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The changing face of enmity: Carl Schmitt's international theory and the evolution of the legal concept of war

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The past few decades have witnessed a renewed interest in the work of Carl Schmitt. Scholars from various disciplines have claimed that Schmitt's critique of universalism, together with his analysis of irregular warfare, provides useful lenses to make sense of the post 9/11 world. In this article, I will critically assess whether Schmitt's work is indeed useful for understanding the post 9/11 world. To that end, I will concentrate on one of the core arguments put forward by Schmitt: that the laws of armed conflict are unable to regulate irregular warfare, including acts of terrorism. In order to determine the validity of Schmitt's arguments, I will focus on one of the instruments used in contemporary counter-terrorism policies: the deliberate killing of specific individuals who are regarded as a security threat ('targeted killing'). Based on an analysis of US and Israeli practice, the article argues that using Schmitt's work as an analytical tool yields mixed results. While his analysis of irregular warfare remains relevant for contemporary conflicts, his denouncement of universalism blinds us to the transformational potential of international law.

Keywords: Schmitt; irregular warfare; terrorism; targeted killing; laws of war; human rights

For international lawyers, Koskenniemi stated some 8 years ago, '… the choice between writing another 1000 page textbook on humanitarian law and trying to deal with Schmitt's critiques of universal moralism should not be too difficult' (Koskeniemmi, 2002: 424). Koskenniemi's remark reflects a broader sense that Carl Schmitt, notwithstanding the dark sides of his work,[1] has something important to say about international

[1] For a discussion of Schmitt's complicated relation to Nazism, see (among many other writings): Scheuerman (1999); Schwab (1989). For the Schmitt's interrogation at Nuremberg see the special issue of *Telos* (1987) and Bendersky (2007).

relations in the 21st century. The past two decades have witnessed a proliferation of articles and books on the work of Carl Schmitt, often in relation to issues of armed intervention, terrorism, and the so-called 'war on terror'.[2] One of the recurring arguments in this body of literature is that Schmitt's writings on the transformation of war and enmity provide useful lenses to understand and critique international law and politics in the 21st century.[3] Scheuerman, for example, argues that Schmitt's *Theory of the Partisan*[4] anticipated phenomena such as Guantanamo and Abu Ghraib, thus making it ' … disturbingly relevant to the legal and political world in which we find ourselves … ' (Scheuerman, 2006: 108). In this context, Schmitt is invoked, 'both as part of a *diagnoses*, if you like, and as a shorthand for *danger*' (Müller, 2007).

In this article, I will critically assess whether Schmitt's work is indeed useful for understanding the post 9/11 world. To that end, I will concentrate on one of the core arguments put forward by Schmitt: that the laws of armed conflict are unable to regulate irregular warfare, including acts of terrorism.[5] For Schmitt, the laws of armed conflict are intrinsically bound up with a statist understanding of war and enmity, with the imagery of regular armies that carry arms openly and that distinguish themselves from the civilian population. Irregular fighters disrupt the very foundations of the laws of armed conflict, thus frustrating international law's ambition to set limits to warfare. States confronted with irregular fighters, Schmitt argues, tend to get enmeshed in a logic of terror and counter-terror, in which they deny legal protection to the enemy. This tendency is exacerbated when states believe that they are fighting a just war, when they claim to protect universal values against enemies of mankind. In such cases, Schmitt argues, states and irregulars treat each other as 'criminals and parasites', as 'that is the logic of *justa causa* (just cause) without recognition of a *justus hostis* (just enemy)'.[6] It is the combination of irregularity and moral universalism that Schmitt holds responsible for the breakdown of international legal protections in times of war. As Koskenniemi has argued, it is precisely this critique that

[2] Tracy Strong, for example, states that 'a computer search of the holdings of a research university library sixty-three journal articles in the last five years as well as thirty-six books published since 1980, most of them since 1990 … '. Foreword to: Schmitt (2007a).

[3] See, for example, Kochi (2006: 267): ' … Schmitt's conception of the figure of the 'partisan' is relevant to the contemporary consideration of war, and in particular, acts of 'terror' and 'terrorism'.

[4] Schmitt (1963). In this article, I will use the English translation of Schmitt's *Theorie der* Partisanen. For translations, see: Schmitt (2007b).

[5] For the difference between Schmitt's category of the partisan and terrorism, see section 'Real and absolute enmity' of this article.

[6] Schmitt, supra note 4, at 30.

speaks to many contemporary scholars: '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 obsoleteness of traditional rules of warfare … ' (Koskenniemi, 2004).

This article assesses the soundness of Schmitt's arguments in the context of the contemporary fight against terror (including the 'war on terror' or, as it is called nowadays, the 'overseas contingency operations').[7] In order to determine the validity of Schmitt's arguments, I will focus on one of the instruments used in contemporary counter-terrorism policies: the deliberate killing of specific individuals who are regarded as a security threat. The example of targeted killing is chosen for three main reasons. In the first place, policies of targeted killing fit very well with Schmitt's theses regarding the breakdown of the classical legal concept of war and the increasing individualization of enmity. This makes those policies very good case studies to study Schmitt's (gloomy) predictions regarding the effects of such individualization. If it turns out that the individualization of enmity is not (or not necessarily) accompanied by a weakening of the legal protection offered to the enemy, this is a strong indication that something important is missing in Schmitt's reading of the effects of irregular warfare. Secondly, some core questions regarding the legality of targeted killings are relevant for many other aspects of the 'war on terror' as well. A good example is the question regarding the legal status of combatants: this question plays a pivotal role not only in debates about the (il) legality of targeted killing but also in discussions regarding the lawfulness of measures such as preventative detention. Thirdly, compared to issues such as Guantanamo Bay or UN sanctions against individuals, policies of targeted killing have received relatively little attention in academic writing. Nevertheless, they concern the most basic human right of all (the right to life) and have had a real impact in several countries around the globe.

Policies of targeted killings have gained increasing legitimacy since the beginning of the 21st century and have become an integral part of the security policies of several states.[8] This article, however, focuses exclusively on the use of targeted killings by two states: the United States and Israel. The reason is that both states not only openly acknowledge the

[7] 'Global War On Terror' Is Given New Name, Bush's Phrase Is Out, Pentagon Says', Scott Wilson and Al Kamen, Washington Post Staff Writers, Wednesday, 25 March 2009, available at: http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html (accessed 24 September 2009).

[8] For an overview, see Melzer (2008).

existence of policies of targeted killing, but also defend its lawfulness in terms of the laws of armed conflict. This sets the two apart from states that deny involvement in targeted killings, states that refuse to articulate legal justifications or states seeking to defend the use of lethal force as an exceptional measure of law enforcement.[9] Because the United States and Israel regard targeted killings as lawful measures in times of armed conflict, their policies offer a good case study to assess Schmitt's core argument that waging a war against irregulars (including 'terrorists') will fatally undermine the protections offered by the laws of armed conflict.

This article is structured as follows. The first section traces the basic tenets of Schmitt's international legal thinking, in particular his writings on war and enmity. The main aim of the first section is to demonstrate how Schmitt's arguments regarding the disruptive force of irregular warfare follow from his writings on the rise and fall of classic international law in general. The second section analyzes policies of targeted killing through the lens of Schmitt's international legal thinking. It argues that the creation of a category of 'unlawful combatants' fits well in Schmitt's arguments regarding the breakdown of basic categories of classic international law. At the same time, it contends that Schmitt's critique of universalism fails to do justice to one of the transformations in the legal understanding of war: the emergence of a body of law that combines the collectivistic logic of the laws of armed conflict with the cosmopolitan logic of human rights. A good example of this development can be found in the Jerusalem High Court's decision on the legality of Israel's policy of targeted killing. Although the Court's decision should not be (and has not been) accepted uncritically, it does show that Schmitt's argument that the combination of universalism and irregularity unavoidably leads to denial of legal protection to the enemy does not always hold up. In that sense, it can also be read as an exploration of alternative ways of dealing with the dilemmas posed by irregular warfare.

