

**‘An Irregularity that Cannot be Regulated’:**  
**Carl Schmitt’s Theory of the Partisan and the ‘War on Terror’**

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*...il faut opérer en partisan partout où il y a des partisans.*

Attributed to Napoleon by Carl Schmitt

*...all growth, progress and rearing, moral or material, are slow; all destruction, relapse and degeneracy, fearfully rapid...*

Francis Lieber, *Guerilla Parties Considered With Reference to the Laws and Usages of War*

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<sup>1</sup> The first part of this essay draws extensively from *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (London and New Haven: Yale University Press, 2003). The essay as a whole was first presented at the conference ‘Jurisprudence and the War on Terrorism’ at Columbia Law School, 22<sup>nd</sup> April 2006. I wish to thank the participants, and Kim Lane Scheppele and Jeremy Waldron in particular, for valuable comments and suggestions.

In 1970 a Berlin-based German Maoist claimed that Carl Schmitt had been the ‘only person who was competent to say something about the topic’ of partisans and irregular combatants.<sup>2</sup> Joachim Schickel’s comment was hardly an individual ideological aberration: Schmitt’s writings on the partisan contributed much to his secret and sometimes not so secret renaissance among the radical student Left in Germany and Italy during the 1960s and 1970s. Now, more than thirty years later, the name Schmitt is yet again bandied about, this time in debates concerning the so-called ‘war on terror’, where it is often assumed that ‘the recent political philosophy of the affluent, liberal west may not afford the most useful point of entry for an investigation into problems of terror and terrorism’.<sup>3</sup> Schmitt’s theories, on the other hand, appear to provide precisely such a ‘point of entry’.

Very generally, in these recent debates reference to Schmitt’s theories serves on the one hand as a diagnostic tool structurally to understand what some critics see as a globalized state of emergency; on the other hand it is used, more normatively, to flag the danger of uncontrolled executives and a notion of sovereignty that comes to depend on the exception (and the enemy) for the constitution of the polity. In other words, Schmitt is invoked both as part of a *diagnosis*, if you like, and as a shorthand for *danger*. As an American observer has put it: ‘Carl Schmitt may well be what the Greeks called a *pharmakon*: i.e., both a poison and its remedy.’<sup>4</sup>

It seems to me, however, that in the context of the so-called ‘global war on terror’ Schmitt’s writings have rather little heuristic value; in other words, they do not function particularly well as either a diagnostic tool or as a danger signal in the areas of discussion where Schmitt’s name is now habitually evoked. True, ‘Schmitt’ can

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<sup>2</sup> Joachim Schickel, *Gespräche mit Carl Schmitt* (1970; Berlin: Merve, 1993), 9.

<sup>3</sup> Samuel Scheffler, ‘Is Terrorism Morally Distinctive?’, in: *The Journal of Political Philosophy*, Vol. 14, No. 1 (2006), 1-17; here 3.

<sup>4</sup> Tony Corn, ‘Clausewitz in Wonderland’, *Policy Review Web Special*, September 2006.

serve as a quasi-metonymic invocation of regimes of exception, but it seems to me that Schmitt's actual theories of how exceptions and emergency regimes work offer relatively little by way of understanding what is happening in the US or other countries engaged in the 'war on terror'. And that is not even to ask the question whether the existentialist or theological baggage that Schmitt's theories might carry (at least as contraband, according to many Schmitt interpreters), does not in fact distract from properly understanding present-day political and legal constellations.

Having said that, I would nevertheless like to engage two aspects of Schmitt's thought that have received less attention than his theses on sovereignty and states of exception. First, Schmitt's ideas about partisans and irregular forces<sup>5</sup>; and, second, what one might call Schmitt's meta-theory about changes in jurisprudence and legal thinking based on shifts in power and, if you like, hegemony – what some have now started calling 'lawfare'.<sup>6</sup> The former is arguably more original than the latter, but both might contribute to our understanding of the 'war on terror' in a way that very general references to uncontrolled sovereignty in my view do not.

This essay falls into two parts: first, I want to reconstruct Schmitt's understanding of the partisan and guerrilla warfare that he began to develop in the early 1960s. It is important to remember that Schmitt never simply analyzed political phenomena, much as he at times was eager to suggest that he was merely an impartial observer of the transformations in world politics. Rather, the figure of the partisan allowed Schmitt to reiterate his theses about the end of modern European statehood and the international legal system of the *ius publicum Europaeum*, while at the same time

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<sup>5</sup> An important exception is William E. Scheuerman, 'Carl Schmitt and the Road to Abu Ghraib', in: *Constellations*, Vol. 13, No. 1 (2006), 108-124.

<sup>6</sup> Corn, 'Clausewitz'.

reinserting the possibility of the political into what threatened to become a ‘universal homogeneous state’ (Alexandre Kojève), i. e. a global state based on perfectly functioning legality, in which all claims for mutual recognition had been satisfied and Schmittian enmity had ceased once and for all. The partisan not only relied on space as a precious resource against occupying armies; his violent actions also created a fracture in modern, homogeneous political space dominated by what Schmitt saw as universalist, necessarily levelling ideologies – whether liberal democracy or communism.

