



SEÇÃO: ÉTICA E FILOSOFIA POLÍTICA

## “A Conviction about What is Moral or Lawful” Carl Schmitt on humanitarianism, the *humanum*, and the possibility of a “universal *jus commune*”

*“Uma convicção sobre o que é moral ou lícito” Carl Schmitt sobre o humanitarismo, o humanum, e a possibilidade de um “jus commune universal”*

*“Una convicción sobre lo que es moral o legal” Carl Schmitt sobre el humanitarismo, el humanum, y la posibilidad de un “jus commune universal”*

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**Abstract:** Carl Schmitt (1888-1985) spent much of his life arguing against human rights. While this may not come as a surprise, a closer examination of *The Concept of the Political* reveals that Schmitt's critique of Liberal humanitarianism is itself rooted in a concept of the *humanum* as a sphere of substantive moral and political conflict. As an analysis of Schmitt's concept of the enemy shows, this *humanum* serves as an argument for the necessity of a juristic distinction between enemy and foe. For, only by distinguishing between the relativized enemy and the absolute foe, Schmitt argues, will we be able to distinguish create a space for particularly political action. Having revealed the framework of mediated moral conflict, in which Schmitt conceives of political action, I then turn to consider Schmitt's minimalist proposal for a positive definition of a “universal *jus commune*” and assess its significance for a discussion of human rights.

**Keywords:** Carl Schmitt. Human rights. Friend-enemy. Foe. Humanum.

**Resumo:** Carl Schmitt (1888-1985) passou grande parte de sua vida argumentando contra os direitos humanos. Embora isso possa não ser uma surpresa, um exame mais detalhado de *O conceito de político* revela que a crítica de Schmitt ao humanitarismo liberal está enraizada em um conceito do *humanum* como uma esfera de conflito moral e político substantivo. Como mostra uma análise do conceito de inimigo de Schmitt, esse *humanum* serve como um argumento para a necessidade de uma distinção jurídica entre inimigo e inimigo. Pois, apenas distinguindo entre o inimigo relativizado e o inimigo absoluto, Schmitt argumenta que seremos capazes de distinguir e criar um espaço para uma ação particularmente política. Tendo revelado a estrutura do conflito moral mediado, em que Schmitt concebe a ação política, passo a considerar a proposta minimalista de Schmitt para uma definição positiva de um “*jus commune universal*” e avalio seu significado para uma discussão dos direitos humanos.

**Palavras-chave:** Carl Schmitt. Direitos humanos. Amigo-inimigo. Inimigo. Humanum.

**Resumen:** Carl Schmitt (1888-1985) pasó gran parte de su vida argumentando contra los derechos humanos. Si bien esto puede no ser una sorpresa, un examen más detenido de El concepto de lo político revela que la crítica de Schmitt al humanitarismo liberal tiene sus raíces en un concepto del *humanum* como una esfera de conflicto moral y político sustantivo. Como muestra un análisis del concepto de enemigo de Schmitt, este *humanum* sirve como argumento para la necesidad de una distinción legal entre enemigo y enemigo. Pues, sola-



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mente distinguiendo entre el enemigo relativizado y el enemigo absoluto. Schmitt sostiene que seremos capaces de distinguir creando un espacio para la acción particularmente política. Habiendo revelado la estructura del conflicto moral mediado en el que Schmitt concibe la acción política, paso a la propuesta minimalista de Schmitt para una definición positiva de un "jus commune universal" y evalúo su importancia para una discusión de los derechos humanos.

**Palabras clave:** Carl Schmitt. Derechos humanos. Amigo-enemigo. Enemigo. Humanum.

Carl Schmitt (1888-1985) spent much of his life arguing against human rights. This may not surprise those familiar with his work and biography and many of Schmitt's interpreters continue to see in his thought little more than the theoretical foundation of his membership in the National Socialist Party (1933-1936) and the justification of Hitler's tyranny and the Holocaust.

Critical as Schmitt may have been of universal humanitarianism, however, it is also immediately clear when reading Schmitt's work that he is not at all interested in justifying the inhumane. For, aside from any questions about Schmitt's "anthropological pessimism" or general misanthropy, let alone his anti-Semitism,<sup>3</sup> his critique of universal humanitarianism can only be understood as an argument against the political misuse of the term humanity and is essentially a reflection on the relationship between the *humanum* and the political. Taking the *humanum* as my argumentative leitmotif, I will argue that Schmitt's concept of the political not only constantly relates to and finds its ultimate limit in a concept of human existence located between morality and law, but that it is only in the apprehension of this *humanum* in Schmitt's thought that we can begin to understand the possibility of a positive understanding of universal rights in his writings. To this end, I will argue that Schmitt saw the function of law and, thus, the possibility of anything like human rights, as the creation of an overarching framework within which a limited and human form of moral enmity and conflict must be permissible.

I have divided this paper into three main sections. In the first part, I begin by reviewing Sch-

mitt's critique of universal humanitarianism as a deceptively partisan ideology. I then argue that this relativization of humanitarianism's universal claim is not intended to lead to a nihilistic moral relativism, but rather to reveal the omnipresence of the moral decision behind all social conflict and thus those concerning human rights as well. It is, therefore, only as moral and thus political claims that the human rights corpus can be understood as one formulation among many of a highest and therefore undefinable good in which it too participates.

Having made clear the essentially moral nature of human rights' claim to a certain social order, in the second section, I turn to examine the way in which Schmitt elevates the sphere of rights, or law, above that of the purely moral. In order to demonstrate this, I show how Schmitt's friend-enemy distinction, far from the gateway to unquenchable hatred, in fact represents a juristic concept intended to permit a form of relativized and, above all, *humanized* enmity in contrast to the absolute enmity directed at the "foe" or "criminal." Ironically, humanitarianism's strict rejection of any concept of the enemy is merely the flip side of totalized enmity, both of which represent fundamental misunderstandings of the enemy because they are incapable of thinking in mediated terms and grasping the enemy as not only a moral, but also legal category. In distinguishing the moral from the lawful and identifying the latter as a reflection upon its relationship to the moral, we see once more the idea of an overarching structure within which conflict is possible as the guiding principle of Schmitt's conception of law's function.

In the third and final section, I draw together the results of the first two sections and reflect on Schmitt's mention of a "universal *jus commune*" (*durchgängiges Gemeinrecht*)<sup>4</sup> as a possible conception of what human rights might be and what rights one might understand as such. Though Schmitt mentions only two rights, formulated as one single right, namely, the "right to property

<sup>3</sup> Walter (ed.), *Der Begriff des Politischen: Synoptische Darstellung der Texte*, Duncker & Humblot, Berlin 2018, 1.

<sup>4</sup> Schmitt, *Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien (BP)*, Duncker & Humblot, Berlin 2009, 105.

and a procedural minimum (due process of law),<sup>5</sup> it is precisely in the minimalism of this proposal that we see Schmitt's concern not as the establishment of a human rights corpus, but as the enabling of discourse about the good and the nature and purpose of human being.

### Schmitt's critique of universal humanitarianism

Schmitt formulates the logical groundwork for his critique of universalist human rights most clearly in the sixth chapter of *The Concept of the Political*. His immediate critique directs itself at what he sees as the dishonest claim to neutrality made by self-proclaimed representatives of "humanity." He writes,

When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent. At the expense of its opponent, it tries to identify itself with humanity in the same way as one can misuse peace, justice, progress, and civilization in order to claim these as one's own and to deny the same to the enemy.<sup>6</sup>

While this may seem to be a rather cynically neutral view of the term humanity as a meaninglessly flexible instrument which can be used by any party, Schmitt's concern here lies first and foremost in the false use of a universal term to describe a particular and relative standpoint, which blatantly contradicts any meaningful notion of humanity. For, because the political can only take place between human beings, it remains "an empty phrase if it does not signify politically that

certain men of this higher order rule over men of a lower order."<sup>7</sup> It is this unavoidable partiality of any claim to represent humanity that leads Schmitt to write that "humanity is not a political concept,"<sup>8</sup> by which he means that humanity as such cannot take on a political form. In the absence of any politically meaningful sense of the term "humanity," "when being reproached for immorality and cynicism, the spectator of political phenomena can often recognize in such reproaches merely a political weapon used in actual combat."<sup>9</sup> For the "observer of political phenomena," the use of the term "humanity" is an ideological weapon used to feign neutrality - nothing more and *nothing less* - because humanity lies "beyond" the sphere of the political. *Auctoritas, non veritas facit legem*.

That the concept of humanity lies beyond the political does not, however, mean that it is beyond the purview of the political thinker nor that it does not bear a central relevance for the concept of the political. In fact, the very opposition between the claim to be on the side of humanity and the value-neutral political thinker, for whom both parties are first and foremost claimants to truth, reflects the fundamental connection between political thought and Schmitt's concept of the human. It is precisely the "observer of political phenomenon," who is aware of what humanity truly means and who, by not using the term humanity, expresses this awareness almost in the vein of Proposition 7 of Wittgenstein's *Tractatus Logicus-Philosophicus*, "Whereof one cannot speak, thereof one must be silent."<sup>10</sup> It is the political thinker who does justice to humanity by not taking the name of humanity in

<sup>5</sup> Schmitt uses the English term "due process of law" in parentheses.

