

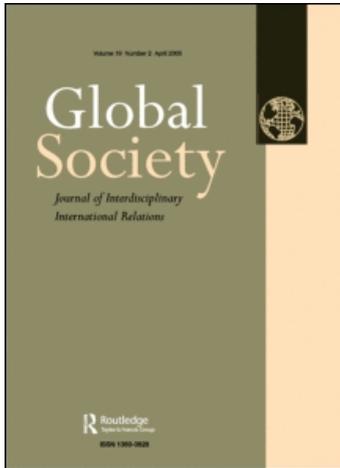
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Which Cosmopolitanism? Whose Empire? Or Why the Schmittian Charge of “Liberal Imperialism” is Only Half Right

JASON RALPH*

This article examines the Schmittian-inspired charge that liberalism is intrinsically imperialistic and that it dehumanises alternative illiberal political projects in ways that lead to disproportionate and indiscriminate violence. It focuses specifically on the charge that the US war on terror is the latest manifestation of this kind of liberal imperialism. Such an argument only makes sense when liberalism is combined with exclusionary modes of nationalism and realism. This synthesis underpins the “hard Wilsonianism” of American neoconservatism. The article argues that the Schmittian-inspired charge of imperialism cannot be properly directed at the more inclusionary cosmopolitan forms of liberalism, which is illustrated with reference to the Rome Statute of the International Criminal Court.

Introduction

There has been much interest of late in the ideas of Carl Schmitt.¹ This is not surprising given the fact that his theories of “the partisan” and “the state of exception” seem almost prophetic when one considers the 9/11 attacks and the Bush administration’s response.² Schmitt’s ideas, however, found favour even before the declaration of a “war on terror”. The charge that “he who evokes humanity

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1. G. Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005); Louiza Odysseos and Fabio Petito (eds.), *The International Political Thought of Carl Schmitt. Terror, Liberal War and the Crisis of Global Order* (London and New York: Routledge, 2007); William Rasch, “Human Rights as Geopolitics. Carl Schmitt and the Legal Form of American Supremacy”, *Cultural Critique*, Vol. 54 (2003); Sara E. Davies, “International Law and the State of Exception” and Richard Devetak, “Failures, Rogues and Terrorists. States of Exception and North/South Divide”, in Alex Bellamy, Roland Bleiker, Sara Davies and Richard Devetak (eds.), *Security and the War on Terror* (London: Routledge, 2007).

2. Carl Schmitt (translation and introduction by George Schwab), *Political Theology. Four Chapters on the Concept of Sovereignty* (Chicago and London: University of Chicago Press, 1985); “Theory of the Partisan: Intermediate Commentary on the Concept of the Political”, *Telos*, Vol. 127 (2004), pp. 11–78. For commentary see Alain de Benoist, “Global Terrorism and the State of Permanent Exception. The Significance of Carl Schmitt’s Thought Today”, and Gary L. Ulmen, “Partisan Warfare, Terrorism and the Problem of the New *Nomos* of the Earth”, in Odysseos and Petito (eds.), *The International Political Thought of Carl Schmitt, op. cit.*, pp. 73–96 and 97–106, respectively.

wants to cheat" struck a chord with those already suspicious of the emerging practice of humanitarian intervention.³ That chord resonated loudly after NATO's "humanitarian war" against Serbia and the United Nations' indictment of Milosevic seemed to confirm Schmitt's argument that liberal states were prone to fight unrestrained wars that criminalised their opponents.⁴ It reached a crescendo with the Iraq War, a war that quite obviously was based on irresponsible claims either to liberate humanity from the threat of weapons of mass destruction or to liberate the Iraqi people from the threat of Saddam's tyrannical regime. The graphic images of the human rights abuses offered further evidence to support Schmitt's claim regarding the dehumanising influence of liberal wars fought in the name of "civilisation".⁵