Yet, there was no simple way in which the *guerilla* could be said to have somehow ‘redeemed’ the political. Rather, Schmitt’s account of the partisan as a quintessentially Cold War figure was in the end profoundly ambiguous. The partisan could easily turn into an agent or saboteur, and the seemingly conservative political type ready to defend his native soil and traditional ways of life, whom Schmitt appeared to be celebrating, could suddenly be turned into a revolutionary committed to absolute enmity. In the end, Schmitt relinquished his hope that the partisan could revive a meaningful notion of enmity – bureaucratic, industrial society, which functioned according to the standards of legality, necessarily proved stronger than the popular nationalist legitimacy any partisan could claim for himself.

Yet this particular narrative of the partisan as victim did not exhaust Schmitt’s account. In the second part of the essay I will abstract a number of claims from Schmitt’s historically situated account: first, the idea that the partisan consciously enters into a confrontation in which he is willing to risk not just his life, but also his honour and his dignity; second, the notion that the status of the partisan as a genuinely political actor, in Schmitt’s view, is a *symptom* (rather than a cause) of larger structural transformations in international law and world order: the reason that the

partisan cannot be dismissed simply as a criminal is that existing political forms (such as the nation-state) and conceptions of legal order (such as the *ius publicum Europaeum*) are in the process of losing legitimacy, thus opening a space where irregulars can put existing political structures and legal orders further into question. Third, there is the Schmittian claim that territorially delimited (or essentially nationalist) partisan struggles are most likely to be legitimate and have the best chance of succeeding in the long run.

Now, to be sure, all of these Schmittian claims are highly speculative and none should be taken at face value; like much of Schmitt's work, they are neither clearly based on logical reasoning nor grounded in systematic empirical observation – calling them intuitive would not be an obvious injustice. Yet, as I argue towards the end of this essay, taken together, they present a much more comprehensive challenge to liberals who seek to provide a systematic response to current approaches to the 'war on terror'. In particular, if Schmitt is not entirely mistaken in thinking that the partisan or terrorist is in certain respects a symptom of much larger structural problems, then an adequate response will have to involve a much broader re-conceptualization of international order than is often assumed by American liberals in particular.

### *Schmitt's Theory of the Partisan: A Brief History*

Schmitt had become particularly interested in the partisan and his relation to the political in the early 1960s. His thinking had taken off from a book by the journalist Rolf Schroers, a liberal and a somewhat tragic figure in the intellectual history of

post-war West Germany. In 1961, Schroers had authored an extensive treatise on the partisan as a ‘contribution to political anthropology’.<sup>7</sup> A self-consciously contrarian figure, Schroers had previously written a book on T. E. Lawrence and edited a number of unsuccessful intellectual magazines. He first met Schmitt in 1955 and subsequently tried to persuade him to write a book on Hitler.<sup>8</sup>

Although Schroers’ book predated Schmitt’s small volume on the *Theory of the Partisan* by two years, it had a clearly distinguishable Schmittian flavour. In fact, Schroers claimed in a letter that his book could not have been written without Schmitt – then going even further to reveal that Schmitt had been the real intended audience for the work all along.<sup>9</sup> Schroers made the partisan a last incarnation of autonomy in a world that was increasingly regulated by bureaucracy and technology. More specifically, the partisan was the type of truly authentic personality who felt his identity damaged or at least acutely threatened by a foreign occupation, even if there was no direct threat to life and limb.<sup>10</sup> He was driven by a feeling for *Heimat*, or homeland – and therefore differed fundamentally from the revolutionary who was fighting for an abstractly constructed future, instead of a personally experienced past. Yet, despite his desire to defend the specific law and way of life associated with a particular territory, the struggle of the partisan could easily be instrumentalized by what Schroers called ‘interested third parties’. These were primarily states that were using the partisan for their own purposes inspired by *Realpolitik* or, more likely, ideology. According to Schroers, ideological instrumentalization, often accomplished

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<sup>7</sup> Rolf Schroers, *Der Partisan: Ein Beitrag zur politischen Anthropologie* (Cologne: Kiepenheuer & Witsch, 1961)

<sup>8</sup> Dirk van Laak, *Gespräche in der Sicherheit des Schweigens: Carl Schmitt in der politischen Geistesgeschichte der frühen Bundesrepublik* (Berlin: Akademie, 1993), 252.

<sup>9</sup> *Ibid.*, 252.