<sup>6</sup> CP, 54 [51]: "Wenn ein Staat im Namen der Menschheit seinen politischen Feind bekämpft, so ist das kein Krieg der Menschheit, sondern ein Krieg, für den ein bestimmter Staat gegenüber seinem Kriegsgegner einen universalen Begriff zu okkupieren sucht, um sich (auf Kosten des Gegners) damit zu identifizieren, ähnlich wie man Frieden, Gerechtigkeit, Fortschritt, Zivilisation mißbrauchen kann, um sie für sich zu vindizieren und dem Feind abzusprechen." In general, English translations of quotes from *The Concept of the Political* (CP) have been taken from *The Concept of the Political. Expanded edition. Translation, Introduction, and Notes by George Schwab*, Chicago 2007. The second, bracketed page number refers to the German text (BP). I have noted any alterations I made to Schwab's translation and, where I think it relevant, provided the original German. This translation includes, however, neither the foreword nor the three corollaries or the endnotes published in the 1963 edition. For these sections, I thus provide only the page number in the German text.

<sup>7</sup> Ibid., 67 [26].

<sup>8</sup> Ibid., 55 [52].

<sup>9</sup> Ibid., 67 [62] (alteration N.H.): "der Betrachter politischer Phänomene kann, wenn er konsequent bei seinem politischen Denken bleibt, auch in dem Vorwurf der Immoralität und des Zynismus immer wieder nur ein politisches Mittel kämpfender Menschen erkennen."

<sup>10</sup> Wittgenstein, Ludwig. *Tractatus logico-philosophicus. Werkausgabe Band 1*, Suhrkamp, Frankfurt a.M. 2016, 85. It is as a critique of speaking about humanity that we must understand Schmitt's statement that "Wer Menschheit sagt, will betrügen" (emphasis N.H., "Whoever says 'humanity' wants to deceive," translation N.H.). It would also be interesting to compare the way in which humanity loses its fundamentally political and thus also human character in constituting itself and the way in which the Master in Hegel's "master-bondage dialectic" ultimately finds that there is no one left to recognize its victory with the way that a fully realized humanity would lose its very human being.

vain and claiming to represent something clearly too vast for any single position to occupy.<sup>11</sup>

In the following sections I will use the terms humanitarianism and human rights more or less interchangeably because, as far as Schmitt's criticism is concerned, their misunderstanding of the political is essentially the same. In the course of this paper, I will also use the term Liberalism in an at times nearly synonymous way because, for Schmitt, it is absolutely clear that "The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism,"<sup>12</sup> that is, Liberalism. Likewise, adjectives such as economic, technical, scientific, but also universal, will be used flexibly depending on the argumentative context and the aspect of Schmitt's *humanum* being described.

### The Moral Fabric of the Political

Schmitt's critique of human rights expresses itself initially as a relativization of their claim to universality and an attack on their pretension to neutrality. While such a lowering may seem to do injustice to both the "higher" as well as more the "fundamental" status of human rights, in reality, this relativization is not only intended to deny their higher claims, but rather to reveal the very fundamental political and moral claims concerning what is right, which are being made even in the most quotidian laws and seemingly straightforward of conflicts. Leo Strauss noted this, when he wrote of Schmitt's affirmation of the political as "ultimately nothing other than the affirmation of the moral"<sup>13</sup> because, "it is always possible to reach agreement regarding the means to an end that is already fixed, whereas there is always quarreling over the ends themselves: we are always quarreling with each other and ourselves over the just and the good."<sup>14</sup>

Schmitt himself illustrates this in his text *Roman Catholicism and Political Form* (1923) with the example of a conflict between a factory owner and the factory workers, in which the factory owner says, "I feed you," and the workers answer, "we feed you" and both sides believe they are in the right.<sup>15</sup> While it may be tempting to believe that one side is actually in the right and that one could demonstrate this by pointing to a mathematically calculable economic discrepancy, this, Schmitt tells us, would be a misrecognition of the moral-political reality at hand.

This no struggle of production and consumption, in no sense something economic; it arises from a different conviction about what is moral or lawful. It concerns the ethical or legal determination of who is actually the producer, the creator and therefore the owner of modern wealth.<sup>16</sup>

For Schmitt, therefore, not only are all ostensibly economic conflicts fundamentally political and moral in nature, the very idea of an economic conflict is a *contradictio in adjecto* insofar as the economic in its ideal form represents a conflict-free sphere of activity.<sup>17</sup> Who receives how much, who has to work how much, who the real producer of wealth is; all these questions seemingly concerned only with distribution and allocation are, in reality, moral ones. There is and would be no conflict without the political. For, just as every party will claim to be fighting in the name of humanity or the good, so too a real conflict between the factory owner and the factory workers is not based in one party's desire for a fair solution and the other party's desire for an unfair solution, but by their differing views on what is fair and just. It is in this sense, in the ever-presence of a moral decision and thus a decision about the good, that human rights, as questions of the good and the just or the moral

<sup>11</sup> Cf. Hannah Arendt's argument against the validity of "the good" as a political concept in *Vita Activa: oder vom tätigen Leben*, Piper, Munich 1967, 71 (§10).

<sup>12</sup> *CP*, 54; [51]: "Menschheit ist ein besonders brauchbares ideologisches Instrument imperialistischer Expansionen und in ihrer ethisch-humanitären Form ein spezifisches Vehikel des ökonomischen Imperialismus."

<sup>13</sup> Strauss, *Notes on Carl Schmitt*, in: *The Concept of the Political*, trans. J. Harvey Lomax, in: *CP*, 97-123; here, 115 (section 27).

<sup>14</sup> *Ibid.*, 117-118.

<sup>15</sup> Schmitt, *Roman Catholicism and Political Form (RC)*, trans. Gary L. Ulmen, Westport, CT: Greenwood Press 1996, 17.

<sup>16</sup> *Ibid.*, 17-18.

<sup>17</sup> Regarding conflict's centrality for the political, see, *CP*, 26-27 [25-26]. Liberalism's own formulation of this ideal absence of conflict is illustrated by Schmitt in his discussion of Liberalism's attempt to eliminate "power" (*Gewalt*), *CP*, 74-78 [68-71].

in the broadest sense of the term, are the root and object of all conflict.

Now, perhaps, it seems as if we have not really gotten any further than the mere relativization of all moral claims. And in a certain way we have not, since, as far as our ability or, rather, inability to determine which side is 'in the right' is concerned, there is little difference between both sides having a claim to truth and neither side having one. Effectively, both the universalization of moral claims as the basis of all law and conflict would seem to be the same as their absolute devaluation and relativization. In order for the difference between these two views and valuations to become apparent, we must move beyond the immediate question of which side is right and understand the dynamic at work when two sides, both in the right, collide with one another.<sup>18</sup>

Central as the question, "who is right?", is, when determining what rights are human rights, it obfuscates our view, when we try to understand the moral nature of human rights and their position as inhabitants of a pluralistic political world. Taken to its logical extreme, Schmitt's relativization of human rights as one moral order among many lowers human rights to the level of law as such. For, not only do all human collectives believe that they are in some way fighting for the good, this question of the good is latently present in all law. Yet, if human rights are actually just like any other set of laws, this is not because both are arbitrary determinations of the good, but because what they share and what makes them human is a moral decision in the broadest sense of the term, realized in an encounter with the other.

I write of the moral in the "broadest" sense of the term in order to distinguish it from morality understood as a fixed aspect of life concerning moral action. Charles Taylor describes a similar distinction in *Sources of the Self*, when he writes of "justice and the respect of other people's life,

well-being, and dignity" as "a gamut of views a bit broader than what is normally described as the 'moral,'" yet tied to moral issues because "they all involve what I have called elsewhere 'strong evaluation', that is, they involve discriminations of right or wrong, better or worse, higher or lower."<sup>19</sup> In a certain sense, we are dealing with the difference between morality and the moral. Indeed, this distinction is itself essential to Schmitt's concept of the political, if one is to understand how Schmitt can argue that the political supersedes the oppositions between "good and evil in the moral sphere,"<sup>20</sup> while also making clear that it is very much the moral which is at stake in the political as well as that this political necessitates the presupposition of an evil or problematic human nature which is, however, "to be taken here in a rather summary fashion and not in any specifically moral or ethical sense."<sup>21</sup> Instead, the moral in this most general sense is, one might say, the very act of distinction or, as Schmitt might say, de-cision (*Ent-scheidung*). The difference I am trying to get at here and which I think Schmitt's political is based on has been expressed by Taylor when he writes that,

Much contemporary moral philosophy, particularly but not only in the English-speaking world, [...] has tended to focus on what it is right to do rather than on what it is good to be, on defining the content of obligation rather than the nature of the good life; and it has no conceptual place left for a notion of the good as the object of our love or allegiance.<sup>22</sup>

What Taylor's contrasting pairs are getting at is a distinction between naturalism's formalism (right, doing, content, obligation) and some other more holistic and active way of apprehending what the moral means (good, being, nature, good life). Moral existence does not exhaust itself in the question of what is moral and what is immoral, but rather represents a fabric or medium through which the structure of the political manifest

<sup>18</sup> Szondi, *Versuch über das Tragische*, Insel Verlag, Frankfurt a.M. 1961.