This criticism of humanitarian/democratic intervention and of the war on terror/rogue states is just one part of what is seemingly Schmitt's most pertinent point, which is the argument that liberalism is intrinsically imperialistic because it is the ultimate denial of the political. If politics is the art of the possible, Schmitt argued, then liberalism is a denial of politics because it seeks to limit possibilities.⁶ It does this by identifying universal truths and by prescribing constitutional laws derived from those truths. This epistemological imperialism is reinforced by the material power of liberal states, which, at least since the collapse of the Soviet Union, has been unchallenged. American power, in particular, is now the armour of coercion that crushes alternatives by first identifying them as "rogues" and by then declaring exceptions to any norms (e.g. state sovereignty) that might otherwise guarantee their existence. Bush's "axis of evil" and the 2003 Iraq War is offered as a powerful example of such behaviour; the tendency to see "failed states" and "political vacuums" instead of really existing illiberal alternatives is another. The interventionist programme to rebuild and to democratise nation-states is therefore, at least from this perspective, nothing more than liberal imperialism.⁷ Although the assumption is often that liberal states do benefit economically—because "democratisation" invariably means access to markets or resources—this is not necessary for the charge of imperialism to stick.⁸ It is sufficient merely for liberal states to use coercive power to advance

3. Carl Schmitt (translation, introduction, and notes by George Schwab), *The Concept of the Political* (Chicago: University of Chicago Press, 1996), p. 54.

4. Tarak Barkawi, "Air Power and the Liberal Politics of War", in Ken Booth (ed.), *The Kosovo Tragedy. The Human Rights Dimensions* (London and Portland: Frank Cass, 2001), pp. 307–313; Peter Stirk, *Carl Schmitt, Crown Jurist of the Third Reich. On Preemptive War, Military Occupation and World Empire* (Lewiston: Edwin Mellen Press, 2005), pp. 42–49.

5. William Scheuerman, "Carl Schmitt and the Road to Abu Ghraib", *Constellations*, Vol. 13 (2006), pp. 109–123; Stanford Levinson, "Torture in Iraq and the Rule of Law in America", *Daedalus*, Vol. 133 (2004), pp. 7–9.

6. For elaboration see Linda Bishai and Andreas Behnke, "War, Violence and the Displacement of the Political", in Odysseos and Petitto (eds.), *The International Political Thought of Carl Schmitt, op. cit.*, pp. 106–111.

7. Louiza Odysseos, "Crossing the Line? Carl Schmitt on the "Spaceless Universalism" of Cosmopolitanism and the War on Terror", in Odysseos and Petitto (eds.), *The International Political Thought of Carl Schmitt, op. cit.*, pp. 124–143; Rasch, *op. cit.*, pp. 120–147; *idem*, "A Just War? Or Just a War? Schmitt, Habermas and the Cosmopolitan Orthodoxy", *Cardozo Law Review*, Vol. 21 (1999–2000).

8. On the link between "democracy promotion" and the interests of a transnationalist capitalist class see William Robinson, *Promoting Polyarchy. Globalization, US Intervention and Hegemony* (Cambridge: Cambridge University Press, 1996). On Schmitt's leftist appeal see G.L. Ulmen, "American Imperialism and International Law: Carl Schmitt on the US in World Affairs", *Telos*, Vol. 72 (1987),

the liberal goal, which is ultimately to deny the space in which alternative political projects can grow.

Unfortunately this account of contemporary global politics often overstates the case against liberalism; and because it fails to adequately appreciate profound differences within that tradition it sometimes criticises the wrong kind of liberalism. It is argued in this paper that the Schmittian-inspired charges against liberalism—that it exports a modern subjectivity based on individualism, that it criminalises and dehumanises illiberal alternatives and that this leads to the disproportionate and indiscriminate use of violence⁹—apply only when liberalism is combined with the exclusionary modes of nationalism and realism found in American neoconservatism. When these charges are made against liberal cosmopolitanism they lack substance because from this perspective the enemies of liberalism have non-negotiable rights as members of a community of humankind. This must be taken into account when assessing the claim that Schmitt can help us understand US policy since 9/11. The reason why Schmitt's critique of liberal war appears particularly relevant to the war on terror/rogue states is because US policy during the Bush administration was inspired by a neoconservative mindset that uses *liberal* internationalism to re-establish a sense of America's unique *national* identity. The recent exceptions to international humanitarian law are in this respect not only about responding to terrorism but are also part of a cultural narrative that seeks to represent the US as *the* guarantor (and possibly *the* sovereign) within a liberal world order.¹⁰ This is a policy of neoconservatism and it underpins an approach that can be justly accused of imperialism because it seeks to promote a liberal world order *while simultaneously declaring an exception to the rule of law*. The point here, however, is that this approach cannot, despite certain claims to the contrary, be associated with liberal cosmopolitanism. This is important to understand because once one accepts that liberal cosmopolitanism is not complicit in acts of liberal imperialism then one can begin to see its potential as a reasonable and compelling alternative to America's "empire of liberty".