<sup>10</sup> Hans Grünberger, ‘Die Kippfigur des Partisanen. Zur politischen Anthropologie von Ralf Schroers’, in: Herfried Münkler (ed.), *Der Partisan: Theorie, Strategie, Gestalt* (Opladen: Westdeutscher Verlag, 1990), 42-60.

by the ‘agents’ acting on behalf of interested third parties, could only bring about the ‘moral death’ of the partisan.<sup>11</sup> For the liberal Schroers the figure of the partisan had an ultimately *moral* character. It was the last refuge of an independent personality in the face of a society – and a kind of warfare – which had become completely constrained by impersonal imperatives.

Since the partisan confronted a machine-like state run by technocratic functionaries, his counter-terror against occupation forces and an imposed alien order ultimately amounted to nothing less than existential acts of authenticity – and therefore possessed a kind of ‘illegal legitimacy’.<sup>12</sup> This, if you like, liberal partisan, however, also contrasted with the figure of the revolutionary guerilla. The latter -- despite the ostensible similarities -- was just another kind of ‘functionary’ fighting for an abstract, pre-determined ideological programme. Schroers’ partisan precisely did *not* have a party. Thus, the partisan was in the first instance a romantic figure. But he was also in all likelihood destined to be a victim of an age of ideologies and a new kind of global technocratic warfare which left no space for authentic individual struggle.

In two lectures delivered in Pamplona and Zaragoza in the spring of 1962, Carl Schmitt adopted a surprising number of arguments and themes which Schroers had laid out. In his actual slim volume on *The Theory of the Partisan*, first published in 1963, however, he also related the partisan much more systematically to his concept of the political – in fact calling his book an ‘intermediate remark on the concept of the political’.<sup>13</sup> Even more than Schroers with his emphasis of *Heimat*, Schmitt tied the concept of the partisan to the notion of territory -- thereby also

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<sup>11</sup> *Ibid.*, 59.

<sup>12</sup> *Ibid.*, 45.

<sup>13</sup> Carl Schmitt, *Theorie des Partisanen: Zwischenbemerkung zum Begriff des Politischen* (1963;Berlin: Duncker & Humblot, 1995)

indirectly distinguishing him from the figure of the terrorist.<sup>14</sup> Partisans – or guerillas -- fought primarily for the control of territory. Apart from what he called his ‘telluric’ character, Schmitt also stressed the guerilla’s irregularity and the heightened intensity of his political engagement as essential attributes. Schmitt conceded that the partisans’ goals could be fused with other ideologies such as socialism, but nationalism or a mutation thereof was what one might call their ideological essence. Despite the fact that they were illegitimate bearers of arms, they were potentially an army and a state in the making. They did not wish to gain any kind of universality, nor could they.

Schmitt, then, argued that the authentic partisan necessarily had an autochthonous and perhaps even conservative character. To support this image of the ideal-typical partisan as a peasant, Schmitt reconstructed a historical genealogy of the figure of the partisan. According to this analysis, it was of course no accident that guerilla warfare had originated among the deeply reactionary priests and peasants under Napoleonic occupation in early nineteenth-century Spain: the partisan was a proper representative of the people, and the opposition of occupation army against *Volk* constituted the original friend-enemy distinction for partisan warfare.

Moreover, the *guerilla* was in almost all cases an uneducated ‘poor devil’ who fought a hopeless fight for his *patria chica* without support from the nobility, the high clergy and the bourgeoisie, all of whom were *afrancesados* – sympathizing with the French occupiers on account of class and culture.<sup>15</sup> In the same vein, Schmitt described the Tyrol uprising in 1809 and the Russian partisan war of 1812 as elemental, autochthonous movements of the poor and the uneducated. They were

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<sup>14</sup> See also Herfried Münkler, ‘Guerillakrieg und Terrorismus’, in: *Gewalt und Ordnung: Das Bild des Krieges im politischen Denken* (Frankfurt/Main: Fischer, 1992), 142-75.

<sup>15</sup> Schmitt, *Theorie*, 14. Needless to say, this account could be substantially questioned in light of subsequent historical scholarship.

inspired by a traditional Catholic or Orthodox religiosity, which had not been touched by the philosophical spirit of revolutionary France.<sup>16</sup> In that sense, authentic partisan warfare was tied to underdevelopment or even a self-conscious resistance to modernity.

However underdeveloped his social and economic background, the partisan had at least one political advantage: he instinctively knew the *concrete* enemy – the liberal bourgeoisie of both developed and underdeveloped countries did not. Moreover, while the partisan did not create the state of exception, he could learn to move in what the occupation forces appeared to have made a permanent state of exception already. At the same time Schmitt stressed that, against the backdrop of larger developments on the chessboard of European politics, the partisan was mere ‘irregular cannon fodder in global conflicts’.<sup>17</sup> Supposedly ‘great’ inter-state politics could simply swallow the peasant struggling for his soil.