<sup>19</sup> Taylor, *Sources of the Self. The Making of Modern Identity*, Harvard University Press, Cambridge 1989, 4.

<sup>20</sup> *CP*, 26 [25].

<sup>21</sup> *Ibid.*, 58 [55].

<sup>22</sup> Taylor, *Sources of the Self*, 3.



itself as a kind of participation in a discourse on the good, however difficult it may at times be to see this discourse.

In making the possibility of a meaningful concept of humanity dependent upon its political realization, Schmitt defines his concept of humanity as a fundamentally pluralistic and, thus, internally political one. Humanity's relationship to the political is, therefore, twofold. On the one hand, "Humanity is not a political concept"<sup>23</sup> because it is impossible to adopt a position – given that one is a political actor with a specific and only partial position within the political world – which could be called that of humanity. On the other hand, it is precisely this impossibility of assuming the position of humanity, the impossibility of not occupying a morally relative standpoint and thus the impossibility of any claim to absolute truth, which reveals the pluralism of the moral and of the political world as the inner constitution of the *humanum*, understood as the overarching framework for conflict between humans concerning both their rights as well as what is right.

When Schmitt argues that "The political entity cannot by its very nature be universal in the sense of a unity embracing all of humanity and the entire world"<sup>24</sup> because humanity "has no enemy,"<sup>25</sup> he is invoking the alarming rhetoric of the enemy to make a point, not about humanity's eternal damnation to conflict and war, but about the subject's fundamental need for a "co-existing, political unity," in other words, what one could call the Other. Humanity cannot differentiate itself from anything. For, having unified and permanently pacified all human beings, it lacks any other that could acknowledge its existence. It would have constituted itself before an absolute void and, as Schmitt writes in another context, "A life which has only death as its antithesis is no longer life but

powerlessness and helplessness."<sup>26</sup> The political differentiation must, therefore, be a "distinction in mankind,"<sup>27</sup> "For life struggles not with death, spirit not with spiritlessness; spirit struggles with spirit, life with life."<sup>28</sup> We cannot allow ourselves to be convinced into confusing a *Weltstaat* with the *Staatenwelt*.

It is in the image of such a humanity both beyond and yet constituted by the political and in analogy to the political as a sphere of moral conflict that Schmitt conceives of what can be understood as his minimalist concept of universal rights as a *complexio oppositorum*, in which political difference is possible.

### The humanum and law

In the preceding paragraphs, I have tried to show the way in which Schmitt argues for the essentially moral nature of all social conflict as well as rights. At the same time, it would be an oversimplification of Schmitt's concept of the political and his *humanum* to see in it nothing more than a cold sphere of unmediated morality or to see in conflicts concerning the definition of human rights a "clash of cultures." On the contrary, the concept of the political presupposes a *legal elevation* above unmediated morality. In a certain sense, most attempts to relativize Schmitt's defense of the political are unsuccessful not because they seek to relativize and thus blunt the "the force of real life,"<sup>29</sup> but rather because they overlook or are unwilling to accept the already present relativization in Schmitt's understanding of the political, namely, the relativization of enmity through the permission of war as a legitimate means of political action.<sup>30</sup> In reality, however, it is this relativization of moral enmity which delineates the political, not as a sphere of the extreme, but

<sup>23</sup> CP, 55 [52]: "Menschheit ist kein politischer Begriff."

<sup>24</sup> Ibid., 53 (alteration N.H.) [50]: "Die politische Einheit kann ihrem Wesen nach nicht universal in dem Sinne einer die ganze Menschheit und die ganze Erde umfassenden Einheit sein."

<sup>25</sup> Ibid., 54 [51].

<sup>26</sup> Ibid., 95 [87]: "Ein Leben, das gegenüber sich selbst nichts mehr hat als den Tod, ist kein Leben mehr, sondern Ohnmacht und Hilflosigkeit."

<sup>27</sup> Ibid., 36 [34].

<sup>28</sup> Ibid., 96 [87].

<sup>29</sup> Schmitt, *Politische Theologie. Vier Kapiteln zur Lehre von der Souveränität (PT)*, Duncker & Humblot, Berlin 2009, 21: "die Kraft des wirklichen Lebens" (translation N.H.).

<sup>30</sup> Cf. CP, 30 [29]: "Finally even more banal forms of politics appear, forms which assume parasite- and caricature-like configurations. What remains here from the original friend-enemy grouping is only some sort of antagonistic moment."

as a sphere of mediated existence, positioned, accordingly, in the middle. Indeed, for Schmitt, the human is far too closely linked to its capacity for intellectual abstraction and reflection for him to conceive of the *humanum* as the unreflective and unequivocal equation of one's position with morality or absolute truth.<sup>31</sup> While Schmitt makes clear that such absolute claims are, indeed, possible, he explicitly conceives of the political as a sphere in which such claims are relativized and humanized. This becomes clear, not only when one takes note of his repeated use of the phrase "hors l'humanité" to describe the non-status of those humanitarianism declares its enemy, but also, when one considers Schmitt's concept of the enemy not in the context of his friend-enemy distinction, but rather as part of an *enemy-foe distinction*.<sup>32</sup> For, the enemy, far from the object of an unquenchable hatred, is, Schmitt argues, a juristic concept intended to both limit and permit moral conflict, thus, acknowledging, accepting and humanizing it rather than eliminating it.

Initially, Schmitt presents the enemy, "our own question as a figure,"<sup>33</sup> as a moral category, and political concept in opposition to the friendship of economic exchange. It is the friend-enemy distinction that ensures the serious case and the possibility of fighting for one's substantive beliefs and all attempts to domesticate, let alone eliminate or transform the friend-enemy distinction lead to fundamental misunderstandings of Schmitt's

concept of the political.<sup>34</sup> The friend-enemy distinction is an "as such immediately elucidating distinction as the simple criteria of the political" and "the specific political distinction to which political actions and motives can be traced back is that between friend and enemy."<sup>35</sup>

The friend and enemy concepts are to be understood in their concrete and existential sense, not as metaphors or symbols, not mixed and weakened by economic, moral, and other conceptions, least of all in a private-individualistic sense as a psychological expression of private emotions and tendencies.<sup>36</sup>

The friend-enemy distinction presupposes "the ever present possibility of combat," or, more precisely, "war" as "armed combat between organized political entities." And by "armed," Schmitt specifies, he means "a means of physically killing human beings." It is this "real possibility of physical killing" through which "the concepts of friend, enemy, and combat receive their real meaning." The reason for this is quite simply that one's physical existence, one's life, in other words, is the ultimate sacrifice one can make and that it is precisely such an ultimate sacrifice which the "serious case" demands of us by virtue of its being the serious case. Thus, while Schmitt makes clear that the concept of war only has the function of "the most extreme realization of enmity,"<sup>37</sup> he also challenges us to find a phenomenon other than war that could be equated with the serious case in the same way as war. "War," Schmitt confirms,

<sup>31</sup> Cf. Schmitt's citation of the term "brain" in the thought of two other authors: *ibid.*, 34, fn. 14: To be precise, war, for Clausewitz, is not merely one of many instruments, but the ultima ratio of the friend-and-enemy grouping. War has its own grammar (i.e., special military-technical laws), but politics remains its brain. It does not have its own logic; *BP*, 32, fn. 10.: "Genau betrachtet ist übrigens bei Clausewitz der Krieg nicht etwa eines von vielen Instrumenten, sondern die 'ultima ratio' der Freund- und Feindgruppierung. Der Krieg hat seine eigene 'Grammatik' (d.h. militär-technische Sondergesetzmäßigkeiten, aber die Politik bleibt sein 'Gehirn', er hat keine 'eigene Logik';" and, *RC*, 36: "What continually provoked the anarchist was their intellectualism. They had too much "idea," too much "brain." Bakunin can only utter the word "cervelle" with sibilant fury. Behind this word he rightly suspected the claim to authority, discipline, and hierarchy;" *RK*, 61-62: "Was den Anarchisten immer von neuem reizte, war ihr Intellektualismus. Sie hatten zuviel »Idee«, zuviel »Gehirn«. Das Wort »cervelle« kann Bakunin nur mit zischender Wut aussprechen; hinter ihm wittert er, mit Recht, den Anspruch auf Autorität, Disziplin, Hierarchie." Günter Meuter writes that "the dismissive evaluation of that which one could call the 'concrete-factual' is among the ideas that provide his work as a whole with continuity. Thus, as early as 1914, Schmitt writes that a "bare factuality" lacking all transcendence is of no value whatsoever; such value results as part of an abstract reference to a norm." German: "Schmitt's Die abschätzige Bewertung dessen, was man das Konkret-Faktische nennen könnte, gehört zu den kontinuierlichstiftenden Momenten von Carl Schmitts Gesamtwerk. So spricht Schmitt bereits 1914 davon, daß die tranzendenzlose "bloße Tatsächlichkeit" überhaupt keinen Wert habe; dieser ergebe sich nur im abstrahierenden Bezug auf eine Norm." *Zum Begriff der Transzendenz bei Carl Schmitt*, in *Der Staat*, vol. 30, 483-512, here, 483.