The breakdown of conventional enmity

Enmity in the Jus Publicum Europaeum

The concept of enmity is central to Schmitt's thoughts on international law and politics. For Schmitt, politics appears only where a community distinguishes friends from enemies and is prepared, if necessary, to enter

[9] As Melzer (supra note 8, at 42) points out, the United States also keeps silent on targeted killings outside the context of Afghanistan and Iraq (two cases generally recognized as armed conflicts).

into armed conflicts with the latter.[10] The enemy exists '… only when at least potentially, one fighting collectivity of people confronts a similar collectivity'.[11] The phrase 'at least potentially' is important here. For Schmitt, the political does not reside in armed struggle itself – let alone in glorifying war – but '… in the mode of behaviour which is determined by this possibility, by clearly evaluating the concrete situation and thereby being able to distinguish correctly the real friend and the real enemy'.[12] As Schmitt emphasized, there is no need to denounce the enemy as evil or inferior – all that counts is that the enemy poses a (potential) existential threat: '.. The enemy is not someone who, for some reason or other, must be eliminated or destroyed because he has no value'.[13] Schmitt's understanding of the political is thus related to a normative concern: the ever-looming possibility that the enemy is denounced as a criminal or brute against whom wars of annihilation are justified. As Schmitt repeatedly emphasized, it is important to seek ways to prevent the public enemy (*hostis*) turning into a personal enemy that should be destroyed or re-educated. This concern explains his admiration for the legal order that emerged in Europe from the 16th century on, the so-called *Jus Publicum Europaeum*.[14] This order, Schmitt argued, was built around the notion of the *justus hostis*: the 'just enemy', which he later also called the 'conventional enemy'.[15] Characteristic of just or conventional enmity is that the opponent in war is regarded as equal and worthy of respect, not as a criminal or an enemy against whom all methods of warfare may be applied. This treatment of enmity, Schmitt holds, constitutes one of the founding elements of an international legal order: 'the ability to recognise a *justus hostis* is the beginning of all international law'.[16]

Within the *Jus Publicum Europaeum*, Schmitt contends, enmity was limited in several ways. In the first place, it was limited to European *States*

[10] Schmitt, supra note 2, at 27: 'The political enemy need not be morally evil or aesthetically ugly; he need not appear as an economic competitor, and it may even be advantageous to engage with him in business transaction. *But he is, nevertheless, the other, the stranger*; and it is sufficient for his nature that he is, in a specially intense way, *existentially something different and alien*, so that in the extreme case conflicts with him are always possible'.

[11] Ibid, at 28.

[12] Ibid, at 35.

[13] Schmitt, supra note 4, at 85.

[14] For Schmitt, the *Jus Publicum Europaeum* emerged in the 16th century, as a response to the religious and civil wars that plagued Europe, and ended at the end of the 19th century. For Schmitt, the recognition of the flag of the Congo Society by the United States in 1884 symbolized the breakdown of the Eurocentric order of the *Jus Publicum Europaeum*: '… it was a symptom that traditional, specifically European international law was dissolving gradually, but nobody seemed to notice' (Schmitt, 2006).

[15] For an analysis, see Slomp (2009).

[16] Schmitt, supra note 17, at 51, 52.

who were bound together in a pluralistic society of sovereigns. According to Schmitt, attempts at individualization of enmity or universalizing, imperial tendencies were successfully resisted. European States regarded each other as 'lawful enemies' – and the military fighting on behalf of those States as privileged combatants. In the second place, the notion of enmity did not affect the State's sovereign decision to go to war in the first place. The determination of who constitutes the public enemy as well as the decision on the ways to fight this enemy belonged to the prerogatives of the sovereign and escaped legal regulation. A discriminatory concept of war was thus foreign to classical international law, while the *jus in bello* was strictly separated from the question as to the just causes of war. In the third place, the notion of enmity was limited to European territory – wars at sea and colonial wars were excluded from its operation. The spatial limitation of classical international law fulfilled an important function, according to Schmitt. It opened up a non-European zone of combat where power struggles could be fought out without the limitations of conventional enmity and without possible negative consequences for the inter-State relations on European territory (as an anticipation, in Ulmen's words, of the dictum 'whatever happens in Vegas stays in Vegas').[17] Exemplary in this respect is Schmitt's discussion of the Amity line, which set the newly 'discovered' world apart from European territory: 'The significance of the amity lines in the 16th and 17th century international law was that great areas of freedom were designated as conflict zones over the distribution of the new world. As a practical justification, one could argue that the designation of a conflict zone at once freed the area on this side of the line – a sphere of peace and order ruled by European public law – from the immediate threat of those events "beyond the line", which would not have been the case had there been no such zone. The designation of a conflict zone outside Europe contributed also to the bracketing of European wars, which is its meaning and justification in international law'.[18]

Of course, there is no need to adopt Schmitt's reading of the *Jus Publicum Europaeum* without qualifications. His understanding of European land wars, for example, is affected by a nostalgic imagery of the classical era in international law – a 'virtuous past' that stands in contrast to degenerated contemporary times (Koskenniemi, 2004; Müller, 2003). Moreover, one could wonder whether just war criteria had indeed disappeared from the *Jus Publicum Europaeum*. Sure, 'war' as an institution of classical international

[17] G.L. Ulmen, Introduction to: Schmitt (1938 and 2006).
[18] Schmitt, supra note 17 at 97, 98.

law liberated itself from the confines of just war thinking. At the same time, however, just war notions figured prominently in the so-called measures short of war, the 'acts of war taking place during times of peace'.[19] Measures short of war were the corollary of the increasing formalization of 'war' as an institution of international law. They gained prominence during the 19th century, not coincidentally also the golden age of war as an institution of international law. Measures short of war were especially popular with the bigger powers and included measures such as humanitarian and political intervention, rescuing nations abroad, or reprisals.[20] Several measures short of war can be regarded as forerunners of the late 20th century enforcement operations in the name of community interests – exactly the type of measures that Schmitt regarded as antithetical to the classic understanding of war and enmity.

Notwithstanding these qualifications, however, Schmitt's work provides useful insights into the institution of war and the concept of enmity that evolved in the *Jus Publicum Europaeum*. Echoes of conventional enmity can be found in the 1949 Geneva Conventions and the 1977 Additional Protocols. Some of the basic ideas of classical war law also underpin these conventions: a separation of war (armed conflict) and peace,[21] a separation of *jus ad bellum* from *jus in bello*,[22] a State-centric reading of armed conflicts,[23] and a strict distinction between criminality and enmity.[24] These characteristics explain why Schmitt characterized the Geneva Conventions as a work of human consciousness; as a body of law that permits the enemy ' … not only humanity, but even justice in the sense of recognition … '.[25]

Conventional enmity in the era of collective security

From the 1920s on, Schmitt has repeatedly argued (and lamented) that the notion of the conventional enemy is under strain (Schmitt, 1926; Schmitt, 1938). Among the factors that challenged the institution of *justus hostis*

[19] Neff (2005). takes his definition from Calvo (1870: 802–803).

[20] Neff, supra note 19, pp. 215–277.

[21] See, for example, common Article 2 of the four Geneva Conventions that determines the applicability of a special legal regime in times of international armed conflict.

[22] The most explicit formulation of this distinction can be found in the preamble to the First Additional Protocol to the Geneva Conventions of 1977.

[23] As is evidenced by the act that the most extensive legal regime applies in interstate armed conflicts and the fact that non-international armed conflicts are defined as 'occurring in the territory of one of a High Contracting Party' (see common Article 3 to the Geneva Conventions as well as Article 1 of Additional Protocol II to the Geneva Conventions).