Yet, there was already an ambiguity in the figure of the partisan at the birth of guerilla warfare. After all – and this at first appeared to be a major contradiction -- Schmitt also wanted to argue that the partisan was a quintessentially modern figure. He had only entered the world-historical stage with the *levée en masse* and the beginnings of popular warfare; the age of total mobilization, in which the contained warfare between states modelled on a chivalric duel was left behind, also saw the emergence of particularly intense conflicts – and particularly cruel conflicts, which had first been depicted by Goya’s paintings of the Spanish *guerilla* campaigns.

In this scheme, the rise of the partisan was just another element in the disintegration of the *ius publicum Europeum* that had modelled inter-state conflict as highly ritualized, strictly contained duels. Partisans, of course, did not engage in

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<sup>16</sup> *Ibid.*, 48.

<sup>17</sup> *Ibid.*, 14.

public, regulated open warfare. In fact, one of the characteristics of the *guerilla* fighter was that he did not display (or choose) a single identity as soldier or civilian.<sup>18</sup> Moreover, international law found it difficult to deal with the figure of the partisan, as he had turned away from the ‘conventional enmity of tamed and limited warfare’.<sup>19</sup> Instead, he had opted for ‘a different, real enmity’, characterized by ‘terror and counterterror’ which would ‘escalate up to the point of complete annihilation’.<sup>20</sup> Ultimately, then, the partisan appeared as a paradoxical figure from the very beginning: he was a traditionalist who could only have emerged under modern conditions -- and while desperately trying to turn back the clock in his part of the world, was actually hastening the decline of conventional European inter-state law.

According to Schmitt, a spark then ‘flew north’ from the Spanish *guerilla* war and set Prussian minds under Napoleonic occupation on fire. Clausewitz formulated a theory of the partisan *in nuce*, while Kleist, with his *Hermannschlacht*, wrote what Schmitt considered the ‘greatest partisan poetry of all times’.<sup>21</sup> It was in Berlin under the eyes of the French occupiers that the partisan received a proper philosophical ‘accreditation’ as a ‘new figure of the world spirit’ by Clausewitz and Fichte – who, not by accident, had also written on Machiavelli as a great theorist of national resistance. Unlike in Spain, where the educated classes had failed to connect with the *guerillas*, those imbued with Prussian *Bildung* went so far as to formulate the first theories of popular uprisings, or ‘the nation in arms’, against foreign occupation.

Such theorizing about *guerilla* warfare also marked the beginning of a new alliance of the partisan with philosophy, an alliance which was subsequently solidified

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<sup>18</sup> On this point see also Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1991), 179.

<sup>19</sup> Schmitt, *Theorie*, 17.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, 15.

by Lenin; the Soviet leader made the partisan into a professional revolutionary who viewed the class enemy as an absolute enemy. According to Schmitt, this fusion of partisanship and absolute enmity marked a further step in the destruction of the Eurocentric world Napoleon had supposedly sought to rescue and which the Congress of Vienna had attempted to restore. Stalin then perfected this combination by harnessing the energies of the essentially defensive partisan devoted to his *Heimat*, while also drawing on the aggressiveness of the ruthless professional revolutionary. It was Mao, however, who finally fully implemented this combination. He consistently relied on the *telluric* character of the partisan by recruiting his fighters among the Chinese peasants, and finally united resistance with revolution.

It seemed, then, that Schmitt simply could not make up his mind about the partisan. On the one hand, the partisan appeared as an authentic carrier of the political after the end of the era of the European nation-state. When the partisan confronted a situation in which his own state had been vanquished by a foreign power, he was immediately able to make an effective distinction between real friends and real enemies. His life was no longer mediated by a regular politics – and therefore distinctions between private and public would break down in the face of the sheer existential seriousness of partisan warfare.

The revolutionary partisan clearly marked another decisive stage in the destruction of the supposedly humane form of European inter-state conflict. By definition, the partisan was a totalitarian figure – existentially and totally absorbed in his struggle. Therefore, according to Schmitt, he could also be totally usurped by parties, which were the only truly totalitarian organizations. Parties, as quintessentially modern inventions, as well as the quintessentially modern ‘motorization’ and acceleration of politics combined to effect a total mobilization of

the partisan. At the same time, this could mean a complete loss of legitimacy, as the infinitely mobile partisan literally lost touch with the territorial ground and therefore his *only* form of legitimacy.

Yet, there were also internal conceptual difficulties with Schmitt's analysis. What, after all, accounted for the difference between the real and the absolute enemy except for a link to one's territory? Schmitt might have claimed that only territory would impose some limit on war, but he had already conceded that partisan warfare created a new kind of political space. It was no longer the open plain which served as the spatial basis of the old wars modelled on duels between gentlemen, but a space with unsuspected depths in which regular soldiers would be trapped. It was unclear why Communist ideology could not also aid in the determination of the real enemy – unless Schmitt sought to disqualify class as an element in enmity altogether.

Schmitt's study, like virtually all his works, was ultimately more suggestive than systematic -- 'the object [of inquiry] remains hidden in the mist', as one reviewer put it.<sup>22</sup> This was due not least to the fact that Schmitt's own ambiguities about politics in the post-war world came to be reflected in his portrayal of the partisan.