<sup>32</sup> Cf. Schmitt, *Theorie des Partisanen. Zwischenbemerkung zum Begriff des Politischen (TP)*, Duncker & Humblot, Berlin 1963, 87 ff., esp. 94.

<sup>33</sup> *TP*, 87 f.: "unsere eigene Frage in Gestalt" (my translation).

<sup>34</sup> *CP*, 32 ff. [31 ff.]

<sup>35</sup> *CP*, 26 (alteration N.H.) [25]: "Die Frage ist dann, ob es auch eine besondere, jener anderen Unterscheidungen zwar nicht gleichartige und analoge, aber von ihnen doch unabhängige, selbständige und als solche ohne weiteres einleuchtende Unterscheidung als einfaches Kriterium des Politischen Die spezifisch politische Unterscheidung, auf welche sich die politischen Handlungen und Motive zurückführen lassen."

<sup>36</sup> *Ibid.*, 27-28 [27].

<sup>37</sup> *Ibid.*, 32-33 (alteration N.H.) [31].

"is still today the most extreme possibility."<sup>38</sup>

Now, as much as Schmitt's interest in the friend-enemy distinction lies in its constitutive function for political unity and sovereignty and the way in which it ensures the possibility of the "serious case" and "physical killing," there is another aspect of the concept of the enemy which interests Schmitt and which he discusses as part of his critique of humanitarianism, when he writes,

The use of the name "humanity," the appeal to humanity, the seizing of this word, all this could, for the simple reason that one cannot use such sublime names without certain consequences, only manifest the terrible claim that the enemy should be denied the quality of being human and declared *hors-la-loi* and *hors l'humanité* and that this war should be waged to the point of the most extreme inhumanity.<sup>39</sup>

In particular, I would like to point out that Schmitt criticizes the possibility "that the enemy is denied the quality of being human." While this may seem to suggest only the very obvious fact that, as universal humanitarianism would also like to make clear, the enemy is a human being, Schmitt is not interested in the neutralization of enmity which humanitarianism would like to effect by revealing the 'real' identity of the enemy as a fellow human being. Instead, Schmitt wants to make clear that humanitarianism's self-identification with humanity leads to misunderstanding and dehumanization of the concept of the enemy, expressed as a loss of the legal distinction between the enemy as one's equal and the foe as an object of one's absolute hatred. This moment of political and legal recognition presupposed by the concept of the enemy is exemplified in the

fact that "As a sovereign state in a war subject to international law, the enemy is also acknowledged as one's equal. [...] The enemy too has a status; it is not a criminal."<sup>40</sup>

Schmitt uses a number of terms to describe this dehumanization and negation of the enemy as one's equal, but his use of the term "criminal" is significant here, as his repetition of the term makes clear, when he writes that "it is hard for humans not to consider their enemy a criminal."<sup>41</sup> The significance of the term "Verbrecher" lies in the fact that the criminal, like the enemy and even more obviously so, is a fundamentally legal concept. Unlike the enemy, however, the criminal is not recognized as one's equal. This meaning stems mostly from the criminal's relationship to the police, not the military, and thus its nature as a question of domestic politics. To illustrate this point, Schmitt cites "the classical maxim with which the Prussian-German army hoped to defeat the partisans: the troops fight the enemy; marauders are taken care of by the police."<sup>42</sup> While the criminal may retain certain rights, the legal relationship between the criminal and the state is necessarily imbalanced. To declare one's political enemy a criminal is, therefore, to speak of a foreign enemy as if they were a domestic enemy and thus to imply that one in some way governs the world. The consequence of such a blurring of the lines between the domestic and the foreign, the internal and the external are made clear in a passage of extreme importance for Schmitt's concept of the political, as his endnote about it only further emphasizes.<sup>43</sup>

<sup>38</sup> Ibid., 35 [33].

<sup>39</sup> BP, 11. "Die Führung des Namens 'Menschheit', die Berufung auf die Menschheit, die Beschlagnahme dieses Wortes, alles das könnte, weil man nun einmal solche erhabene Namen nicht ohne gewisse Konsequenzen führen kann, nur den schrecklichen Anspruch manifestieren, daß dem Feind die Qualität des Menschen abgesprochen, daß er *hors-la-loi* und *hors l'humanité* erklärt und dadurch der Krieg zur äußersten Unmenschlichkeit getrieben werden soll" (translation N.H.).

<sup>40</sup> Ibid., "Auch der Feind ist im Krieg des zwischenstaatlichen Völkerrechts als souveräner Staat auf gleicher Ebene anerkannt. [...] Auch der Feind hat einen Status; er ist kein Verbrecher."

<sup>41</sup> Ibid., "es fällt den Menschen schwer ihren Feind nicht für einen Verbrecher zu halten."

<sup>42</sup> Ibid., 17: "Man erinnere sich nur der klassischen Maxime, mit der die preußisch-deutschen Heere den Partisanen zu besiegen hofften: die Truppe bekämpft den Feind; Marodeure werden von der Polizei erledigt."

<sup>43</sup> Regarding the lines cited here, Schmitt writes (BP, 110): "P. 35. The end of section three is decisive for the concept of the enemy presupposed in this treatise [...] Thus, it is clearly stated that the fundamental meaning of the concept of the enemy does not lie in the annihilation of the enemy, but rather in defense, in a testing of one's strength and the achievement of a common border. Yet, there also exists a concept of the absolute enemy, which is expressly rejected here" (translation N.H.). German: "S. 35. Der Schluß dieses Abschnittes 3 ist für den in der Abhandlung vorausgesetzten Feindbegriff entscheidend [...] Damit ist deutlich gesagt, daß der hier zugrunde liegende Feindbegriff nicht in der Vernichtung des Feindes, sondern in der Abwehr, in der Messung der Kräfte und der Gewinnung einer gemeinsamen Grenze seinen Sinn hat. Doch gibt es auch einen absoluten Feindbegriff, der hier als unmenschlich ausdrücklich abgelehnt wird."



War the takes place in the form of the "absolute last war of humanity." Such wars are necessarily especially intense and inhuman because, by transcending the limits of the political framework, they simultaneously degrade the enemy in moral and other categories and are forced to make of him a monster that must not only be defeated but also utterly destroyed. In other words, he is an enemy who no longer must be compelled to retreat into his borders only.<sup>44</sup>

Here, we see with total clarity, the way in which Schmitt not only equates the enemy's dehumanization with its dejuridification and illegalization, but ultimately as an *exceeding of the political*.

In addition to the criminal, Schmitt also mentions the English word *foe* as a particularly vicious, disqualifying and dehumanizing epithet. Concerning the foe, in the second corollary to the concept of the political, Schmitt writes, "In English, the word *enemy* has entirely replaced the Germanic word *foe* (which originally meant only one's opponent in a mortal conflict and then later took on the meaning of any enemy)"<sup>45</sup> To describe the unthinkable intensity which such extra-political mortal enmity can take on, Schmitt cites Cromwell's speech from September 17<sup>th</sup>, 1665.

The first things therefore, that I shall speak to, is That, that is the first lesson of Nature: Being and Preservation ... The conservation of that "namely our National Being" is first to be viewed with respect to those who seek to undo it, and so make it not to be." Let us thus consider our enemies, the Enemies to the very Being of these Nations (he always repeats this "very Being" or "National Being" and then proceeds): "Why, truly, your great Enemy is the Spaniard. He is a natural enemy. He is naturally so; he is naturally so throughout - by reason of that enmity that is in him against whatsoever is of God. Whatsoever is of God which is in you, or which may be in you."<sup>46</sup>

In what can only be an intentional act of misinterpretation, Schmitt's citation of Cromwell's groundless hatred for papist nations is often presented as an expression of how Schmitt would like us to understand the enemy, when it is actually very clear that Schmitt is describing precisely an enmity based in an "appeal to [...] a higher or better law, a so-called natural law or law of reason"<sup>47</sup> and that this is "the worst confusion," which Schmitt wrote of on the previous page and which "arises when concepts such as justice and freedom are used to legitimize one's own political ambitions and to disqualify or demoralize the enemy."<sup>48</sup> In short, what neither universal humanitarianism nor Cromwell can understand is the concept of an enemy which "need not be morally evil."<sup>49</sup> They, in their fundamentally Protestant economism, cannot differentiate between the moral and the lawful. With the exception of "the fanatical hatred of Napoleon felt by the German barons Stein and Kleist,"<sup>50</sup> all of the examples Schmitt cites come from figures and ideologies which Schmitt openly opposes in his writings: Voltaire (French Revolution and Liberalism), Lenin (Communism), Cromwell (Protestantism).

