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Doing Justice to the Political. The International Criminal Court in Uganda and Sudan: A Reply to Sarah Nouwen and Wouter Werner

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Abstract

This article is a reaction to Sarah Nouwen and Wouter Werner, 'Doing Justice to the Political. The International Criminal Court in Uganda and Sudan', 21 EJIL (2010) 941. It takes issue with attempts to understand international law and particularly the workings of the International Criminal Court in terms of Carl Schmitt's thesis on the political as distinguishing between friend and enemy. My contention is that parties to a violent/political conflict may try to mobilize the law in their struggle, but that the structure of the law itself escapes the logic of the political: law cannot be 'political' in the Schmittian sense. The unexpected upshot of this is that Schmitt's notion of the political may operate as a normative criterion for testing whether legal officials are still respecting the constraints of their practice. If legal authorities are indeed in the business of defining the enemy of mankind, then they are not doing this through or with the help of the law. They may simply act against the law. To substantiate this point, the article thinks through the difference between conventional and absolute/real enemies and contrasts these notions with the characteristics of (international criminal) law.

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1 The Politics of the ICC

Since its creation the International Criminal Court¹ has not missed an opportunity to emphasize its a-political and purely legal position within the international community.² By contrast, in their thought-provoking article producing fresh empirical material, Sarah Nouwen and Wouter Werner argue that the Court acts politically in the sense of Carl Schmitt's concept of the political, as it takes part in making the crucial distinction between friend and enemy. The article analyses two recent cases before the ICC: the case against the leader of the Lord's Resistance Army and the case against officials of the Sudanese government. The authors show that in both cases attempts are being made to portray the defendants as enemies of mankind. The Ugandan government hopes to weaken the LRA's international position by turning it into an enemy of the entire international community. In doing so, it seeks to strengthen its own situation by becoming a friend of the international community. Similarly, because the ICC relies on the cooperation of the international community (physically) to bring defendants to the Court and give full effect to its rulings, in the Darfur case Court officials call non-cooperation with the Court a form of providing assistance to an enemy of mankind.³ Furthermore, whereas war tribunals deal with 'defeated enemies' after hostilities have ended, the ICC intervenes in an ongoing conflict, where it may be 'used as an instrument to defeat enemies'.⁴

Interestingly, the authors' objective is not to disqualify the Court as extra-statutory, because of its political character.⁵ Rather they want to convey the message that the failure to recognize the political aspect of the Court may intensify and prolong the violent conflict. By contrast, in this reply I contend that parties to a violent/political conflict may *try* to mobilize the law in their struggle, but that the structure of the law itself escapes the logic of the political: law cannot be 'political' in the Schmittian sense. The unexpected upshot is that Schmitt's notion of the political may operate as a criterion for testing whether legal officials are still respecting the constraints of their practice. If legal authorities are indeed in the business of defining the enemy of mankind, then they are not doing this *through* or *with the help of* the law. They may simply act *against* the law. To substantiate this point, we shall think through the difference between conventional and absolute/real enemies and contrast these notions with the characteristics of (international criminal) law.

2 What Makes 'the Political' so Political?

According to Schmitt the distinctive feature of the political is the willingness and capacity to distinguish friend from enemy. This is what makes the political different

¹ Hereafter, ICC or the Court.

² Nouwen and Werner, 'Doing Justice to the Political. The International Criminal Court in Uganda and Sudan', 21 *EJIL* (2010) 941, at 942–943.

³ *Ibid.*, at 960.

⁴ *Ibid.*, at 963.