As Raymond Aron pointed out in a scathing critique which sought to draw clear lines between Schmitt's analysis and his own reading of Clausewitz in the 'planetary age', Schmitt had failed in particular to draw rigorous distinctions between the levels of policy, tactics and law.<sup>23</sup> But partly these confusions had to do with the fact that the 'classical concepts' of the *ius publicum Europaeum* simply could no longer do justice to the complexities of world politics at the height of the Cold War.

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<sup>22</sup> Helmut Ridder, 'Schmittiana II', in: *Neue politische Literatur*, No. 2 (1967), 137-45.

<sup>23</sup> Aron, *Penser la guerre, Clausewitz, II*, 213. According to Aron, Schmitt had committed 'stunning errors' in applying Clausewitz's doctrines.

A new *nomos* and therefore a new vocabulary for international law had yet to develop in an age, when, in Aron's words, war had become a 'chameleon'. In the meantime Schmitt and his followers were left either confused or speechless in the face of global conflict and the excessively messy re-ordering of political space. In the year of the Cuban Missile Crisis, Schmitt hardly had anything to say about the atom bomb – except that it made notions of order and locale even more complex than it had already become by the beginning of the Second World War.<sup>24</sup>

However, he also vaguely understood that the Cold War had created an entirely new 'landscape of treason', an expression Schmitt adopted from the influential journalist and writer Margret Boveri, with whom Schmitt corresponded occasionally in the 1950s.<sup>25</sup> This was not least a new *theoretical* landscape characterized, according to Schmitt, by the 'open collisions and hidden collusion' of multiple legitimacies.<sup>26</sup> Schmitt chose the plural of legitimacy consciously, arguing that in such a world, even 'deep and desperate enmities' could no longer create clear demarcations, as the shifting allegiances of Clausewitz demonstrated.<sup>27</sup> In the face, then, of apparently multiple political meanings, myriads of criss-crossing allegiances and affinities as well as dimly perceived new political structures, old conceptual boundaries had necessarily become blurred – and the *Gestalt* of the partisan had itself become deeply ambiguous. Rather than casting political actors such as the pirate and the buccaneer outside a de-moralized *ius publicum Europaeum*, profoundly

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<sup>24</sup> At other points, Schmitt seemed to suggest that human beings, even those nominally in possession of power, had become merely a 'prosthesis' of the atom bomb, 'a part of the technical and social apparatus which produces the atom bomb and applies it'. See Schmitt, *Gespräch*, 27.

<sup>25</sup> Margret Boveri, *In der Landschaft des Verrats* (Hamburg: Rowohlt, 1956). See also Christian Tilitzki, 'Margret Boveri und Carl Schmitt – ein lockerer Briefkontakt', in: Piet Tommissen (ed.), *Schmittiana VII* (Berlin: Duncker & Humblot, ), 281-308.

<sup>26</sup> Carl Schmitt, 'Clausewitz als politischer Denker: Bemerkungen und Hinweise', in: *Der Staat*, Vol. 6 (1978), 479-502; here 485.

<sup>27</sup> *Ibid.*, 488.

ideological figures such as the subversive, the agent and the traitor became integral to the ideologized antagonism of the Cold War.

Schmitt had hoped that partisans of tradition might be capable of at least disrupting the apparently seamless legalistic workings of the universal homogeneous state – thereby perhaps establishing a meaningful conception of enmity before a new system of great spaces could emerge. Instead, the partisan turned out to be less than politically reliable. Treason of course was nothing but another expression for a changing of friends and enemies, and the partisan himself could not be clearly identified as the friend or enemy of Schmitt's politics. Irrespective of actual ideological allegiances, he could be turned into a spy or a saboteur, that is, a mere technician in the Cold War – or he could resurrect a heroic form of political action and therefore be a genuine carrier of the political. The fact that the diagnosis remained blurred was a result of the fact that the figure itself appeared to be oscillating.

Ultimately, Schmitt drew the consequences from the fact that the partisan would be unlikely to disrupt the new post-war world order in any decisive manner. He concluded that the telluric legitimacy of the partisan was simply insufficient to overcome the legality of the post-war state, or rather what he saw as the remnants of the state amidst industrial society. The clearest example for Schmitt was the failure of the French general Raoul Salan, leader of the illegal *Organisation d'Armée Secrète*, to defend French Algeria by carrying the methods of the Algerian war into the French metropolis.<sup>28</sup> The coup of the renegade parts of the French army failed. The legitimacy they claimed for defending the *pieds noirs* and for honouring the nation against a state which supposedly had betrayed its own citizens counted for nothing in

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<sup>28</sup> Schmitt, *Theorie*, 65-70.

a trial at the of which they were declared mere traitors. French republican legality, according to Schmitt, remained the only legitimacy for members of a French army – and therefore the irregularity of Salan and his co-conspirators became not only a form of illegality, but also a form of illegitimacy.<sup>29</sup>