[24] As is evidenced by the fact that the Geneva Conventions give combatants the privilege to use force and the right to prisoner of war status when captured, even when they fight in an unjust war. Of course, combatants can turn into (war) criminals if they abuse their privileges.

[25] Schmitt, supra note 4, at 32.

were the rise of ideologies with global aspirations[26] and the development of technology. The latter opened up new spaces for warfare (aerial warfare, submarine warfare), and due to the uneven distribution of technological capabilities, affected the very notion of equality in war: 'To war on both sides belongs a certain chance, a minimum of possibility for victory. Once that ceases to be the case, the opponent becomes nothing more than an object of violent measures … The victors consider their superiority in weaponry to be an indication of their *justa causa*, and declare the enemy to be criminal, because it is no longer possible to realize the concept of *justus hostis*'.[27]

For the purposes of this article, however, the most interesting challenge to conventional enmity comes from the development of international law itself: the transformation of the *Jus Publicum Europaeum* into an abstract universalistic 'international law', that did away with traditional understandings of war and enmity. In this newly emerging order, spatial and cultural confines on warfare were lifted in favor of an order that was based on universalism in two forms: (1) geographically, through the inclusion of the non-Western world and (2) conceptually, through the inclusion of values such as world peace and human rights.

The first form of universalism did away with the geographic locus of conventional enmity. For Schmitt, the lifting of the spatial boundaries of conventional enmity did not necessarily imply that international law had become more inclusionary. On the contrary, he feared and predicted that the spatial exclusions of the *Jus Publicum Europaeum* would be transformed into exclusions based on universal concepts; that the laws of war would be deemed inapplicable against enemies of humanity. This fear was reinforced by the second form of universalism, which reintroduced just war doctrines in international legal discourse. The resurface of notions of just war – or perhaps rather *bellum legale* – poses a fundamental challenge to the notion of war as developed in the *Jus Publicum Europaeum*. As was set out above, this notion was based on a fundamental equality between warring States who each held the prerogative to start a war if they deemed it necessary. This equality of warring parties is difficult, if not impossible, to reconcile with the idea of 'just' or 'lawful' wars. Just war notions are modeled after a law-enforcement paradigm, where one party holds a just cause to use force against a law-breaker or a threat to general security.[28] It is not surprising,

[26] Here, Schmitt referred especially to US-led liberalism and USSR-led communism. Note that Schmitt left out a discussion of Nazism as one of the most devastating attacks on the traditional limits of warfare and the moderation of enmity.

[27] Schmitt, supra note 17, at 320, 321.

[28] Of course, it is also possible that none of the warring parties holds a just cause. What is excluded, however, is that both parties to an armed conflict can have a just cause.

therefore, that the re-emergence of just war doctrines in international law went hand in hand with attempts to criminalize aggression, both at the level of States and at the levels of individuals. Although such attempts have hardly been successful since the Nuremberg trials, they do reflect one of the fundamental transformations in 20th century international legal thinking: the gradual mixing of notions of enmity and criminality as well as the downplaying of the collective nature of war.

There were also other signals that classic legal categories reading were challenged by the emergence of a discriminatory concept of war. The changing attitude toward war and enmity was nicely captured by US Secretary of State Stimson: ' … when two nations engage in armed conflict either one or both of them must be wrongdoers … We no longer draw a circle about them and treat them with the punctilios of the duelist's code. Instead we denounce them as lawbreakers'.[29] Following the logic of a discriminatory concept of war, several legal scholars have questioned some of the time-honored institutions of the classic law of war, such as the notion of a separate *legal state* of war, the possibility for third states to remain neutral, and the equal granting of belligerent rights to both parties to a conflict.[30]

Still, it should be noted that international practice has been extremely reluctant to give up the heritage of the *Jus Publicum Europaeum*. Take, for example, the separation of *jus in bello* and *jus ad bellum*, which lie at the heart of classic international law. Even in the era of collective security, states have generally upheld the separation, arguing that the question as to the justness of one's cause should be kept apart from the question regarding the rights and duties of states under the laws of armed conflict. As the First Additional Protocol to the Geneva Conventions reaffirms unequivocally: ' … the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances … without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'.[31] In similar fashion, neutrality managed to survive as an institution of international law,[32] with the notable exception of preventive

[29] Stimson (1932: iv). Quoted by Neff, supra note 19, at 295.

[30] For an excellent discussion, see Neff, supra note 19, 335–340. For a recent critique on the even-handed application of the laws of armed conflict, see: Orakhelashvili (2007).

[31] First Additional Protocol to the Geneva Conventions of 12 August 1949, Preamble.

[32] For an overview see, *inter alia*, Michael Bothe, The Law of Neutrality, in Fleck (2008) and Neff (2000). See also International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 216, para 89: ' … international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is

or enforcement action taken by the Security Council[33] and notwithstanding some eruptions from states that believed their cause to be universal.[34] One should therefore be cautious not to jump to conclusions regarding the effects of the emergence of a discriminatory concept of war in international law. Rather than abandoning established categories of the laws of war altogether, contemporary international law attempts to have it both ways: it seeks to combine a system of collective security with legal categories that were developed in times when war was the sovereign prerogative of states. In this sense, contemporary international law bears strong resemblances to the League of Nations, which, in Schmitt's analysis, tried to introduce a discriminatory concept of war, and at the same time 'remained committed to the interstate, military war of traditional European international law'.[35]

A more fatal challenge to conventional enmity would occur in quite a different context: not in interstate wars or in UN enforcement operations, but in the context of civil wars, wars against foreign occupation, and in the use of violence for revolutionary purposes. The impact of these wars on conventional enmity is central to Schmitt's *Theory of the Partisan*.

Real and absolute enmity

Schmitt labeled his *Theory of the Partisan* an 'intermediate commentary on the concept of the political'.[36] While Schmitt had introduced the friend-enemy distinction as the core of the political in his earlier work, he had failed to differentiate between different forms of enmity.[37] The *Theory of the Partisan* sets out to fill this gap by distinguishing between the concept of enmity that dominated classical European land wars and concepts of enmity that figure in partisan struggles. However, the aim of the *Theory of the Partisan* is not just to identify different analytical categories of enmity. It is also an expression of Schmitt's anxieties regarding the partisan as a political and legal figure. The partisan is portrayed as a possible redeemer of the political, who knows his concrete enemies and demonstrates a willingness to kill and to risk his own status,

applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used'.

[33] Article 2 (5) UN Charter.

[34] The prime example is Bush's statement shortly after the 9/11 attacks: 'Every nation in every region now has a decision to make. Either you are with us, or you are with the terrorists'. Bush's address to a joint session of Congress on Thursday night, 20 September 2001, available at: http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/ (accessed 18 October 2009).

[35] Schmitt, supra note 18, at 246.

[36] Schmitt, supra note 4 (subtitle of the book).

[37] For an analysis, see Slomp (2005).

if necessary. Hence, Schmitt's somewhat peculiar admiration for figures such as Chairman Mao or General Salan. For Schmitt, the partisan symbolizes the hope that enmity and the plurality of the world could be preserved, notwithstanding the development of technology and the realities of the Cold War. At the same time, however, Schmitt expressed pessimism about the partisan's ability to maintain an independent position in world politics. The partisan, he argues, has always depended on assistance and recognition by a foreign, regular power (the 'interested third party').[38] With the progression of (military) technology, this dependency has grown to a point where the partisan runs the risk of becoming a puppet in the hands of the great powers, to the effect that his struggle is nothing but a struggle controlled by world powers, '… something like a dogfight, … the apparently harmless game of a precisely-controlled irregularity and an "ideal disorder", ideal insofar as it could be manipulated by the great powers'.[39]

The partisan also counts as yet another symbol of the decline of conventional enmity and the limits on warfare that came with it. In this context, Schmitt distinguishes between two types of partisan warfare, each characterized by its typical imagery of enmity.