⁵ *Ibid.*, at 964.

from other spheres of discourse, knowledge, and practices (e.g. theology, metaphysics, morality, sciences, economics, law). It means that this willingness and capacity to distinguish friend from enemy cannot be derived from, reduced to, or explained by these other spheres.⁶ But what makes determining the enemy so exclusively political? First, the enemy is existential. He poses a threat to the life and life-style of the group for which he is an enemy. The threat is existential because the enemy constitutes nothing less than the negation of the group for which he is an enemy.⁷ What makes this threat political is the fact that there is no standard available to determine whether the threat is existential; only the participants in the conflict can determine this.⁸ For example, the simple fact that people have incompatible religions does not make them existential enemies even if there are constant violent outbreaks among them. Only if religion is turned into the defining criterion for the existence of a particular group, does an existential negation of that group by another religion become possible.⁹ Making religion a defining criterion is a matter of the political. The second element that makes the distinction between friend and enemy political is that it expresses a readiness to engage in a struggle for life and death. The ultimate possible consequence of determining friend and enemy is war.¹⁰ The essence of war is the real possibility of killing and being killed. Probably, for many people war is an existential matter *par excellence* in an obvious and literal way: it may lead to the end of your existence. Yet Schmitt does not understand the existential aspect of war in such biological way. It is rather by a kind of reasoning *in absurdum* that war must be existential. No other sphere of discourse, knowledge, norm, or principle can seriously require from people that they be ready to kill and be killed by other people. No rational purpose or norm can provide a reason for the preparedness to kill and be killed.¹¹

Finally, distinguishing friend from foe is exclusively political because what really matters is the willingness and capacity to do so. This links to the first factor that makes the distinction political. The distinction need not be made. What matters is the *possibility*.¹² The enemy need not be present yet. The same goes for the struggle for life and death. In fact, if the enemy is already there and one is engaged in bloody conflict, the true political moment is already over. The soldier who is about to kill and/or be killed in a war is not political because it has already been determined for him who is friend and enemy.

3 Friend/Enemy Distinction and the *Hegung des Krieges*

Schmitt is so emphatic about identifying the political, because failure to do so directly affects the (legal) order and concrete stability. In fact precisely distinguishing

⁶ C. Schmitt, *Der Begriff des Politischen* [1932] (1963), at 26–27.

⁷ *Ibid.*, at 27 and 33.

⁸ *Ibid.*, at 27.

⁹ *Ibid.*

¹⁰ It should be noted that Schmitt moves casually from 'struggle' (*Kampf*) to 'war' (*Krieg*). But though struggle is still a non-legal concept, war seems primarily a legal notion: *ibid.*, at 33.

¹¹ *Ibid.*, at 49–50.

¹² *Ibid.*, at 27.

friend from enemy is what makes order and peace possible. If there is no willingness and capacity to single out the enemy, the enemy may already be *within* the community and legal order itself. And he may simply wage war and overthrow the order from within. Similarly, ignoring the enemy and the possibility of war (for example out of pacifism) does not make the political disappear. It just means that the enemy has an easy fight.¹³ It is crucial for Schmitt that law cannot prevent violent conflict, nor can it make the political disappear. However, it is possible to curtail the scope and intensity of violent conflict and hence prevent an endless bloody conflict, i.e., the *Hegung des Krieges*.¹⁴ According to Schmitt there was for more than 200 years in Europe a system in place that precisely organized this *Hegung des Krieges*, the *jus publicum Europeanum*. It was the system of sovereign states after the Peace of Westphalia and lasted until World War I. The system was based on three types of relations: friends, conventional enemies, and absolute/real enemies. The friends are inside the territory of each sovereign state.¹⁵ Conflicts on the inside are never truly violent and political. Hence they can be governed by domestic – neutralizing – law (ordinary civil and criminal law). By contrast, between sovereign states violent conflict is possible and often happens. But this violent conflict can be restrained thanks to the concept of the conventional enemy, i.e., *justus hostis*.¹⁶ This formal notion of the enemy does not pertain to causes of war but to the fighting parties themselves. The most important requirement is that the armies must be public, i.e., acting for and on behalf of the state or sovereign. In other words, the fighting can take place only between those armies; civilians are excluded. Furthermore, the war must be preceded by a declaration of war containing the particular *demands*. Thus, hostilities take place only with a view to the particular demands, not the elimination/extinction of the enemy. To guarantee that violence does not spill over to the inside, the hostilities are to take place at the borders of the sovereign states. According to Schmitt, this scheme of an inside of friends and an in-between of conventional enemies is possible only if the conflict with the potential absolute or real (existential) enemies can be exported to an outside. Hence, the importance of the seizure of a space outside the European sovereign states: the taking of the high seas and the discovery of the ‘New World’.¹⁷ This was the space allocated to absolute enemies where there can be unrestrained violent conflict not governed by the *jus publicum Europeanum*. We may depict the different regimes schematically as follows.