Schmitt had always held that the institutional and the political could part company. For a short time, the partisan in his struggle against imposed foreign institutions appeared as a genuine ‘carrier of the political’. Yet, legality proved stronger than legitimacy, and in a world run according to technocratic imperatives and seamless functioning, the partisan was likely to disappear again, as Schmitt put it graphically, ‘like a dead dog from the Autobahn’.<sup>30</sup> In this sense, the *Theory of the Partisan* really was a resigned restatement – rather than an intermediate remark on the concept of the political. It left the nostalgic Schmitt with nothing except to provide a hidden homage to Salan and the OAS.<sup>31</sup>

### *An Irregularity that cannot be Regulated: Three Schmittian Claims*

What can one conclude from Schmitt’s analysis of the partisan? Clearly, his writings are not exhausted by a hope for a resurgence of ‘the political’, which one might find more or less bizarre, but which certainly constitutes a subtext of his book – in fact so that every usage of Schmitt’s arguments should take into account that Schmitt was not merely providing a political phenomenology, but almost desperately attempted to

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<sup>29</sup> *Ibid.*, 83-7.

<sup>30</sup> *Ibid.*, 80.

<sup>31</sup> Aron sensed this hidden homage and was adamant that he found the analogy Schmitt drew between Salan and General von York ‘unacceptable’. See Aron, *Penser la guerre*, 210. Aron also criticized Schmitt for having omitted – rather tellingly -- references to the various forms of Resistance to the Nazis.

invest the figure of the partisan with meaning. And yet, as said at the beginning of this essay, there are more substantive hypotheses and ideas which might be worth our attention.

First, the partisan is always – by Schmitt’s definition -- a particularly ambiguous figure who is likely to confound existing legal categories, and who at least has the potential to disrupt a fully legalized or even codified international order. Partisans rely on confounding categories, and on blurring existing legal and political distinctions – part of what can make them successful is to throw their regular adversaries off track, to make states misapprehend their nature, and to have them react in ways that indirectly further the partisans’ goals. The ideal-typical Schmittian partisan actively seeks to create confusion among his enemies; he tries to retain what one might call an *epistemological advantage* over regular, recognized political actors.

Second, Schmitt argues that in periods of transition from one legal, territorially grounded order to another, irregular political phenomena like the partisan might be especially difficult to subject to anything resembling the rule of law. Non-state actors are for Schmitt a *symptom* of the decaying *ius publicum Europaeum* (and the decay of the state itself as a political form); they cannot be dealt with according to its political or legal categories; and, if anything, attempts to force them into existing categories would hasten the dissolution of a state-centred system of international law. Put differently: according to Schmitt, in a world in which state sovereignty and state-based international law are uncontested, the partisan is bound to remain an odd, politically irrelevant figure, perhaps even a madman, but for the most part a mere criminal. As Schmitt put it: as long as ‘classical law’ had known clear distinctions

between war and peace, between combatants and non-combatants, or between the enemy and the criminal, the ‘partisan could only be a marginal phenomenon’.<sup>32</sup>

So the partisan benefits from – and himself hastens – the decay of an existing legal system. The default option therefore becomes one in which the – by definition irregular – partisan is stipulated to be beyond all attempts at ‘normative regulation’. Schmitt does gesture towards the Geneva conventions, and apparently praises them for the ‘humane disposition’ they express; he even reminds us that they deserve ‘admiration’. At the same time, he is adamant that that they are parasitic on classic legal and political distinctions and a state-centred international law; they can appear to ‘regularize’ the phenomenon of the partisan, in Schmitt’s view, because they take as a template the experience of the various forms of national resistance during the Second World War. But the genuine partisan, according to Schmitt, ceases to be a partisan, if he or she is assimilated to regular armies, or is seen as an army-in-the-making. There can be no ‘valid regulation of the irregular’, Schmitt keeps insisting; the ‘irregular’ could only dissolve if the regularity of armies and states, against which partisans define themselves, also dissolves or at least decisively weakens. In all other cases, a situation of brutally advancing a *justa causa* without recognition of a *justus hostis* simply has to be accepted.