Just before citing Cromwell, however, Schmitt provides us with a description of what it means to identify and recognize not the foe, but rather the enemy, writing, "Political thought and political instinct prove themselves theoretically and practically in the ability to distinguish friend and enemy. The high points of politics are simultaneously the moments in which the enemy is, in concrete clarity, recognized as the enemy."<sup>51</sup>

What is striking about these sentences is, of course, not the centrality of the friend-enemy distinction itself for Schmitt's definition of the

<sup>44</sup> CP, 36 (alteration N.H.) [35] "Der Krieg spielt sich dann in der Form des jeweils "endgültig letzten Krieges der Menschheit" ab. Solche Kriege sind notwendigerweise besonders intensive und unmenschliche Kriege, weil sie, über das Politische hinausgehend, den Feind gleichzeitig in moralischen und anderen Kategorien herabsetzen und zum unmenschlichen Scheusal machen müssen, das nicht nur abgewehrt, sondern definitiv vernichtet werden muß, also nicht mehr nur ein in seine Grenzen zurückzuweisender Feind ist."

<sup>45</sup> BP, 96-97: "Im Englischen hat das Wort *enemy* das germanische Wort *foe* (das ursprünglich nur den Gegner im tödlichen Kampf, dann jeden Feind bedeutete) ganz verdrängt."

<sup>46</sup> CP, 67-68 [62].

<sup>47</sup> Ibid., 66-67 [62]: "Zweitens könnte die Berufung auf das Recht bedeuten, daß ein höheres oder richtigeres Recht, ein sogenanntes Natur- oder Vernunft-Recht dem Recht des *status quo* entgegengesetzt wird."

<sup>48</sup> Ibid., 66 [61].

<sup>49</sup> Ibid., 27 [26].

<sup>50</sup> Ibid., 67 [62].

<sup>51</sup> Ibid.

political, but rather the moment of theoretical reflection which Schmitt sees as the core of the great moments of recognition of the friend-enemy distinction. In other words, while Schmitt sees a distinction between friend and enemy as the motor behind political activity, there are two levels of distinguishing between friend and enemy. There is the immediate reality of the involved political actor for whom the enemy is the enemy, but there is also the moment in which, as those actors still aware of the meaning of the political know, the enemy is recognized as the enemy. What Schmitt is describing is a self-reflective moment amidst a political reality that demands a fundamentally non-reflexive conviction that one is fighting for the good, lest one succumb to the spirit of Hamlet and lose the strength to make a decision.<sup>52</sup> The political comes into sight not when one sees the enemy, but when one recognizes, both cognitively as well as politically, the enemy as the enemy. Thus, even the enemy, it turns out, is not a concept of the extreme, but rather, while indicative of the intensity which the political can reach, a relative concept, beyond which lies the foe.<sup>53</sup>

This enemy-foe distinction is reflected in Schmitt's concept of war. For, just as Schmitt differentiates between two concepts of the enemy, so too he also has two definitions of war, one political and one absolute.<sup>54</sup> Political war is the regulated war fought with limitations of whatever kind, which has as its goal the repelling of an enemy back to within its borders and thus, also, a clearly defined goal and limit.<sup>55</sup> Absolute war, on the other hand, can only stop when the enemy has been annihilated. It is in this distinction that

Schmitt's arguments about the relevance of war for the concept of the political as its most extreme possibility become fully comprehensible.

For, while it is the "real possibility of physical killing" that lends to politics its seriousness and differentiates it from the endless discussion of Liberal parliamentarianism, Schmitt also makes clear that this characteristic is common to both political and absolute war. Thus, in order to understand the political, we must also ask what criteria it is which makes a differentiation between political war and absolute war and, thus, enemy and foe, possible. That this distinction between the enemy and foe has generally been ignored in favor of the friend-enemy distinction is understandable, given that, for Schmitt, the "the main flaw" of *The Concept of the Political* lay "therein that the various kinds of enemy - conventional, real or absolute enemy - are not differentiated with sufficient clarity."<sup>56</sup>

Thus, while absolute war is indeed an intensification of limited political war, it is also qualitatively different in its unlimitedness. And this limitedness of political war comes, Schmitt makes clear, from the presence of a legal distinction. Indeed, it is precisely the legal nature of the enemy and limited war which characterizes the relationship between the enemy and the human.

The limitation and clear circumscription of war contains a relativization of enmity. Any such relativization is great progress for humanity. Naturally, it is not easy to effect this. For, it is hard for humans not to consider their enemy a criminal. European international law, with its terrestrial international war, was, at any rate, able to achieve this rare step forward.<sup>57</sup>

<sup>52</sup> Schmitt writes of "an endangerment of [the political actor's] immediate combative strength, a weakening by reflection, Hamletization" (BP, 109). Cf. Schmitt, Carl. *Hamlet oder Hekuba: Der Einbruch der Zeit in das Spiel*, Eugen Diedrich, Düsseldorf - Köln, 1956.

<sup>53</sup> I am fully aware of the obvious criticism which can be launched at such a theory of political recognition, in particular as Nancy Fraser has formulated it (see "Rethinking Recognition," in: *The New Left Review*, no. 3, May/June 2000, online at: <https://newleftreview.org/issues/ii3/articles/nancy-fraser-rethinking-recognition>, last accessed: March 24<sup>th</sup>, 2021). Aside from the fact that I think it insufficient to criticize what one might call Hegelian interpretations of political recognition as nothing other than "allegory" (Michael Hardt and Antonio Negri, *Empire*, 82, see also, 129) or even capitalist deception (just as I also acknowledge that there are clearly reasons for supporting a universalist approach to human rights), I think (for the same reason) that, in order to understand Schmitt's argument, which is the concern of this paper, it is necessary to first fully comprehend the fundamental formulation of political recognition as the recognition of the other not as "the same" as oneself, but as one's equal.

<sup>54</sup> I refer here to "absolute war" instead of "total war" because the latter is a more complex term and question which we cannot address in the space of this article and which concerns less the distinction between two kinds of war as it does the possibility of a state of total war which exceeds and ultimately dissolves even a concept of absolute war.

<sup>55</sup> For a critical appraisal of Schmitt's concepts of war, see, Teschke, Benno. *Carl Schmitt's concepts of war: a categorical failure*. In: Meierhenrich, Jens and Simons, Oliver (eds.) *The Oxford handbook of Carl Schmitt*. Oxford 2016, 367-400.

<sup>56</sup> BP, 16: "Der Hauptmangel in der Sache liegt darin, daß die verschiedenen Arten des Feindes - konventioneller, wirklicher oder absoluter Feind - nicht deutlich und präzise genug getrennt und unterschieden werden."

<sup>57</sup> BP, 11: "Die Hegung und klare Begrenzung des Krieges enthält eine Relativierung der Feindschaft. Jede solche Relativierung ist ein großer

Against the binary differentiation between war and not-war or, more precisely, the continued definition of peace as not being at war, Schmitt's concept of war is a juridic one which differentiates itself from the chaos of total war in the same way that the enemy differentiates itself from the foe, namely, in its juridification, relativization and humanization of enmity as an answer to "the great problem," namely, "the limitation of war."<sup>58</sup>

Schmitt's concept of war is not merely armed conflict between groups of people. It is a formalized, mannerist, visible and classical concept of war, so profoundly regulated that the opposing sides are "normally they are even identifiable by a uniform."<sup>59</sup> For Schmitt, when robbed of its legal framework and limits, war becomes absolute war and exceeds the political or, one might say, falls back below the level of the political and gives way to barbarism. And yet, to say that political war and absolute war differentiate themselves merely according to whether or not a legal distinction between enemy and foe is present would be a return to empty legal formalism.

In reality, the distinction between enemy and foe is not so much a legal distinction as a juristic one. For, given that the moral remains the fabric of the political, it is also clear that, while a legal relativization is necessary, this relativization cannot take on a purely formalistic and effectively neutralizing form, but must maintain its link to the moral and the human. For, like the question posed by the distinction between a juristic order and a legal order,<sup>60</sup> the distinction between friend and enemy cannot be the object of law itself, but can only be grasped by why Schmitt refers

to as "juristic thought" or "juristic logic," forms of perception still attuned to the "specific legal reality" and, most relevant at this moment, "a specific juridical logic [...] whose focus of interest is the normative guidance of human social life."<sup>61</sup>

### Closing remarks on the possibility of a Schmittian Human Rights Corpus

In analyzing the way Schmitt delineates the political as a sphere of substantive moral conflict within the framework of a juristic relativization of enmity, I have oriented my argumentation towards two concepts: the moral and the lawful. In doing so, I have tried to show the way in which Schmitt not only locates the political between the moral and the lawful but also ties it to a concept of the *humanum*. Yet, still, the question remains, what does this actually mean for human rights?