¹³ Cf. *ibid.*, at 54.

¹⁴ C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europeanum* (1950), at *inter alia* 66, 69, 112–115 (for the scope of the curtailment compared with the bloody religious wars).

¹⁵ Cf. the ‘Säkularisierung des gesamten europäischen Lebens’, *ibid.*, at 98–99. Still, it is not really clear what, according to Schmitt, happened and should have happened to the ‘conventional’ and ‘real’ enemies who were already inside the territory of a sovereign state. For an analysis see Schotel, *supra* note *.

¹⁶ Schmitt, *supra* note 14, at *inter alia* 112–115, 124–125, 129, 133–134.

¹⁷ *Ibid.*, in general ‘Die Landnahme einer neuen Welt’, at 53–109, and, for a summary, at 120–121.

Relationship	Conflict	Space	Law
Friends	No violent conflict ¹⁸	Territory of sovereign European state	Domestic private and public law
Conventional enemies	War is possible, but restrained	At the borders <i>between</i> European states	Jus publicum Europeanum
Absolute or real enemies	Absolute war	Outside Europe	— ¹⁹

According to Schmitt, two modern arrangements put an end to the *Hegung des Kriegen*. First, the introduction of a community of mankind and even a world community, which transformed the friend/enemy dichotomy of a particular community into friend/enemy of mankind.²⁰ Since the whole globe belongs to mankind, there is literally no more room for spatial demarcations. As a result both friends and enemies are already inside, which leads to an everlasting violent conflict.²¹ Secondly, war as a strategic instrument becomes morally suspect.²² In fact, the use of violence in the form of an aggressive war becomes a violation of the peace of mankind.²³ Consequently, what was previously a conventional enemy turns into a violator of the peace of mankind, and ultimately an enemy of mankind. In short, it equates a violator of international law with an enemy of mankind.

4 The Court Cannot be Political

The empirical material presented by Nouwen and Werner clearly reveals *attempts* to portray defendants as enemies of mankind. In this respect, the ICC operates precisely within the logic of the two arrangements that, according to Schmitt, put an end to the *Hegung des Kriegen*: focus on mankind and equating a violator of law with the enemy. Yet a closer look shows that the ICC lacks the capacity to be political in the Schmittian sense. First, in the empirical material presented the term ‘enemy of mankind’ is not

¹⁸ If internal conflict became violent then it was dealt with as a police matter governed ultimately by state of siege (which is different from a state of war): C. Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political* [1963] (trans. A.C. Goodson, 2004), at 7.

¹⁹ This box is left blank intentionally. It would be inexact simply to say that the zone outside Europe was a complete legal void; in particular the legal regime of the high seas was much more complex; Schmitt, *supra* note 14, at 153. See in general the section entitled ‘Von der elementaren zur geordneten Freiheit der Meere’, at 153–156.

²⁰ See ‘Auflösung des jus publicum Europeanum’, in *ibid.*, at 200–212.

²¹ Schmitt, *supra* note 6, at 77–78.

²² Schmitt, *supra* note 14, at 246–247.

²³ *Ibid.*, at 247–255. See also for the move whereby the enemy is turned into a violator of a legal norm Schmitt, ‘Über das Verhältnis der Begriffe Krieg und Feind’ (1938), Corollarium 2 in Schmitt, *supra* note 6, at 104.

used.²⁴ Secondly, attempts to characterize the defendants as enemy are made through statements and documents (in the periphery of the official proceedings) that are unlikely to make it to the official dossier of the trial. Finally, the statements are made by the prosecutor. The prosecutor is of course an official of the Court. Yet his position should be distinguished from that of the judges who have a final say on the – legal – qualification of the defendant.