The first is the defensive, 'genuine', autochthonous partisan. According to Schmitt, the ideal type of this partisan can be found in the Spanish (Iberian) guerilla war against Napoleonic occupation (1808–14). This war consisted of a series of small, irregular wars against a highly regularized, modern army. In a somewhat romanticized fashion, Schmitt portrays the Spanish resistance as the work of peasants and lower clergy who sought to defend their soil against a foreign invader with universalistic pretensions. This imagery of the Spanish war is the prism through which Schmitt reads the history of partisan warfare in the 19th and 20th century.[40] For Schmitt, the genuine partisan is an inherently political figure, ready to risk his life and dignity in irregular battles for his home soil. The concept of enmity underlying partisan warfare is not conventional, not the idea of a *justus hostis* that prevailed in European land wars. On the contrary, partisan warfare builds on an idea of 'real enmity', a form of enmity that places itself outside the containment of war

[38] Schmitt, supra note 4, at 74–76.

[39] Schmitt, supra note 4, at 79.

[40] Note, however, that Schmitt believed that the Spanish guerilla war did not lead to the development of a *theory* of the partisan as a political figure. For him, this was only done in Prussia, through the official embracement of partisan warfare in the 1813 *Landsturm* Edict as well as through reflections of theorists such as von Clausewitz. This granted, so to say, philosophical legitimacy to the partisan and facilitated his adoption by 20th century revolutionaries.

that characterizes conventional enmity, spurring a logic of terror and counter-terror, and annihilation. Yet, despite the uncontained and irregular character of the methods of warfare, partisan warfare based on real enmity knows an important limit: it is, in the end, a defensive, territorially bounded war. Genuine partisans, in Schmitt's conception, are telluric and defensive in nature; they do not fight for abstract universal ideas, but for what they perceive to be the liberation of the homeland.

Such territorial, defensive limitations are absent in the second type of partisan fighter: the international revolutionary. While the autochthonous partisan fights against a real enemy on a concrete territory, the international revolutionary fights for abstract, universalistic ideals, against an 'absolute enemy'.[41] The most pronounced expressions of absolute enmity locate Schmitt in the works of Lenin, for whom 'the concrete absolute enemy was the class enemy - the bourgeois, the essential capitalist and the social order in countries where this bourgeois capitalist was dominant'.[42]

In (revolutionary) practice, a mixture of telluric and global revolutionary elements proved to be most effective. During the Second World War, for example, Stalin successfully linked the fight against foreign occupation to the spirit of the communist revolution. The mixture of real and absolute enmity becomes even more articulated in the works of Mao. In his writings – and in his irregular armed struggles – Mao combined the global struggle for communism with the fight against colonialism and foreign occupation, as well as the fight against the Chinese elite. The result is a mixture of mutually reinforcing imageries of enmity: 'racial enmity against the white colonial exploiter; class enmity against the capitalist bourgeoisie; national enmity against the Japanese intruder; and the growing enmity against his own national brothers in long, bitter civil wars. All this did not paralyze or relativize enmity as one might have thought, but rather intensified and strengthened it in a concrete situation'.[43]

In his analysis of the partisan, Schmitt does not clearly distinguish partisan warfare from terrorism. However, as Münkler has pointed out, differentiating between the two is of utmost importance, also in view of

[41] Schmitt's portrayal of the telluric and the revolutionary partisan has not gone unchallenged. Scheurman (2006: 113) points at the critique voiced by Herfried Münkler, who has argued that there is little reason to believe that a defensive, telluric partisan necessarily shows more restraint than his offensive, revolutionary counterpart. On the contrary, defensive partisans could very well work on the assumption that they defend and represent an authentic, genuine community that needs to be purged of alien elements. Those fighting for universal ideals, on the other hand, tend to work on the basis of a more inclusive ideology (Münkler, 1992).

[42] Schmitt, supra note 4, at 52.

[43] Schmitt, supra note 4, at 59.

the challenge posed to conventional enmity. For partisans, terror campaigns fulfill 'only a tactical function in support of a strategy that (seeks) to decide the conflict militarily' (Münkler, 2002: 70). Terrorism, by contrast, avoids military confrontations, relying instead on the spread of fear and terror, the provocation of an (over) reaction and mobilizing of the masses in whose names terrorists believe to act. Where terrorists primarily aim at indirect psychological effects, partisans aim much more at 'the immediate physical consequences of the use of force- blowing up a particular bridge, paralyzing a particular power-plant, or destroying precisely these houdes … '.[44] It goes without saying that the indiscriminatory logic of terrorism poses an even more fundamental threat to conventional enmity than the defensive or offensive partisan.

Regulating the irregular

As has been argued above, one of the main characteristics of Schmitt's partisan is his irregularity. Such irregularity, however, only receives concrete meaning in relation to its negative counterpart, to what is considered as regular. In this context, Schmitt distinguishes between pre-Napoleonic struggles, which involved methods that could be regarded as 'irregular', and the Spanish guerilla war of 1808. For a theory of the partisan, the latter is of far more importance, as it concerned an irregular war waged against a regular, modern army. The force and meaning of the partisan's irregularity, Schmitt argues, depend on the 'power and significance of the regularity that he challenges'.[45] The regular-irregular distinction is echoed in international law. The classical law of nations increasingly modeled its institution of war after the imagery of a regularized duel between equal parties. It was against this background that the problem of irregular warfare became acute. From the 19th century on, there have been continuing debates about the possible recognition of irregular fighters within the regularized laws of war. Should the irregulars be granted a formal status, including the privilege to participate in hostilities and the right to prisoner of war status upon capture? How could such recognition be reconciled with the basic assumptions of the laws and customs of war, which are based on the model of a regular army that distinguishes itself from the civilian population?

Roughly speaking, definitional struggles over the legal status of irregulars took place between powerful states (potential occupying powers who could rely on the strength of their regular armies) and smaller states,

[44] Münkler (2002), at 70.
[45] Schmitt, supra note 4 at 3.

who were more likely to be the victim of foreign occupation.[46] The bigger powers emphasized the need to subject combatant status (and thus prisoner of war status) to strict conditions, while the smaller states had a tendency to plea for a relaxation of the conditions and an extensive protection for the civilian population. Underlying these debates, however, is also a fundamental normative dilemma. A formal recognition of irregulars could enhance the chances that they will respect the laws of armed conflict and would operate as a check on the regular armies of the powerful states. At the same time, however, such recognition would put a bonus on blurring one of the fundamental distinctions that ground the law of armed conflict: that between civilians and combatants. As Best has put it: 'At heart and strictly speaking, of course, the problem is insoluble. The attempt to solve it can go no further than offer a choice of grim options under grey skies' (Best, 2001).

One such grim option is offered by the 1977 First Additional Protocol to the Geneva Conventions (AP I). Article 44 of AP I makes an attempt to stretch the definition of 'combatant' so as to include fighters that use guerilla methods of warfare. In doing that, it starkly deviates from the typical imagery of the conventional fighter. Article 44 (3) puts fighters under an obligation to distinguish themselves from the civilian population, but only while they are engaged in an attack or in a military operation preparatory to an attack. The article goes even further by arguing that there are situations in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself. In that case, the fighter retains his combatant status, provided that he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack.

In its commentary on AP I, the International Committee for the Red Cross (ICRC) has tried to spell out the rationality behind Article 44. The commentary offers an interesting mixture of realism and idealism. Guerilla fighters, it is argued, should be recognized, because the realities on the battlefields cannot be ignored; placing guerilla fighters beyond the reach of the law of armed conflict will not make them disappear. At the same time, the commentary expresses the hope that formal recognition will encourage guerilla fighters to comply with the law of armed conflict as much as possible.[47] The relaxation of the criteria for combatancy entailed in Article 44, however, proved too controversial for a number of States. It was feared that loosening the requirements for privileged

[46] Schmitt, supra note 4, at 27.