I would like to conclude this paper with a response to this question and, moreover, by turning to the Third Corollary of *The Concept of the Political*, entitled *Übersicht über nicht staatsbezogene Möglichkeiten und Elemente des Völkerrechts* (Overview of Non-State-Related Possibilities and Elements of International Law), in order to suggest that we can see here the possibility of a concept of universal rights in Schmitt's work. For, "alongside the *jus gentium* in the sense of a *jus inter gentes* (whose structural form varies depending on the *gentes*) there can exist a *universal jus commune* that goes beyond the borders of the self-contained *gentes* (peoples, states, empires)."<sup>62</sup>

This "universal *jus commune*," as I am translating the term here,<sup>63</sup> can, Schmitt writes,

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*Fortschritt im Sinne der Humanität. Freilich ist es nicht leicht, ihn zu bewirken, denn es fällt den Menschen schwer, ihren Feind nicht für einen Verbrecher zu halten. Dem europäischen Völkerrecht des zwischenstaatlichen Landkrieges ist der seltene Schritt jedenfalls gelungen.*

<sup>58</sup> BP, 18: "Yet, the great problem is how to limit war and this is either a cynical play, the performance of a *dog fight*, or an empty self-deception, if it is not tied to a relativization of enmity on both sides" (translation N.H.). The original German reads: "Das große Problem ist doch die Begrenzung des Krieges, und diese ist entweder ein zynisches Spiel, die Vernastaltung eines *dog fight*, oder eine leere Selbsttäuschung, wenn sie nicht auf beiden Seiten mit einer Relativierung der Feindschaft verbunden ist."

<sup>59</sup> CP, 34 (alteration N.H.) [31]: "normalerweise sogar durch eine "Uniform" gekennzeichnet."

<sup>60</sup> I mean this in the sense in which Schmitt writes in *Politische Theologie* (18) of the state of exception that there "exists an order in a juristic sense, even if it is not a legal order" (translation N.H.).

<sup>61</sup> RC, 12.

<sup>62</sup> BP, 105: "Neben dem *jus gentium* im Sinne eines (nach den Strukturformen der *gentes* verschiedenen) *jus inter gentes*," there is, he writes, the possibility of "ein über die Grenzen der in sich geschlossenen *gentes* (Völker, Staaten, Reiche) hinweggehendes, durchgängiges Gemeinrecht."

<sup>63</sup> The terms *Durchgängigkeit* as well as *durchgängig* could also be translated as "permeatingness" and "permeating," especially as they regard Schmitt's argument for the *impermeability* (*Impermeabilität*) of the state as the border between the foreign and the domestic (BP, 53). I have translated the term "*durchgängiges Gemeinrecht*" as "universal *jus commune*" in particular to emphasize the connection between it and the idea of a general framework for human rights as an extra-political phenomenon. In that such a right permeates the

lie in a common constitutional standard or the presupposition of a minimum degree of internal organization, in common religious, civilizing or economic conceptions and institutions. The most important case of its application is a universally recognized right of free people to property and a minimum degree of legal procedure (due process of law), which exceeds the borders of states and nations.<sup>64</sup>

Given that a complete analysis and exploration of this moment in Schmitt's thought would exceed the boundaries of this paper, I would like to point to five aspects of this thesis as they relate to this paper's argument: 1. the legal minimalism of Schmitt's proposal and its context in Schmitt's work as a whole, 2. the presence of the moral-lawful distinction, 3. the effecting, rather than definition, of human rights, 4. the difference between political sovereignty and economic autarchy, and 5. the shared language of the humanities as a model for a renewed discussion of human rights.

1. Legal minimalism. The first point I would like to note concerns the clearly minimalist character of this basic legal framework, which we also identified as a guiding thought behind both Schmitt's understanding of morality "in the broadest sense" as well as his argument for the permission of enmity and physical killing in the sphere of the political. In particular, I would like to mention two other texts in the context of which this corollary should be understood.

The motif of a minimal, elastic framework for social activity is not only central to Schmitt's notion of juristic order and the sovereign decision, but is also a prominent component of a particularly Catholic, socially oriented line of

thought present in Schmitt's writings.<sup>65</sup> In particular, Schmitt's frequent description of the Roman Catholic Church as a *complexio oppositorum* is to be noted. In *Roman Catholicism and Political Form*, which we have also briefly drawn on above (1.2.), Schmitt writes of the Church that "Its elasticity is really astounding,"<sup>66</sup> describing this "complexio oppositorum" as its diversity and ambiguity – the double face, the Janus/head, the hermaphroditic nature.<sup>67</sup> Considering this Catholicizing element of Schmitt's thought is essential, if we are to see the structural parallel between the *complexio oppositorum* of the Catholic church and the idea of the legal minimum behind Schmitt's formulation of a possible universal jus commune.<sup>68</sup>

Even more essential is that we consider a legal opinion he wrote, published in 1927 and entitled *Unabhängigkeit der Richter, Gleichheit vor dem Gesetz und Gewährleistung des Privateigentums nach der Weimarer Verfassung* (Judicial Impartiality, Equality Before the Law and the Guaranteeing of Private Property According to the Weimar Constitution). Here too, we see the principles of property (Privateigentum) and due process of law (Gleichheit vor dem Gesetz) as the structural principles of law representing both a bare minimum and the broadest possible framework in which the contents of law are left more or less open. In contrast to this text, however, in the third corollary of *The Concept of the Political*, Schmitt has dropped the principle of "the impartiality of judges" (not because he no longer thought it important, but because he no longer thought neutrality possible in a fundamentally depoliticized world).<sup>69</sup> The bare minimum to which I have

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border of the state, however, it effectively poses the question of an apolitical, universal right which 'violates' the externality of the state and subordinates it (logically, not forcefully) to an overarching extra-political unity.

<sup>64</sup> BP, 105: "Es kann in einem gemeinsamen Verfassungsstandard oder in einem Minimum von vorausgesetzter innerer Organisation, in gemeinsamen religiösen, zivilisatorischen und wirtschaftlichen Auffassungen und Einrichtungen bestehen. Der wichtigste Anwendungsfall ist ein über die Grenzen der Staaten und Völker hinweggehendes, allgemein anerkanntes Recht freier Menschen auf Eigentum und ein Minimum von Verfahren (due process of law)." The "generally recognized right of free peoples to property and [...] due process of law," should also be understood as references to Communism's elimination of private property and the right to "process of due law" contained in the 4th and 14th amendments of the constitution of the United States of America.

<sup>65</sup> Cf. Croce, Mariano and Salvatore, Andrea. *The Legal Theory of Carl Schmitt*, Routledge, Oxon - New York 2013.

<sup>66</sup> RC, 4.

<sup>67</sup> RC, 5; cf. Schmitt, Carl. *Illyrien - Notizen von einer damaltinischen Reise* (1925), in: *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916-1969*. Hrsg., mit einem Vorwort und mit Anmerkungen versehen von Günter Maschke, Ducker & Humblot, Berlin 1995, 483-490.

<sup>68</sup> In addition, though I have not included it here in my discussion, there remains the question of whether and the way in which Schmitt remains within the horizon of Liberalism as a political thinker for whom all decisions are valid so long as they possess the necessary existentiality and seriousness, *regardless of their content*, cf. Strauss, Leo. *Notes*, 120. In this regard, the empty, formalistic nature of Schmitt's concept of the political is an expression of its kind of conceptual minimalism, which is where Strauss locates Schmitt's Liberalism.

<sup>69</sup> Cf. corollary 1 in: BP, 89-93.

been pointing throughout this paper can, however, also manifest itself in the form of an "essential contents," as Klaus Kröger writes,

Carl Schmitt's objective categorization of the basic rights of the Weimar Imperial Constitution contains criteria that return in the present when theories of basic rights are specified. His special achievement was to have recognized the multi-layered nature of legal guarantees of basic rights and to have clearly conceptualized this. By differentiating between the content and legal effect of the various regulations contained in the second main part of the Imperial Constitution, he was able to work out the central, inviolable contents of the constitution's basic rights, which no constitutional amendment should be able to change.<sup>70</sup>

2. *The moral and the lawful.* Turning to the concrete contents of this universal *jus commune*, we can see that the dual right to property and due process of law is itself an expression of the conceptual pair of the moral and the lawful.

This becomes clear when one looks at the different possible substances of this universal *jus commune* Schmitt mentions. For, while this universal *jus commune* can, like the political, draw upon diverse fields of life for its unity, there is a subtle distinction between the substantive (law, religion, morality, economy) and the formal (written constitution, political structure, convictions) running through this list of examples. These possible sources and forms of a universal *jus commune* differentiate themselves not so much in terms of the field of society on which they draw, but rather along a scale from the functional to the ideal and, ultimately, the moral.