Schmitt therefore describes – perhaps even celebrates – the genuine partisan as a figure who by definition is *hors la loi*, who takes the risk of being ‘eliminated’, and whom it is legitimate for states to ‘eliminate’. Both states and partisans, according to Schmitt, should realize that they enter a zone of engagement which cannot be subject to norms and where it is legitimate for one side to attack the ‘honour’, ‘dignity’ and, of course, the life of the other. As Scheuerman has pointed out, Schmitt treats

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<sup>32</sup> Schmit, *Theorie des Partisanen*, 16-17.

relations between states and partisans as a ‘black hole’ beyond any ‘normative regulation’.<sup>33</sup> Indeed, Schmitt explicitly claims that if the Geneva conventions apply, partisans actually cease to be partisans; terrorists cease to be terrorists.<sup>34</sup>

Clearly, this argument is one that appears to resonate in the early approaches of the Bush administration to the ‘war on terror’; it arguably is one that also chimes with parts of the popular imagination: restraints can be abandoned, and the duties of humaneness weakened, because the enemy has already signalled that he is willing to risk everything, including, as Schmitt puts it, his own dignity and his honour. Violating the enemy’s dignity – though inhumane treatment, for instance – is therefore not a matter of revenge, let alone personal hatred: the enemy, who, according to Schmitt, is always the *public* enemy, has already made it clear that life and dignity will be fair game in the kind of conflict has he is prepared to wage. A symmetrical response from state actors can then be understood as a signal of being prepared to enter this conflict *on the partisans’ and the terrorists’ terms*.<sup>35</sup>

Successfully engaging in an unconventional form of conflict will then, according to Schmitt, also necessitate a reshaping of legal languages, and, even more importantly, moral perceptions.<sup>36</sup> It is here that Schmitt’s more general claim about ‘lawfare’ enters according to which hegemonic powers will, above all, attempt comprehensively to refashion legal and political language in order to solidify their power and impose their understanding of a political situation and new legal systems that supposedly can deal with new situations. New concepts and categories will be

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<sup>33</sup> *Ibid.*, 40.

<sup>34</sup> *Ibid.*, 29.

<sup>35</sup> See also Stephen Holmes, ‘In Defiance of Law a Proof of Success? Magical Thinking in the War on Terror’, in: Karen Greenberg (ed.), *The Torture Debate in America* (New York: Cambridge UP, 2006), 118-35.

<sup>36</sup> This claim goes beyond the observation that definitions of terrorism are contested and subject to shifting geopolitical constellations. See also Jörg Friedrichs, ‘Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism’, in: *Leiden Journal of International Law*, Vol. 19 (2006).

introduced to deal with new situations on a flexible basis, and to solidify the power of those challenged by partisans.<sup>37</sup>

It is important to note what Schmitt is *not* saying: he does not think that the selective substitution of domestic for international law is a symptom or an adequate response to situations when states are facing national or international partisans, in the way that some present-day legal theorists drawing on Schmitt have claimed<sup>38</sup>; he thinks that the construction of a completely alternative legality – with its attendant vocabulary – is more likely, and coherent as a response. In other words, Schmitt's theory (if that is the right word for his rather sketchy outline) does not support what some scholars have come to call 'imperial law' – that is, the selective use of national law instead of international law, as well as the selective violation of international law without the substitution of domestic law. Schmitt would have expected a much more comprehensive strategy for legal change, and, not least, systematic transformations of legal concepts.<sup>39</sup> Law would be the continuation of war by other means – and new legitimate law would in all likelihood be the precondition for winning a drawn-out global conflict, that is not least about the power to have one's own definitions and diagnoses of new geopolitical constellations generally recognized.

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<sup>37</sup> See Schmitt's remark about 'American imperialism' in the early 1930s: 'Es gehört aber ferner zu jeder Machtausübung..., dass sie eine bestimmte Rechtfertigung vorbringt, eine Art Legitimitätsprinzip hat, ein ganzes Inventar von völkerrechtlichen Begriffen und Redensarten, von Schlagworten, die nicht nur „ideologische“ Vortäuschungen sind und nicht nur Propagandazwecken dienen, sondern einen Anwendungsfall der einfachen Wahrheit enthalten, dass alle Tätigkeit der Menschen irgendeinen geistigen Charakter trägt und dass auch die Politik, die imperialistische so wenig wie irgendeine andere geschichtlich bedeutungsvolle Politik, keineswegs ihrer Natur nach etwas Ungeistiges ist.' See Carl Schmitt, 'USA und die völkerrechtlichen Formen des modernen Imperialismus' in: *Frieden oder Pazifismus? Arbeiten zum Völkerrecht und zur internationalen Politik 1924-1978*, Hrsg. Günter Maschke (Berlin: Duncker & Humblot, 2005), 350.

<sup>38</sup> For such alternative accounts, see for instance Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', in: *European Journal of International Law*, Vol. 16 (2005).

<sup>39</sup> See also Michael Byers, 'Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change', in: *The Journal of Political Philosophy*, Vol. 11 (2003).

Schmitt thus ultimately affirms a view that dealing with genuine partisans – who, in his account, often are assimilated to figures whom one might as well call terrorists – is indeed beyond all normative regulation. It remains unclear – as so often in Schmitt – whether this is a more or less timeless fact about the political, or whether new normative regulations of dealing with partisans could in fact emerge once the old, now decaying system of state-centred international law – the ‘old regularity’, if you like – has been replaced with something else.

