. Athlone, London; Pippin, RB (2000) What is the Question for which Hegel's Theory of Recognition is the Answer? *European Journal of Philosophy*, 8 (2): 155–172.

the critical assessment of what is occurring within the legitimisation of certain actors and the condemnation and criminalisation of others under international political structures and international law. Schmitt's theory of the partisan and the re-conceptualisation of both traditional state war and acts of terror, as taking place within a global intra-state civil war between partisans and interested third parties, helps to challenge the assumption of a *prima facie* illegitimacy of contemporary acts of terror.

All war involves terror; the war of the state is no less terrible than the terrorist's use of a car bomb or airplane as a missile. Each involves the politically motivated killing of another people designated as an enemy.⁹⁶ What renders the act legal or illegal, legitimate, or illegitimate, depends upon nothing particular about the act itself. Rather, the question of legitimacy is one of legal and political judgement. This does not occur within a vacuum but occurs within a global legal and political context. On one side, this context involves the development of juridical traditions, such as the Westphalian tradition, which, in the interest of avoiding intra-state civil wars, involves a continual insistence upon the institution of the state as holding a monopoly upon the legitimacy of violence. On the other, such legal traditions occur within a wider political context of threat and war: a global partisan war between shifting groups of friends and enemies and, at times, the designation of absolute enmity. This later conception, insisted upon by Schmitt, continually brushes upon and threatens the first. In turn, the acknowledgement of this political 'reality' is continually suppressed by international legal ordering.

In one interpretation of Schmitt's account lies, perhaps, the expectation of the fracturing of the Westphalian order. This order is undone by an emerging global civil war, which, in the 20th century, was taking place in the anti- and post-colonial wars of the 'third world'. Contemporary terrorism, to an extent, moves the theatre of war back into the 'West' and perhaps signals a new stage in the emergence of a global civil war, fought along

⁹⁶ One might argue that terrorist acts openly target civilians, while state wars distinguish between 'civilian' and 'military' targets. This distinction was effectively done away with during the aerial bombardments of the Second World War and has operated as empty rhetoric ever since.

pre-Westphalian lines: an intra-state civil war between both politically and religiously orientated partisans.⁹⁷ While ‘the Left’ (in the wake of Stalin’s Gulags) currently suppresses the relating of political and social struggle to violence, this pacifism might in the future fade when increasing social, economic and political pressures open onto new partisan wars over human dignity and human happiness.

Such a possibility would not involve the disappearance of international legal ordering. In the prevention of chaos, law will always need to deem certain partisans ‘illegal’ and ‘illegitimate’. Further, in a Hobbesian sense, law is forced to draw a line of distinction between legitimate and illegitimate violence. The lack of a boundary opens onto the position of a war of all against all, where questions of law and right become the objects of contestation between warring parties. It is in this sense that the question of the legitimacy of violence, the distinction between ‘war’ and ‘terror’ occur, as mediation between the two moments of ‘a war of all against all’ and ‘a war of some against some’. The distinction opens onto a theoretical question over the relation between legal ordering and the phenomena of war and terror. It leads to a question: what is the relation between war and the notion of right?

At a more general level, for legal thinking today it is worth considering contemporary acts of terror in terms of Schmitt’s theory of the partisan. Whether we consider the primarily defensive partisan (Islamic and secular) war of resistance against US forces in occupied Iraq, or the global, revolutionary war of Islamic political organisations, Schmitt’s theory helps to place both forms of violence within a relatively recent but important tradition of warfare and political action. Such an assessment avoids a common error in thinking in which the Islamic terrorist is treated as some form of *evil*, and as an apolitical actor of pure negativity who plays out some form of radical *jouissance*. Such a characterisation, often peddled by many on the ‘Left’, treats this phenomenon as if it were something absolutely new and unprecedented and

⁹⁷ This is not to say that I am affirming a theory of ‘class war’ rather, what is at issue is a complex set of international political, ethical, economic and religious ‘social antagonisms.’

characterises it as a primordial or libidinal violence unable to be explained by traditional political categories.⁹⁸

The traditions of Islamic reformism and radicalism⁹⁹ that developed in the 19th and 20th centuries in response to the frailty of the Islamic world in the face of Anglo-European colonialism, and the numerous political and military organisations that have developed from these intellectual movements, are not completely divorced from the context and world described by Schmitt's theory of the partisan: from political-military actors such as Mao and Ho Chi Minh.¹⁰⁰ While the contemporary suicide bomber has characteristics and a world vision that contain a version of a specifically 'Islamic' content, this does not place the Islamic terrorist outside the sphere of the political, outside of the world of the partisan, and outside of the ongoing global play between friends and enemies. One can be a religious actor, a believer, and still be within the sphere of the

⁹⁸ One example of how the Islamic terrorist is portrayed as being outside of tradition categories of the political and emerging as a new phenomenon is given by Selya Benhabib. See: Benhabib, S (2002) Unholy Wars. In: *Constellations*, vol 9, no. 1. At p. 41 Benhabib states: 'The new unit of totalitarianism is the terrorist cell, not the party or the movement; the goal of this new form of war is not just the destruction of the enemy but the extinction of a way of life. *The emergence of non-state agents capable of waging destruction at a level hitherto thought to be only the province of states and the emergence of a supranational ideological vision with an undefinable moral and political content, which can hardly be satisfied by ordinary political tactics and negotiations, are the unprecedented aspects of our current condition.* The new jihad is not only apocalyptic; it is nihilistic. Osama bin Laden's statement that his men love death as much as the Americans love life is an expression of superb nihilism. The eroticization of death, as evidenced on the one hand by the frequently heard vulgarisms about houris, the dark-eyed virgins who are to meet the warriors in the afterlife, but on the other hand and more importantly, by the destruction of one's own body in an act of supreme violence which dismembers and pulverizes it, is remarkable..... These networks of young militants who trot the globe from Bosnia to Afghanistan, from Paris to Indonesia and back to Baghdad, Hamburg or New York, are like Islamic soldiers of fortune, not in search of riches, but in search of an elusive and decisive encounter with death. 'For a response to the 'left-liberal' inability to conceptualise and come to terms with the political questions involved in 'terror' and the 'war on terror' see Žižek, S (2004) *Iraq: The Borrowed Kettle*. Verso, London.

⁹⁹ Of importance are figures such as Jamal al-Din al-Afghani, Sayyid Abu'l-A'la Mawdudi, Sayyid Qutb, Hasan al-Banna.

¹⁰⁰ This is not to say that any of these thinkers were 'communist' or were influenced by Marx. That would be incorrect. Rather, their thinking developed in a colonial and post-colonial context and in many ways was directed to emphasising the social and socialist elements of Islam.

political. For the 'Left' and its general scepticism of religion and religious actors, this point is worth holding onto.

With regard to Schmitt's approach in general, as a purely critical assessment, Schmitt's conception of the partisan remains insightful. Against Schmitt, however, there is a danger of merely affirming his law of structure and reducing legal, ethical and political judgement to the interest of protecting friends and destroying enemies. Certainly the drive to destroy what counts as absolute enmity might characterise the conceptions of many contemporary partisans: whether this is the revolutionary outlook of the Islamic 'terrorist' against Western capitalism, imperialism and moral decadence, or whether this is the outlook of an 'American Right' in its 'war on terror' or 'crusade against Islam'. Yet, one cannot naively affirm these conceptions. While the figure of the enemy is perhaps a requirement of political action, ethical action requires *the attempt to comprehend oneself through the third*. How this can occur at the level of partisans, political organisations and large political institutions remains a question for contemporary legal, ethical and political thinking.

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