On the one hand, we have functional and formalistic criteria like a common constitutional standard, a sufficient internal organization and due process of law. On the other hand we have conceptions, which is to say convictions as well, concerning the religious, the civilized and the economic, as well as the right to property. It is in

this sense that Schmitt's description of the "most important case" as a "generally recognized right of free people to property" and "due process of law," orients itself according to the conceptual pair of the moral and the lawful. For, while due process clearly concerns the lawful and not the moral, the right of free people to property is a fundamental distinction between oneself and the other and thus an expression of a stable concept of the subject in possession of itself as the most fundamental of all moral distinctions, the "I-Not-I" distinction. Once again, human being finds itself between the moral and the lawful and, now, with a right to both.

3. *The effecting of the political.* Yet, before we simply conclude that we need only draw a friend-enemy distinction in order to achieve the ideal of a basically pacified earth, we should pay attention to a further distinction, described above by Kröger, between a constitution's substantive contents ("*Inhalt*"), or morality, and law, or the "legal effect" ("*rechtliche Wirkung*"). In particular, it is important to note that Schmitt does not differentiate between contents and legal *form*, for instance, but rather substantive content and legal "effect." I am emphasizing Schmitt's use of the verb "effect," in the context of the distinction between "content" and "legal effect," because one of Schmitt's main arguments concerning this humanization of enmity is that it will not come from any explicit statement about the human, but rather 'by way of' or 'as an effect of' a distinction which does not intend to directly define the human in any way. Thus, he writes of a relativization of enmity that "naturally, it is not easy to affect,"<sup>71</sup> while also describing war as the "ever present possibility it is the leading presupposition which determines in a characteristic way human action and thinking and thereby *effects* a specifically

<sup>70</sup> Kröger, *Grundrechtsentwicklung in Deutschland: von ihren Anfängen bis zur Gegenwart*, Tübingen 1998, 62: "Carl Schmitts sachliche Einteilung der Grundrechte der Weimarer Reichsverfassung enthielt Kriterien, die in der Gegenwart bei der Ausfächerung der Grundrechtstheorien wiederkehren. Sein besonderer Verdienst bestand darin, die Vielschichtigkeit der Grundrechtsgarantien klar erkannt und auf den Begriff gebracht zu haben. Durch die Differenzierung der unterschiedlichen Regelungen des zweiten Hauptteils der Reichsverfassung nach Inhalt und rechtlicher Wirkung gelang es ihm, den unantastbaren grundrechtlichen Kerngehalt der Verfassung herauszustellen, der jeder Verfassungsänderung entzogen bleiben sollte."

<sup>71</sup> BP, 11: "Freilich ist es nicht leicht, ihn zu bewirken."

political behavior"<sup>72</sup> and writes of how a "non-political opposition" effecting "the real friend-enemy grouping."<sup>73</sup> While we have seen Schmitt argue that a universal Liberal police state could only lead to the enemy's loss of humanity, Schmitt never mentions the enemy's humanity except as something it could be robbed of. The confrontation with the enemy presuppose the human in such a way as to place it once more beyond the political. And yet, in doing so, it effects a certain kind of behavior which, not primarily intended to treat the enemy as humanely as possible, does precisely that.

In truth, a war waged correctly according to the rules of European international law contains more of a sense of right and reciprocity, as well as more legal procedure, more "legal action," as one used to call it, than the show trial put on by modern potentates for the purpose of morally and physically annihilating their political enemy.<sup>74</sup>

In the same way, thus, that Schmitt tells us humanity cannot be the explicit subject of law, so too the relativization of enmity will not be formulated explicitly, but rather effected, not merely made *Realität*, but become *Wirklichkeit*.<sup>75</sup> When Schmitt writes that a "correctly waged war

contain more of a sense for right and reciprocity," it is important to note both the fact that it does not contain more humanity, but rather a sense for right and reciprocity, terms which befit the human without defining it, as well as the fact that this war "contains" this sense for right and reciprocity because the German term for contain, "*enthalten*," also means to "withhold" or in a parliamentary setting to "abstain." Such a war *contains* its sense of right and reciprocity precisely because it does not make it an *explicit* object of consideration, but rather a presupposition. The respect for the enemy demonstrated in this "correctly waged war" is precisely a respect and "sense for right and reciprocity" demonstrated, enacted, realized and *shown*, not *stated*.

#### 4. Political sovereignty vs. economic autarchy.

Not only does Schmitt make clear that a humanization of enmity will not come from a codification of the human, he also makes clear that such a relativization and the very "international character itself" are "only comprehensible based on a comprehensive spatial order on which rest the states themselves"<sup>76</sup> and that this *Raumordnung*<sup>77</sup> depended, during the age of the *jus publicum*

<sup>72</sup> CP, 34 (alteration N.H.) [33]: "Der Krieg ist durchaus nicht Ziel und Zweck oder gar Inhalt der Politik, wohl aber ist er die als reale Möglichkeit immer vorhandene Voraussetzung, die das menschliche Handeln und Denken in eigenartiger Weise bestimmt und dadurch ein spezifisches politisches Verhalten bewirkt."

<sup>73</sup> CP, 38 (alteration N.H.) [36]: "The real friend-enemy grouping is existentially so strong and decisive that the nonpolitical antithesis, at precisely the moment in which it effects this grouping, pushes aside and subordinates its hitherto purely religious, purely economic, purely cultural criteria and motives to the conditions and conclusions of the political situation at hand." Germans: "Die reale Freund-Feindgruppierung ist seinsmäßig so stark und ausschlaggebend, daß der nichtpolitische Gegensatz in demselben Augenblick, in dem er diese Gruppierung bewirkt, seine bisherigen 'rein' wirtschaftlichen, 'rein' kulturellen Kriterien und Motive zurückstellt und den völlig neuen, eigenartigen und, von jenem 'rein' religiösen, 'rein' wirtschaftlichen und andern 'reinen' Ausgangspunkt gesehen, oft sehr inkonsequenten und 'irrationalen' Bedingungen und Folgerungen der nunmehr politischen Situation unterworfen wird."

<sup>74</sup> BP, 11-12. "In Wahrheit enthält ein nach den Regeln des europäischen Völkerrechts korrekt geführter Krieg in sich mehr Sinn für Recht und Reziprozität, aber auch mehr an rechtllichem Verfahren, mehr "Rechtshandlung" wie man früher sagte, als ein von modernen Machthabern inszenierter Schauprozess zur moralischen und physischen Vernichtung des politischen Feindes."

<sup>75</sup> In English, both *Realität* and *Wirklichkeit* mean "reality." One major difference between the two is that, while *Realität*, like the English word "reality," is derived from the Latin *res*, meaning "thing," the German term *Wirklichkeit* is tied to the word for "work" or "effect," respectively "*Wirken*" or "*Wirkung*." The meaning of *Wirklichkeit* is thus always tied to this notion of effectivity.

<sup>76</sup> BP, 103: "Der zwischenstaatliche Charakter selbst nur aus einer umfassenden, die Staaten selbst tragenden Raumordnung zu verstehen."

<sup>77</sup> The spatial order which Schmitt sees as the foundation of any *jus inter gentes* cannot be fully understood without considering the concept of law as *nomos*, which Schmitt conceives of, etymologically (Greek, *nemein*), as an act of line-drawing and land-taking ("*Landnahme*"). Legal orders, for Schmitt, are caused most profoundly by reorderings of the geographical-spatial world. To date, he identifies two major land-takings, the expansion of the Roman Empire and the discovery of the Americas, while also pointing to a "Third Spatial Revolution" that is occurring in the 20th and 21st centuries. In addition to any number of geopolitical developments and re-orderings to which one could point, I think it should also be mentioned that it is perhaps "the internet" which presents the most radical and pressing questions of a new spatial order and in which the lines between combatant and non-combatant, Fake News and freedom of speech, consumption and production are blurred in the strangest of ways. An analysis of the internet in the terms of the *Concept of the Political* would have to consider: the earliest declarations of cyberspace as a sphere of apolitical freedom as well as the unavoidably physical aspect of the internet, manifest in both the massive physical dimensions of mega servers as well as the fact that they cannot but exist in a physical form with a particular geographical location and that it may indeed make a difference *where exactly* a given server is. Finally, one can see the relationship between consumption and production (CP, 57 [54]) with particular clarity in the way that, aside from any data we may consciously create (uploading content, written communication), our consumerism (whether monetary or informational) and, indeed, our very presence online 'produces' data about our online habits, which is, in turn, monetized, as the Facebook-Cambridge Analytica Scandal showed.