[47] The commentary is available at: http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=470&t=com (accessed 24 October 2009). The quotes are from para 1648.

combatancy would put a bonus on irregular warfare and 'terrorism' and undermine the distinction between combatants and civilians. Several States, including Israel and the United States, have so far refused to ratify the First Additional Protocol, while others have made reservations in order to limit the scope of the application of Article 44.[48] Article 44 AP I thus provides an interesting illustration of the dilemmas and diverging state interests involved in regulating irregular warfare. Yet it cannot be regarded as a generally accepted source for the determination of who counts as a combatant under contemporary international law.[49]

At present, the authoritative definition of combatancy is still based on the 1949 Geneva Convention on Prisoners of War. Article 4 of this convention made an attempt to deal with the problem of partisan warfare as it existed during the Second World War. It consists of a compromise between the two positions described above: those who pleaded for a relaxation of the criteria for partisan fighters and those who argued that partisans could only benefit from the Geneva Conventions if they met criteria that went further than the older Hague Regulations.[50] Article 4 grants combatant status to armed groups other than the armies of States who are party to an armed conflict. Members of armed groups that belong to a party to the conflict can gain combatant status, provided they fulfill the following requirements:[51]

(a) they are commanded by a person responsible for his subordinates;
(b) they have a fixed distinctive sign recognizable at a distance;
(c) they carry arms openly;
(d) they conduct their operations in accordance with the laws and customs of war.

Article 4 constitutes a prime example of what Schmitt called the 'discretely styled compromise norms' of the Geneva Conventions. When confronted with the realities of irregular warfare, Schmitt predicted, such norms 'will appear only as the narrow bridge over an abyss, which conceals a successive transformation of concepts of war, enemy, and partisan'.[52] Indeed, Article 4

[48] See, for example the reservations made by Australia, Canada, Germany and the United Kingdom available at: http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (accessed 24 October 2009).

[49] For a denial of the customary status of the article see, *inter alia*, Kretzmer (2005) and Greenwood (2002); Sutter (2008); Pocar (2002). Many writings remain silent on the issue, but some also argue that at least parts of Article 44 constitute customary law. (see, e.g. Kleffner, 2007). For a minority view on the customary status of Article 44, see: Cassese, 1984.

[50] For a discussion see, *inter alia*, the ICRC Commentary available at: http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=375&t=com (accessed 24 October 209).

[51] The requirements are contained in Article 4 (a) (2) of the Third Geneva Convention.

[52] Schmitt, supra note 4, at 32.

is based on the experiences of the Second World War, and has difficulties in dealing with the realities of irregular warfare since 1945. The provision is part of the regime governing international armed conflicts, thus leaving the question as to the combatancy status for those fighting in non-international armed conflicts open. As Kretzmer has put it, 'international instruments do not even attempt to answer this question' (Kretzmer, 2005). In addition, the requirements to carry arms openly and to wear a clearly identifiable sign run contrary to the very essence of partisan and guerilla tactics. This once more raises the question whether the law of armed conflict is able to make sense of the status of those who participate in contemporary conflicts. The next section will take up this question in relation to Israel's and US policies of targeted killing.

The transformation of the legal concept of war

The individualization of war

The term 'targeted killing' is used here to denote a policy of 'intentional slaying of a specific individual or group of individuals undertaken with explicit governmental approval'.[53] The concept used here is thus confined to acts undertaken by a government against specifically selected individuals. Often, such targeted killings aim at incapacitating the leadership of enemy groups such as Sheik Yassin (the founder of Hamas, who was killed in 2004) or Osama Bin Laden. The targeted killing of foreign enemy leaders amounts to a personalization of enmity that is difficult to square with the concept of war that prevailed in the *Jus Publicum Europaeum*. As was set out above, the *Jus Publicum Europaeum* limited war by making it an affair between two sovereign, formally equal states. In the much quoted words of Rousseau, 'war is not, therefore, a relation between man and man, but between state and state, in which private individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers'.[54] Legally speaking, specific individuals such as enemy leaders could still be targeted, but only by virtue of their status as combatant, as part of the state army. Even this possibility, however, was used with great caution, since attacking foreign leaders was considered a violation of the moral codes that held the society of sovereign states together (Ford, 1985).

[53] Note that different terms are used to refer to the same phenomena, such as 'preventative strikes', 'reactive self-defense', or 'extra-judicial killings'. In this article, I will use the term 'targeted killing' since this seems to be the most neutral term to describe the policy (David, 2002: 2).

[54] Rousseau (1978: 50). Quoted in Thomas (2001: 63).

As Ward Thomas has argued, the post-1945 era has witnessed two trends challenging the prohibition on attacking foreign leaders. The first has to do with the changing attitudes toward war that followed two unprecedentedly destructive world wars. Instead of being a legitimate instrument of foreign policy, 'war' (or rather, the use of force) was outlawed and a series of attempts were made to hold leaders personally responsible for the crime of aggression. The development of human rights law and international criminal law further undermined the idea that leaders can hide behind the shield of sovereignty to escape international accountability. Although this trend has not set aside the norm against killing foreign leaders, it does 'suggest that a hard-and-fast rule against assassinating foreign leaders may not "correspond to our sense of what is right" as strongly as in the past'.[55] The second trend is the rise of irregular warfare, such as guerilla tactics and terrorism. Confronted with groups that choose not to play by the rules of international law and international comity, states are tempted to set aside norms that would govern their armed conflicts with conventional enemies. As a result, 'the assassination taboo may not apply as strongly in responses to terrorism'.[56] Thomas's analysis of the rise and relative fall of the prohibition on killing foreign leaders bears strong resemblances to Schmitt's diagnosis of the state of international order in the 20th century. As was set out above, Schmitt argues that conventional enmity has been undermined both by the emergence of a discriminatory concept of war and by the growing importance of irregular warfare.

At the same time, the basic categories of the laws of war have remained grounded in traditional concepts of war and enmity, as was demonstrated by the discussion on the legal concept of 'combatancy' above.[57] This raises the question how targeted killings could be legally justified. One possible strategy could be to sideline the laws of armed conflict by arguing that targeted killings are an instrument of law enforcement, a way for States to fulfill their duty to protect the lives of their citizens. This is indeed how states have defended policies such as 'the final rescue shot' or the 'shoot to kill policy'.[58] It should be noted, however, that the use of lethal force in law enforcement operations is only justified when it is

[55] Thomas, supra note 54, at 83.
[56] Thomas, supra note 54, at 82.
[57] See section 'Regulating the irregular'.
[58] The final rescue shot was adopted in German legislation, while the 'shoot to kill policy' was adopted by Britain after 9/11. For a discussion, also including other countries, see Melzer, supra note 8 at 9–44. Quite tellingly, Melzer discusses current policies of targeted killing in a chapter entitled *Current Trends Towards Legitimation*.

'absolutely necessary in order to safeguard innocent lives'[59] and only as 'the undesired *ultima ratio*, and not the actual aim, of an operation which is planned, prepared and conducted so as to minimize, to the greatest extent possible, the recourse to lethal force'.[60]

Given the strict requirements that govern law enforcement operations, states such as Israel and the United States have opted for another route to justify their policies of targeted killing. Both have argued that their targeted killings constitute lawful exercises of self-defense that take place in an international armed conflict and that are aimed at legitimate military targets.[61] In this way, they could rely on the laws of armed conflict to legitimize their military operations against specific individuals. The validity of the claims by the United States and Israel has spurred intense criticisms from states, international organizations, non-governmental organizations, and scholars.[62] The purpose of this article, however, is not to assess the legal soundness of the arguments of the United States and Israel as such. Instead, the aim is to examine what happens to the basic categories of the law of armed conflict when they are invoked to justify the lethal use of force against irregular fighters. More specifically, I am interested in knowing what happens when the legal categories of 'combatant' and 'civilian', grounded as they are in the idea of the conventional enemy, are applied to irregular fighters, who undermine the very basis of conventional enmity. Will the result be, as Schmitt predicted, that international legal protection is hollowed out by a logic of terror and counter-terror in which the state places the irregulars 'outside law, statute, and honor'?[63] Or will new forms of war and enmity develop that go beyond the categories identified by Schmitt?