The Court's reluctance actually to use the term enemy of mankind is understandable, as the Rome Statute simply does not comprise any crimes for which the qualification of the defendant as an enemy, let alone enemy of mankind, is relevant. In general, contemporary legal practice does not have a legal notion that captures the truly absolute nature of the enemy of mankind. Certainly, there is a long legal tradition concerning the notion of the enemy of all.²⁵ However, there are few examples of where this notion is actually practised and used in law courts in such an absolute way, certainly in modern times. By contrast, the notion enemy is widely used in humanitarian and military law. Here enemy has a very specific technical meaning which largely corresponds with the *justus hostis* principle, not with the absolute enemy of all. Of course, this does not mean that the legal term enemy automatically covers all kinds of participants in a violent conflict. What counts as a legitimate enemy is not always easy to determine. In a way, Schmitt anticipated this legal problem with his Theory of the Partisan.²⁶

More important than the (absence of the) term 'enemy of mankind', the structure of law, especially criminal law, simply cannot produce an enemy in the Schmittian sense. Criminal law regulates the *behaviour* of norm subjects. It commands and mostly prohibits particular behaviour. Typically, it does not penalize someone for who he *is* (existence/status), but for what he *does* (action). As a corollary of the action-oriented approach criminal law is *individualized*. One stands trial for one's own individual actions.²⁷ This also escapes the logic of the political enemy because an individual does not constitute an enemy. The enemy is an entity that typically represents an existential threat. At best an individual can act as the official or *de facto* leader of the group or movement that poses the existential threat. But even by capturing and trying the leader one rarely captures the enemy.²⁸ Similarly, the procedural rules of (international)

²⁴ The characterization that comes closest is: 'the ICC could brand the LRA as internationally wanted "criminals". The ICC could turn the LRA from enemies of the Ugandan government into enemies of "the international community as a whole": Nouwen and Werner, *supra* note 2, at 949. However, there is no reference to official or unofficial documentation issued by or relating to the ICC. Still, the authors show that the Prosecutor alludes to evil typically associated with the 'enemy of mankind' when making analogies with the Nazi regime: *ibid.*, at 960.

²⁵ See D. Heller-Roazen, *The Enemy of All. Piracy and the Law of Nations* (2009).

²⁶ Cf. Schmitt, *supra* note 18. According to Schmitt even the non-*justus hostis* should be dealt with in a way that is proportionate: *ibid.*, at 16.

²⁷ Art. 25 Rome Statute of the International Criminal Court.

²⁸ Cf. the trials of war criminals (e.g. Nuremberg trials, Eichmann trial, and more recently the Milošević case) that never capture what the enemy 'really' represented; the experience of evil disappears when a particular individual of flesh and blood stands trial. Cf. H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1994).

criminal law require the *presence* of the defendant at the trial.²⁹ The idea of actual presence does not correspond with the more possibility oriented nature of the absolute enemy in the Schmittian sense. Also, criminal law is predominantly *backward looking*³⁰ as it considers only the actual acts performed by the defendants. It looks at behaviour that was legally prohibited at the time of the facts (*nullum crimen sine lege*).³¹ This goes against the very nature of the political, which was essentially about the *possibility* of determining friend/enemy. In fact, even if – for argument’s sake – the defendant was an enemy in the political sense, it may well be the case that during or at the end of the trial he ceased to be an enemy. In a sense, this happened in the Darfur case: the parties considered resuming negotiations (but how can you negotiate with an absolute enemy?).³² In short, the nature of the political enemy simply does not fit the structure of (international criminal) law.³³