*europaeum*, on "a universality (*Durchgängigkeit*) of a private and, in particular, economic field beyond [state] borders."<sup>78</sup> Aside from Schmitt's description of this economic sphere's universality and its connection to a universal *jus commune* (*durchgängiges Gemeinrecht*), it is perhaps most interesting to note that we see a rare case in which Schmitt grants the economic, the private, and the universal a certain degree of primacy over the strictly political, public and particular. In contrast to his virulent critique of Liberalism's economic thought as it presents itself in so many of Schmitt's texts, we see here not only the admission and one of the earliest formulations of the Colonialist foundations of the *jus publicum europaeum* with all its consequences for the post-Colonial tradition, but also a factual recognition of the economic's fundamental importance for the political.<sup>79</sup>

Without either going into the complexities of Schmitt's theory of *nomos*, "larger spaces" (*Großräume*<sup>80</sup>), or "spatial revolution," I would like to note that Schmitt describes the dissolution of a common spatial order as the moment in which political sovereignty was replaced by economic autarchy.<sup>81</sup> While the distinction between sovereignty and autarchy is thus, certainly, a reminder of the primacy of the political over the economic, this division is itself much more indicative of a transition away from sovereignty, or autonomy (*auto-nomos*) to autarchy (*aut-arche*). For, in contrast to the politically autonomous state, whose very autonomy is realized in its ability to enter into contact with other autonomous subjects, the economically autarch system would seek to close itself off and free itself from any dependency of the other. The political state is in fundamental need of the other. "Inter-national does not," Schmitt writes, "therefore imply the isolation of all

subjects of international law in this kind of order. On the contrary."<sup>82</sup> Just as Schmitt's concept of the enemy is not to be equated with that of the "foe," in other words, so too he makes clear that the essence of the political lies not in the way it returns us to a state of nature in which *homo homini lupus*, but rather in the way it connects us. And it is in this sense, even more than as an insistence upon the moral, that Schmitt's concept of the political can be seen as an argument for the essentiality of contact with the other. For, what Schmitt criticizes about economic thought is not so much its neutralization of the friend-enemy distinction and its transformation of all enmity into friendship, but rather its fundamental hatred of the other and its ultimate hope that, it might never again have to confront this other. In doing so, Liberalism confuses sovereignty with autarchy, autonomy with independence, encounter (*Be-gegnung*) with exchange (*Tausch*), and, ultimately, tolerance with indifference.

5. *The language of the humanities.* But, if a "sense of right and reciprocity" cannot be actively defined and implemented, but must rather be effected by some external factor and, if these external economic and geopolitical factors are largely beyond the control of any single individual or political actor, then it might seem as though Schmitt has ultimately only left the question of human rights up to fate, as if we could only wait for the next spatial revolution and hope that it will somehow indirectly effect a relativization of enmity and the possibility of recognizing the other as one's equal. To a certain extent, this is true. And yet, I think that, in addition to his argument for political encounter with the other, Schmitt also makes very clear that we must not give up on the possibility of mutual understanding, when he writes

<sup>78</sup> BP, 104: "eine über die Grenzen hinweggehende Durchgängigkeit des privaten, insbesondere des wirtschaftlichen Bereichs."

<sup>79</sup> Ibid., 106: "The connection of these two freedoms [free trade and free economy] determined - to a much stronger degree than the international sovereignty of equal states - the reality of European international law in the 19th century." German: "Die Verbindung der beiden Freiheit [des freien Handels und der freien Wirtschaft] hat - weit stärker als die zwischenstaatliche Souveränität gleichberechtigter Staaten - die Wirklichkeit des europäischen Völkerrechts im 19. Jahrhundert bestimmt."

<sup>80</sup> On "Großräume," see, Schmitt, Carl. *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht*, Duncker & Humblot, Berlin 2009.

<sup>81</sup> BP, 106: "Only when political sovereignty started to become economic autarchy did the common spatial order, together with the presupposed common constitutional standard disappear." German: "Erst als die politische Souveränität anfiel, wirtschaftliche Autarkie zu werden, entfiel mit dem vorausgesetzten gemeinsamen Verfassungsstandard auch die gemeinsame Raumordnung."

<sup>82</sup> BP, 103: "Zwischen-staatlich bedeutet also keineswegs die Isolierung jedes Völkerrechtssubjekts dieser Art Ordnung. Im Gegenteil."

of the causes behind the "new extreme difficulties of mutual understanding."<sup>83</sup>

Firstly, he tells us, "the call directed by a jurist of international law at the beginning of the epoch of the state towards the theologians of both confessions continues to have an effect" and thus continues to separate jurisprudence from its theological origins.<sup>84</sup> Secondly, "the division-of-labor-like splitting up of our institutions of education and research in the humanities has confused our common language."<sup>85</sup> In the first case, jurisprudence has lost its connection to theology; in the second case, he points to a general loss of the unity of the humanities (*Geisteswissenschaften*) (among which Dilthey included the discipline of religious studies (*Religionswissenschaft*) as well as jurisprudence), and, above all, the loss of the humanities' common language. While it may be suggested that the ultimate source of any true respect for other human beings must necessarily be a pre-linguistic one rooted in our apprehension of the face of the other, it is also certain that being able to communicate with one another using language is an essential precondition for any concrete project of human rights, if only for the fact that for a right to have any meaning, it must take on the form of written law.<sup>86</sup> The shared language of the humanities, now lost, to which Schmitt refers is, of course, not so much any spoken language, but rather a rhetoric and vocabulary capable of grasping and communicating more than just information. In recent decades, the question of such a language has been addressed perhaps most prominently by Jürgen Habermas, who, giving up his previously strictly secular stance, has suggested the possibility that religious terminology has a "sense for what is missing."<sup>87</sup>

While the possession of a shared language represents a precondition of any humane discourse, language (much like law) remains a deeply instrumental concept which in no way determines the contents communicated by language. It requires, therefore, an additional intention or desire for communication in general (though this could also be strategic) and, most of all, understanding (which cannot be strategic in Dilthey's sense of the term *Verstehen*). The problem is not only that a discriminating concept of war "can no longer differentiate between enemy and criminal," but rather that it also has no interest in doing so.<sup>88</sup>

## Conclusion

In this article, I have pointed to the possible presence of a conception of universal rights accorded to all free people in Schmitt's thought. That Schmitt's proposal would be unsatisfactory for a positive definition of human rights was, of course, clear from the start. And, how could it be, when it does not even explicitly ban slavery, as his specification of the right to property and due process as a right of *all free people* indicates? Yet, it would be short sighted and solipsistic to declare this minimal outline of a basic universal right irrelevant for a discussion of human rights. Indeed, it is precisely in its minimalism that one of the most important messages of Schmitt's work is realized, namely, his belief that law's function cannot merely be the codification of morality and the enactment of a perfect world both unrealizable and already present, but should rather, like the sovereign decision, concern itself first

<sup>83</sup> BP, 15: "In diesem Bereich treten allerdings neue außerordentliche Schwierigkeit gegenseitigen Verstehens zutage, so daß eine überzeugende Encadrierung der gemeinsamen Problematik fast unmöglich wird."

<sup>84</sup> Ibid.: "Das Wort Silete theologi!, das ein Jurist des Völkerrechts am Beginn der staatlichen Epoche den Theologen beider Konfessionen zugerufen hat, wirkt immer noch weiter," cf. Schmitt, *Die Lage der Europäischen Rechtswissenschaft*. Internationaler Universitäts-Verlag, Tübingen 1950.

<sup>85</sup> Ibid.: "Die arbeitsteilige Aufspaltung unseres geisteswissenschaftlichen Lehr- und Forschungswesens hat die gemeinsame Sprache verwirrt."

<sup>86</sup> "Now, [...] the 'agraphos nomos' [unwritten law] and the written nomos and how the nomos changes in the moment in which it is written – all that belongs to this topic of word and text; word and text as, how should I say, the universal and central topic of that which moves me in the first place" (*Solange das Imperium da ist*: Carl Schmitt im Gespräch mit Klaus Figge und Dieter Groh 1971, ed. Frank Hertweck and Dimitrios Kisoudis, Berlin: Duncker & Humblot 2010, 51, translation N.H.).

<sup>87</sup> Habermas, Jürgen. *Ein Bewusstsein von dem, was fehlt*. Suhrkamp, Frankfurt a.M. 2008.

<sup>88</sup> BP, 11: "It is in no way progress from the perspective of humanity to outlaw the limited war of European international law as reactionary and criminal and instead unleash revolutionary enmities between classes or races, who can no longer differentiate between friend and enemy and also no longer desire to;" the German text reads: "Auf keinen Fall ist es ein Fortschritt im Sinne der Humanität, den gehegten Krieg des europäischen Völkerrechts als reaktionär und verbrecherisch zu ächten und statt dessen, im Namen des gerechten Krieges, revolutionäre Klassen- oder Rassenfeindschaften zu entfesseln, die Feind und Verbrecher nicht mehr unterscheiden können und auch nicht mehr unterscheiden wollen."

and foremost with creating a situation in which norms can have validity<sup>89</sup> and the good can be once more an object of debate and discourse in which we participate. And yet, Schmitt tells us, such a situation can only come about in the presence of a relativization of enmity on both sides. Schmitt gives us no answer to how such a relativization of enmity and recognition of the other as one's equal could be brought about, though I have suggested that Schmitt sees the silencing of theology and the humanities' loss of a shared language as two major problems faced by any contemporary attempt at mutual understanding. Whatever the source of such a relativization may be, it will come, Schmitt tell us, neither from our simply recognizing the other as a human being nor from someone else telling us what it is to be human. It is a question which we will have to answer for ourselves. Only, before we do, it seems as if we must now return to a question of nearly pre-political proportions, no other than "who are we?"

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<sup>89</sup> CP, 46.