In order to answer this question, I take as a starting point the 2006 ruling of the Israeli Supreme Court (or the High Court of Jerusalem, HCJ) on the legality of targeted killing. The HCJ's ruling is used to examine some broader trends in the laws of armed conflict, especially those that are applicable to situations where regular armies are faced with an irregular enemy.

[59] McCann and others vs. UK, ECHR, Judgment of 27 September 1995, Series A, No. 324, at para 200. See also: *Adronicou and Constantinou* vs. *Cyprus*, Judgment of 9 October 1997, EHHR (1997), *Wolfgram* vs. *Germany*, European Commission of Human Rights, 6 October 1986, *Kelly* vs. *United Kingdom*, European Commission of Human Rights, 13 February 1993 in *Stewart* vs. *United Kingdom*, European Commission of Human Rights, 1984.

[60] Melzer, supra note 8, at 239.

[61] Note, however, that the United States has been reluctant to acknowledge killings outside the conflicts in Afghanistan and Iraq. For a discussion, see Melzer, supra note 8, at 42.

[62] For an overview of relevant literature, see: Duffy (2005). Melzer, supra note 8, Kretzmer, supra note 62.

[63] Schmitt, supra note 4, at 30.

Killing in the twilight zone

On 14 December 2006, the HCJ decided on the legality of Israel's policy of 'targeted killing'.[64] After the outbreak of the second Intifada (early 2000), Israel intensified its targeted killing program, killing around 386 Palestinians, including some high-profile Hamas leaders.[65] The legality of the policy was disputed by several human rights groups, including The Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment. Both organizations petitioned to the HCJ, claiming that Israel's policy violated not only domestic law and 'basic principles of human morality' but also international law.[66] Although the HCJ's ruling deals with the specific situation of Israel and the occupied territories, it has ramifications for other conflicts as well. Most importantly, it is of relevance for an evaluation of the policy of targeted killing that the United States adopted after the 9/11 attacks. As was noted above, the United States has been engaged in targeted killing operations in a wide variety of countries, including Somalia, Yemen, Pakistan, the Philippines, Sudan, and Iraq.[67]

In its ruling on the legality of the Israeli policy of targeted killing, the HCJ viewed the Israeli–Palestinian conflict as an international armed conflict, a qualification that was in line with a series of earlier judgments.[68] This qualification had an important consequence: it makes it possible, in principle, to apply the definition of combatancy entailed in Article 4 of the Third Geneva Convention. Individuals who fight in the name of groups such as Hamas or Al Qaida, however, will have a hard time meeting the requirements set out in Article 4 of the Third Geneva Convention. By their irregular nature, they cannot structurally live up to the obligations of carrying arms openly and wearing clearly identifiable signs. Moreover, it is questionable, to say the least, whether they follow a policy of conducting their operations in accordance with the laws and customs of war.

[64] HCJ 769/02 *The Public Committee against Torture in Israel* vs. *The Government of Israel* – Judgment of 14 December 2006, available at: http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.htm (accessed 9 November 2009).

[65] For an extensive overview of Israeli and Palestinian victims since 2000, see B'Tselem, Statistics, Fatalities, available at: http://www.btselem.org/English/Statistics/Casualties.asp (accessed 9 November 2009).

[66] Supra note 64, para 3.

[67] Josh Meyer, 'CIA Expands Use of Drones in Terror War, Los Angeles Times, 29 January 2006; Press anger at US strikes in Somalia, BBC News, 11 January 2007, available at: http://news.bbc.co.uk/2/hi/africa/6251605.stm (accessed 3 November 2009).

[68] Supra note 64, para 16. As mentioned earlier, the HCJ's interpretation of the Israeli–Palestinian conflict is not free from controversies. For a discussion of possible alternative readings of the conflict as either an internal armed conflict or as a situation regulated by the rules governing law-enforcement operations, see supra note 62.

The Israeli government, therefore, argued that those who participate in irregular attacks against the State of Israel are to be regarded as 'unlawful combatants': as persons who do not enjoy the privilege to participate in hostilities, but still constitute a legitimate target for attack.[69] The introduction of this category fits in the broader stance of the Israeli government regarding the rights of irregulars under the Geneva Conventions. According to the Israeli government, the Geneva Conventions should not be so construed as to frustrate the government's abilities to fight against the threats posed by groups such as Hamas and Hezbollah. Illustrative in this respect is that the Israeli government, in response to the Goldstone report on Gaza, launched an initiative to change the laws of armed conflict to provide states with more leeway when they fight terrorist groups.[70]

After the 9/11 attacks, the US government followed suit with the creation of categories such as 'unlawful' and 'enemy' combatants.[71] The US government even went so far as to argue that the 'war on terror' can be regarded as a different type of war in which the laws of armed conflict do not provide protection to the 'terrorists' who are targeted. As Mégret has demonstrated, the arguments that have been used to justify this position essentially mirror the 19th century reasons for excluding colonial peoples from the protection of the laws of war: contemporary terrorists, just like 19th century 'savage warriors', are no party to international treaties, fail to distinguish themselves from the civilian population, deliberately violate the laws of war, and 'cannot possibly be expected to reciprocate'.[72] If 'civilized nations' apply the laws of war in their dealings with uncivilized warriors, they do so out of free choice, not as a

[69] Article 2 of the 'Incarceration of Unlawful Combatants Law, 5762-2002' defines an unlawful combatant as 'a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoner-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him'. Available at: http://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf (accessed 3 January 2009).

[70] Prime Minister: Change the Laws of war to Deal With Terrorism, *Jerusalem Post*, 21 October 2009, available at: http://www.jpost.com/servlet/Satellite?cid=1256037270297&pagename=JPost%2FJPArticle%2FShowFull (accessed 22 October 2009).

[71] *Ex Parte Quirin*, 317 US 1 (1942); *The Military Commissions Act of 2006*, Pub. L. No. 109-366 (S.3930), 120 Stat. 2600, § 948a (1) (A), available at: http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930es.txt.pdf (accessed 3 November 2009).

[72] Frédéric Mégret, from 'Savages' to 'Unlawful Combatants: a Postcolinial Look at Internatoinal Humanitarian Law's 'Other', in: Orford (2006: 265–318, 265–317, 300). Mégret bases his arguments mainly on the memorandum of the Assistant Attorney General Bybee of 22 January 2002 and the positions articulated by Rumsfeld and John Yoo, Deputy Attorney General.

matter of law.[73] The structural resemblance between the exclusion of 'savages' and the exclusion of 'terrorists' from the protection of the laws of armed conflict echoes some of Schmitt's concerns regarding the breakdown of the *Jus Publicum Europaum*. In the first place, it seems to corroborate his fear that the spatial exclusions that characterized the *Jus Publicum Europaeum* can easily be transformed into exclusions based on universal concepts. The exclusion of non-Western people is then replaced by the exclusion of those who violate the basic international order (see section 'Enmity in the Jus Publicum Europaeum' above). Secondly, it seems to corroborate Schmitt's concern that irregular warfare builds on a form of enmity that '… stands outside any containment … (and) rises through terror and counter-terror, up to annihilation'.[74]