Finally, there is a third major claim in Schmitt’s sketch that might deserve our attention: what drives partisans most effectively – at least in Schmitt’s view – is a ‘telluric’ motivation; put differently, they are driven above all by nationalism, or at least by demands that can ultimately be tied back to territory. Schmitt does not provide a clear empirical (or, for that matter, normative) justification for this view, but, as I have tried to show in an earlier article, a belief in the sheer motivational power of nationalism was one of the few constants in his thought (that after all stretched for almost seventy years of the twentieth century).<sup>40</sup> Recent analyses of al-Qaeda have interestingly suggested that motivations which ultimately might as well be described as nationalist, or at least as being tied to territorial demands, might better explain terrorist phenomena, and suicide terrorism in particular, than accounts centred on de-territorialized ideological belief systems.<sup>41</sup>

Moreover, the link to territory provides, in Schmitt’s vision, the only means of preventing partisanship from turning into absolute enmity. Concrete, territorial demands will allow for a measure of calculability or even containment in a way that traditional law, at least in the novel geopolitical constellation with which Schmitt

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<sup>40</sup> Jan-Werner Müller, ‘Carl Schmitt – an Occasional Nationalist?’, in: *History of European Ideas*, vol. 23, no. 1 (1997).

<sup>41</sup> Robert Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism* (New York: Random House, 2005)

thinks he is confronted, does not. It is therefore, in the Schmittian view, decisive whether one is facing a partisan defending territory, as opposed to a transnational (and transterritorial) terrorist who is making absolute revolutionary, or even millenarian-apocalyptic, claims that cannot possibly be fulfilled through negotiation or the kind of duel-like contained conflict which, according to Schmitt, did not criminalize the enemy and made a just peace possible. Defensive partisans and apocalyptic terrorists cannot necessarily be distinguished by the means they employ, but only by genuine knowledge of their goals.

*... and how to counter them*

I have tried to show that observers who link Carl Schmitt's thought with the US approach – or at least the initial approach -- to what has become in rather Orwellian fashion as the 'GWOT' do indeed have a point. Those lawyers and civil servants responsible for sidelining the Geneva conventions appeared to share Schmitt's view that between regular states and armies on the one hand and terrorists and partisans on the other exists nothing but a normative void. Partisans and terrorists, according to Schmitt, signal that they have given up on regular protections associated with the laws of war, and that they are willing to risk not just their lives, but also their honour and their dignity. It is then, from Schmitt's point of view, neither irrational nor surprising that states enter conflict accepting this initial signal – while in turn being willing to risk the safety, dignity, and, presumably, the reputation of their own soldiers and officials.

However, in certain ways even more disquieting might be another element of Schmitt's thought: he held that the emergence and subsequent importance of the partisan – and, by implication, the transnational terrorist – are symptoms of the decay of a wider system of law centred on particular political forms – in this case, the nation-state. The response by state actors is, on this reading, not just a matter of ruthless executive power-grabbing, of dehumanizing the enemy so that he can be treated inhumanely, or, in a more generous interpretation, a question of an uncontained moral panic that makes state actors shed all restraints out of fear. Rather, there are deeper *structural* reasons why partisans and terrorists emerge as important global actors, and why state actors are unable to use stick with traditional, 'duel-like' form of conflict.

One might say, then, that to resist a Schmittian approach to the 'war on terror' a two-part strategy is necessary: on the one hand, we want to show why the 'normative void' view is morally, legally and also strategically wrong. There is no compelling reason of any kind why the terms on which terrorists have chosen to enter a conflict have to be accepted by those terrorists have chosen as their enemies. However, fully to make good on this claim in the face of Schmitt's challenge requires either contesting Schmitt's assertions about structural changes in political forms and the international system; or saying that there is indeed some truth in the idea of profound transformations of Westphalian statehood, or, at least, that there are novel forms of cooperation and competition between governments and non-state actors emerging. The challenge then becomes to show that even under such conditions certain legal norms and moral restraints must be preserved and vindicated. Schmitt himself certainly did not offer a compelling reason for why even the Vattelien idea of *la guerre en forme* could not be conserved; and, if anything, he over-estimated the

capacity even of hegemonic powers more or less single-handedly to reshape legal languages and moral perceptions to suit their interests. Even a supposedly ‘unipolar moment’ might not allow a ‘single remaining superpower’ to do so, as recent years have amply demonstrated.

Finally, there is the question of how to interpret the goals of terrorists: Schmitt’s claim about the power of territoriality is worth taking seriously, even if only fine-grained *empirical* analysis can show what the terrorists’ chosen enemies are actually dealing with. It then might become possible properly to separate those devoted to some delimited form of enmity from those who have decided to engage in what Schmitt would have called absolute enmity. And engaging the former may well be an appropriate way to fight the latter more effectively.

So, in the end, Schmitt’s challenge to liberal thought is arguably much more complex and also more comprehensive than might be apparent at first sight: successfully contesting current strategies in the ‘GWOT’, if seen through a Schmittian lens, will require at least a moral-legal argument as well as a larger structural reading of the global context.