5 Who is an ‘Enemy of Mankind’?

It follows from the previous discussion that the law cannot capture the real enemy because of the latter’s existential nature. So, in spite of all its attempts, the ICC simply cannot tell a friend from an enemy even if it sees one. Not only do the mechanics of law escape the absolute logic of the political enemy, but perhaps Schmitt’s own concept of the political enemy is not so absolute after all. Allegedly, the absolute enemy is political because there are no standards available for determining and identifying the political enemy. By contrast, when it comes to the *conventional* enemy, objective and elaborate criteria are available, i.e., the criteria for the *justus hostis*. Schmitt himself conceded that in *Der Begriff des Politischen* he failed to make clear the distinction between friend, conventional enemy, and the real or absolute enemy.³⁴ The conventional enemy is of course the *justus hostis*, and the absolute enemy the enemy in the political sense. Yet the distinction between conventional and absolute enemy is highly problematic if we stick to Schmitt’s own way of thinking. Schmitt is emphatic about the logic of opposites in the law.³⁵ But what are the opposites of the conventional and absolute enemy? One is inclined to think that from Schmitt’s perspective conventional and absolute enemies are in a sense opposites. If so, it becomes possible to identify the absolute enemy simply – *a contrario* – as the opposite of the *justus hostis*. Since there are identification standards for the conventional enemy, it follows that there are (*a contrario*) standards for the absolute enemy. Furthermore, according to Schmitt,

²⁹ A. Cassese, *International Criminal Law* (2nd edn, 2008), at 389–394.

³⁰ There is also the deterrence objective, which is forward looking. Yet, I am unclear about the actual relevance of deterrence in the international context.

³¹ Arts 22–23 Rome Statute.

³² Conversely, what happens with an enemy of mankind after he has served his sentence? The ICC cannot treat him as an enemy any longer. In fact trying him again would violate the *ne bis in idem* rule (Art. 20 Rome Statute).

³³ The same goes for the notion ‘friend’. For an analysis see Schotel, *supra* note *.

³⁴ Schmitt, ‘Vorwort’ (1968), in Schmitt, *supra* note 6, at 17.

³⁵ *Ibid.*, at 14.

under the *jus publicum Europeanum* the *Hegung des Krieges* was possible thanks to the confinement of uncurtailed warfare to a space outside Europe. The ultimate criterion for identifying the absolute enemy was spatial or geographical. In effect, on Schmitt's reading the same warring parties that were conventional enemies inside Europe became real enemies when outside European territory. This is problematic for Schmitt's notion of the political enemy. Either the absolute enemy is not a political concept in the Schmittian sense because his identification may fully depend on an 'objective' standard, e.g., geography. Or, under the *jus publicum Europeanum* Europe's outside was in reality not the space containing the absolute enemies. Consequently, the real enemies were on the inside, which means that the *jus publicum Europeanum* produced a false *Hegung des Krieges*.

In short, not only does the law fail to capture the absolute nature of Schmitt's political enemy, but Schmitt's own concept of the absolute enemy is not really political. What does this tell us about the findings of Nouwen and Werner? Though I may have shown that *from the legal perspective* the ICC is incapable of defining the political enemy, it does not prevent some of its officials from trying. Worse, perhaps – by a touch of political mythology – the ICC succeeds in defining the defendants as an absolute enemy, making the concerns of Nouwen and Werner very real: the Court contributes to a continuation and intensification of the violent (political) conflict. Perhaps at this point the critical and reflective aspect of law kicks in. Of course, the law as such cannot prevent officials from 'demonizing' defendants – only other people can. However, the law can operate as a standard. In an unexpected way Schmitt's notion of the political offers a criterion for testing whether (legal) officials are respecting the constraints of their practice. When legal officials are in the business of portraying parties to a conflict as an 'enemy of mankind' in a Schmittian sense, they do not act *through* or *with the help* of the law. They act *against* it. If so, rather than being '*used* as an instrument to defeat enemies',³⁶ the ICC and the law are simply *abused*.

³⁶ Nouwen and Werner, *supra* note 2, at 963.