Well aware of the dangers of such escalation, the HCJ made an attempt to prevent the exclusion of irregular fighters from the protection of the law of armed conflict. In a rather courageous move, it denied the existence of a category of 'unlawful combatants'. The Court argued that the laws of armed conflict do not recognize a third category, apart from the categories of 'combatants' and 'civilians'.[75] Instead, the Court re-emphasized one of the ground rules of contemporary international law: if a person does not count as a combatant, (s)he must be regarded as a civilian.[76]

Attacking civilians as such is prohibited (and even a war crime), 'unless and for such time they directly participate in hostilities'.[77] Therefore, in order to justify attacks on irregular fighters, it must be shown that they directly participate in hostilities. This raises a thorny question: when is it justified to regard a civilian as directly participating in hostilities?[78] Under a strict reading, the notion of 'direct participation' should be understood as signifying a sufficient causal relationship between the act

[73] As Rumsfeld has argued, 'technically unlawful combatants do not have any rights under the Geneva Convention (*sic*). We have indicated that we do plan to, for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate, and that is exactly what we have been doing. Transcript: Defense Department Briefing, 11 January 2002, available at: http://www.globalsecurity.org/military/library/news/2002/01/mil-020111-usia01c.htm (accessed 2 January 2009). Quoted in Mégret, supra note 84, at 301.

[74] Schmitt, supra note 5, at 7.

[75] '(…) as far as existing law goes, the data before us are not sufficient to recognize this third category. That is the case according to the current state of international law, both international treaty law and customary international law (…)'. Supra note 76, para 28.

[76] The analysis in this part of the section builds on Kessler and Werner (2008).

[77] The analysis in this part of the section partly draws from Kessler and Werner (2008).

[78] For an overview of the discussion on the issue of direct civilian participation in hostilities, see the ICRC's Melzer (2009; see also: http://www.icrc.org/web/eng/siteeng0.nsf/html/p0990?opendocument – accessed 14 April 2010).

of participation and the immediate consequences (Sandoz *et al.*, 1987), whereas the temporal aspect ('for such time … ') is to be interpreted as referring to the concrete danger posed to the adversary.[79] This strict reading fits well in a traditional armed conflict, where the hostilities are by and large conducted between armed forces and civilian participation is the exception to this rule. In such a situation, a narrow understanding of what constitutes 'direct participation' provides civilians with a strong protection against acts of war. However, in less traditional cases, a narrow reading might have consequences that several States find hard to accept. When armed forces are confronted with sustained, organized violence by civilians, a strict interpretation of the term 'direct participation in hostilities' would put a bonus on irregular forms of warfare, where the distinction between combatants and civilians is willingly and knowingly blurred.

The HCJ acknowledged the absence of a legal consensus on the terms 'direct participation' and 'for such time'. Given the uncertainty surrounding these terms, it pleaded for a case-by-case approach, with the aim of 'narrowing the area of disagreement'.[80] In general, it relied on the *function* performed by a civilian in order to determine the directness of his taking part in hostilities.[81] As to the temporal aspect, the HCJ distinguished between two types of civilians (with a gray area between them). In the first place, the civilian who takes part in hostilities only once or sporadically and who detaches himself from such participation afterwards. Such a person, the HCJ argued, 'is not to be attacked for the hostilities he committed in the past'.[82] Secondly, a civilian who has 'joined a terrorist organization which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them … '.[83] Civilians performing such a role lose their immunity from attack as long as they have not actively distanced themselves from the armed group in which they operate.

By redefining irregular fighters as civilians, the HCJ's ruling thus extends the protection of the laws of war. This extension, however, also implies a transformation of the very notion of 'war' or armed conflict. Traditionally, 'war' – and in particular international war – has been understood as an armed struggle between two equal collectivities. The way in which the HCJ

[79] Ibid, at 1453.
[80] Supra note 76, para 34.
[81] The function criterion is mentioned in para 35, while paras 34–37 of the judgment discuss different case studies.
[82] Supra note 64, para 39.
[83] Ibid, note 64, para 39.

frames the struggle between Israel and the Palestinian armed groups, however, turns this notion upside down. While the Court characterized the conflict as an international armed conflict, it subsequently defined it as a conflict where privileged State combatants fight civilians who directly participate in hostilities. The conflict, in other words, consists of State forces who have the privilege to use force[84] against those who lack such privilege, a situation which normally prevails in peacetime, under the law enforcement paradigm. This is a far cry from the conventional notion of war as an armed struggle between *justi et aequales hostes* based on a strict distinction between combatants and civilians.

The turn to cosmopolitanism

In order to counterbalance the (legal) asymmetry between regular armies and irregulars, the HCJ made a rather innovative move. It added additional criteria for the lawful use by Israeli troops against civilians who directly participate in hostilities. According to the Court, the use of lethal force is only allowed when four criteria are met.[85] In the first place, the State should gather well-based information and verify in cases of doubt. Secondly, it should be ascertained that it is not possible to employ less harmful methods such as arrest and interrogation. Third, a *post hoc* thorough and independent investigation is required regarding the identification of the target and the broader context of the attack. If appropriate, compensation should be paid. Finally, the attack should be proportionate. The HCJ borrowed the four requirements largely from international human rights law. In particular, it referred to the jurisprudence of the European Court of Human Rights to contain the use of force in what it regarded as an international armed conflict.[86]

Critics have been quick to point out that the HCJ's decision not only leaves many questions unanswered (Moodrick-Even Khen, 2007), but also mixes up two quite different bodies of law: human rights law and the laws of armed conflict.[87] From a doctrinal perspective, incorporating human rights law in the laws of armed conflict indeed raises questions.

[84] Provided, of course, they meet the requirements of 'combatant' under international humanitarian law. In relation to targeted killings carried out by secret services, this is not always beyond doubt.

[85] Supra note 64, para 40.

[86] One of the most important cases referred to by the HCJ was the *McCann* case: McCann and others vs. UK, ECHR, Judgment of 27 September 1995, Series A, No. 324. In McCann, the European Court of Human Rights determined that lethal force is allowed when it is 'absolutely necessary (is) in order to safeguard innocent lives'.

[87] For an overview of critical responses in the literature, see Melzer, supra note 8, pp. 32–36.

Both bodies of law have different origins and rationalities: while the law of armed conflict takes as its starting point the existence of fighting collectivities, human rights law rests on a cosmopolitan, individualistic logic that takes peace as the normal condition of (international) life. In Thomas Smith's words, the law of armed conflict 'contemplates a starting point of death, violence and destruction that is repugnant to the essence of human rights law'.[88] The HCJ, however, was confronted with a policy that is difficult to square with the concept of enmity that underlies the prevailing legal definition of a 'combatant'. The enemy under attack in policies of targeted killing is not the *justus hostis* of classical international law. Instead, he is individualized, denied the right to participate in hostilities, and regarded as an enemy, criminal, and risk at the same time. From this perspective, the HCJ's confusion of human rights law and the laws of armed conflict is an understandable response to the personalization of enmity, however paradoxical a mixture of human rights and law war may be.[89] Being unable to invoke the logic of reciprocity that underlies conventional enmity, the HCJ had recourse to the cosmopolitan logic of human rights.

The turn to cosmopolitanism shows that, at least in the context of Israel's targeted killing program, it is possible to escape what Schmitt has called the 'logic of *justa causa* (just cause) without recognition of a *justus hostis* (just enemy)'.[90] Schmitt believed that moral universalism is first and foremost an undermining force: those fighting in the name of universal values, he argued, deny the enemies equal status and thereby weaken the limitation on the conduct of hostilities. The HCJ, however, used universalistic arguments to set limits to the lethal use of force against those who were denied combatant status, emphasizing that Israel's enemies 'are not "outlaws". God created them as well in his image; their human dignity as well is to be honored'.[91]

Of course, the HCJ's decision was made within a specific armed conflict between the Israeli Defence forces and Palestinian armed forces. This makes it difficult to generalize its findings to other armed conflicts where civilians participate in hostilities. Having said that, it should be noted that the HCJ's invocation of human rights fits in a broader trend that Neff has labeled the 'humanitarian revolution': 'a seismic shift … away from a focus on fairness

[88] ISA Conference, San Francisco, p. 5. Paper available at: http://www.isanet.org/sanfran2008/ (accessed 9 November 2009; Smith, 2008).

[89] Schabas, for example, has demonstrated that human rights law is difficult to reconcile with the justifications for the use of lethal force that can be found in the laws of armed conflict. The two bodies of law, therefore, cannot be completely integrated without giving up the foundations of at least one of them (Schabas, 2007).

[90] Schmitt, supra note 4, at 30.

[91] Supra note 64, para 25.

and mutuality as between warring states, to a primary concern with relieving the suffering of victims of war'.[92] The 'humanitarian revolution' was reinforced by the growing impact of human rights law. Increasingly, basic provisions of the law of armed conflict were read through the prism of human rights law,[93] up to a point where the International Tribunal for the Former Yugoslavia (ICTY) started speculating about a fundamental transformation in international law, to the effect that 'A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach'.[94] Although the ICTY overstated its case,[95] it did signal an important development in international law, where human rights and the laws of war are growing closer together. The turn to humanitarianism and human rights has particularly affected the rules governing non-international armed conflicts and situations of foreign occupation. As was set out in the first section, these are exactly the contexts discussed in Schmitt's account of the partisan: situations where conventional enmity is disrupted and traditional provisions of the law of armed conflict are difficult, if not impossible, to apply. Moreover, they are those contexts where conflicts rise 'through terror and counter-terror'.[96] One of the driving forces behind the humanitarian revolution and the turn to human rights was the containment and moderation of this logic of escalation. This has resulted, *inter alia*, in the outlawing of practices such as collective punishment or hostage-taking of civilians in occupied territories.[97] Moreover, it has spurred the use of human rights law to redefine some basic categories of the law of armed conflict, such as the notion of 'protected persons' under the 4th Geneva Convention (which protects civilians under enemy control).[98]

[92] Neff, supra note 19, at 315.

[93] For an overview, see Meron (2000).

[94] Prosecutor vs. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

[95] A year after Tadic, for example, the International Court of Justice took a very state-centric approach in its Advisory Opinion on the Legality of Nuclear Weapons, arguing that it was unable to determine whether the use or threat of nuclear weapons is unlawful in 'in an extreme circumstance of self-defence, in which the very survival of a State would be at stake'. International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, para 105.

[96] Schmitt, supra note 4, at 7.

[97] For a general discussion, see Darcy (2007).

[98] See Prosecutor vs. Delalić, No. IT-96-21-T, Judgment of 16 November 1998. The 4th Geneva Convention protects civilians who are under enemy control. According to Article 4, the Convention protects persons who find themselves 'in the hands of a Party to the conflict or Occupying Power of which they are not nationals'. The ICTY, however, eventually found this emphasis on nationality unsatisfactory in the context of the armed conflict in Bosnia. It deviated from the nationality requirement laid down in Article 4 based on two principal grounds. The first was that in the Bosnian conflict conceptions of enmity were primarily

As was noted above, the turn to human rights law partly emerged as a response to the breakdown of a State-centric understanding of war and enmity. Especially in non-international armed conflicts and in situations of occupation, human rights law provides starting points for the containment of lethal force by States against irregular fighters – although, of course, it remains to be seen to what extent this affects the actual facts on the ground.[99] Where traditional war law is silent or underdetermined, courts and tribunals have sought to fill in gaps by taking up insights from human rights law. The marriage of human rights law and the laws of armed conflict, however, is not just a response to the breakdown of conventional enmity. It is also a development that in and of itself spurs the disintegration of Statist conceptions of enmity. It shows that the relationship between the two bodies of law is more complicated than the traditional reading of the laws of armed conflict as a *lex specialis* of human rights law.[100] Human rights law has deeply penetrated the laws of armed conflict and affected its identity and basic values. In this way, a regime has emerged that combines two radically different rationalities: a cosmopolitan, individualistic rationality on the one hand and a State-centric, collectivistic rationality on the other.

Conclusion

The past few decades have witnessed a renewed interest in the work of Carl Schmitt. Scholars from International Relations, international law, and political theory have claimed that Schmitt's critique of universalism, together with his analysis of irregular warfare, provides useful lenses to make sense of the post 9/11 world. However, as this article has shown, using Schmitt to understand the fight against terrorism yields mixed results. His historical analyses make it possible to situate current anti-terrorism policies in longer, structural transformations of war and enmity.

structured along ethnic lines, not along Statist lines. The second was that the ICTY regarded the primary aim of the law of armed conflict to be the protection of individuals, not the facilitation of State interests. The result was that the category of protected persons under the 4th Geneva Convention was broadened so as to include those who were regarded as enemies on ethnic grounds – a broadening that the ICTY regarded as in line with the increasing emphasis on human rights law since 1945.

[99] See, for example, the allegations that the Israeli Defense forces have disregarded the HCJ'ruling on targeted killing. Israel's top court ruling on targeted killings disregarded by military, *Jurist, Legal News and Research*, http://jurist.law.pitt.edu/paperchase/2008/11/israel-top-court-ruling-on-targeted.php (accessed 9 November 2009).

[100] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, p. 226.

Moreover, his discussion of conventional enmity helps to understand the political logic behind legal definitions of combatancy. At the same time, however, it should be noted that his account of the history of international law is not free from nostalgia and a romanticization of the classic era of European domination. In addition, his predictions regarding the breakdown of classic categories of the laws of war should be treated with caution. As Schmitt himself recognized, international practice has been quite reluctant to give up the heritage of classic international law. To a large extent, legal institutions such as neutrality and legal principles such as the separation of *jus ad bellum* from *jus in bello* have survived the emergence of a discriminatory concept of war.

Schmitt's treatment of the partisan is equally ambiguous. His analysis of the way in which partisan warfare disrupts conventional enmity and the foundations of the laws of armed conflict is indeed disturbingly relevant for the 'war on terror'. The way in which the Israeli and US government have defended the targeted killings of individuals mirrors Schmitt's argument that irregular warfare undermines the very *rationale* of the laws of war. This process is intensified when states rely on universalistic arguments to discredit their 'unjust enemies'. However, as the second part of this article has shown, the invocation of universalism in the fight against irregulars need not have the consequences predicted by Schmitt. Since 1945, the laws of armed conflict have increasingly been geared toward humanitarian ends. The notion of reciprocity, which was so crucial for the traditional legal concept of war, has been supplemented and sometimes even supplanted by humanitarian concerns, especially the protection of individuals. In similar vein, human rights law has been used to interpret and reinterpret provisions of the laws of armed conflict, in particular the rules governing non-international armed conflicts and situations of foreign occupation. In this way, universalism has been used to temper the logic of terror and counter-terror and to protect the basic rights of irregular fighters. In order to illustrate the impact of this 'humanitarian revolution', this article has examined the 2006 Israeli Supreme Court's ruling on targeted killing. Although the Court denied conventional enemy status to irregular fighters, it refused to place them outside the protection of law. Instead, it supplemented the protection offered by the laws of war with human rights provisions. In this way, it combined the collectivistic logic of the laws of war with the cosmopolitan logic of human rights.

Of course, we should not interpret all this as an unavoidable march toward the humanization of the laws of armed conflict. Many of the dilemmas, paradoxes, and downsides of universalism that were identified by Schmitt remain very much alive. Yet, some recent applications of the

laws of armed conflict do show that it is at least possible to use universalism not as a disruptive force, but as a way to set limits to the use of lethal violence.

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