To make this argument this paper is divided into four sections. The first two sections elaborate on how recent scholarship, in its unquestioning acceptance of Schmitt's thesis, fails to properly distinguish liberal cosmopolitanism from what is identified here as the "hard Wilsonianism" of the Bush administration.¹¹ The paper then illustrates its central argument with reference to what might be called "the clash of liberalisms" that occurred with the creation of the International Criminal Court (ICC). The third section sets the Court up as a truly liberal cosmopolitan institution because it seeks to uphold the rule of a law that is grounded on a reasoned consensus across international and world society. It acts, in other words, in a disinterested way on behalf of what is, because it is based on a consensus, an extremely "thin" definition of humanity. Its definition of humanity involves, as Schmittians would expect, the criminalisation of inhumanity, but the liberal cosmopolitanism embedded in the Rome Statute

pp. 43–71; Chris Brown, "From Humanized War to Humanitarian Intervention. Carl Schmitt's Critique of the Just War Tradition", in Odysseos and Petito (eds.), *The International Political Thought of Carl Schmitt*, *op. cit.*, p. 62.

9. These charges are made by Odysseos, *op. cit.*, pp. 124–143.

10. As Schmitt famously put it: "Sovereign is he who decides on the exception." Schmitt, *Political Theology*, *op. cit.*, p. 5.

11. The phrase is Max Boot's. See his article "Neocons", *Foreign Policy*, Vol. 140 (2004), pp. 20–28.

promotes neither a subjective view of right nor disproportionate violence on behalf of that subjectivity. In fact, the criminalisation of certain acts during war (i.e. war crimes), rather than certain reasons for war (i.e. aggression) has the effect of denying claims to *justa causa* (even those of liberal states) and it therefore interrupts the processes that can lead to the dehumanisation of enemies.

Understood in this way, liberal cosmopolitanism should be seen as a counterweight to, rather than an accomplice of, liberal imperialism. Indeed, the very fact that the Bush administration vehemently opposed the ICC is presented in the fourth section as further evidence that there are important differences between the imperialist and cosmopolitan versions of liberalism. It accepts that US support for the ad hoc Courts in the former Yugoslavia, Rwanda and Iraq might be interpreted through the lens of liberal imperialism because here the US applies a law (international criminal law) that it is effectively exempt from. There is, however, a key difference between the ICC and these ad hoc courts. Before the creation of the ICC, international criminal justice was an ad hoc exception to the rule that said states are sovereign and that international peace and security (rather than justice) is the primary goal of international society. Under this regime, the United States could decide when and where that exception applied. The reason why the United States opposes the ICC, in other words, is not because the United States is opposed to justice; it is in fact a strong supporter of international criminal courts and the values that underpin them. Rather, it opposes the ICC because being able to decide "the exception" is essential to the discourse of American exceptionalism. If this is not exactly Schmitt's sovereign, it is certainly the mindset of a liberal state with imperial pretensions.

The Charge of Liberal Imperialism

Schmitt's concept of the political naturally lends itself to support the arguments of those who are suspicious of the cosmopolitan project. Yet the recent work that draws on Schmitt to attack contemporary liberalism makes a significant error by conflating the hard Wilsonianism of US foreign policy with liberal cosmopolitanism. For example, William Rasch conflates Wilsonianism, which he believes emerged out of Christianity's civilising mission, with Habermasian discourse ethics despite the fact that Habermas himself has drawn strong distinctions between his cosmopolitanism and American foreign policy.¹² Louiza Odysseos does acknowledge the cosmopolitan opposition to the war on terror, although she considers this to be insignificant in the broader theoretical/philosophical context that links the two.¹³ With this qualification, Odysseos uses Schmitt to level four charges at what she understands to be liberal cosmopolitanism and the war on terror. The following section will introduce these charges before demonstrating how they do indeed relate to the policies of the Bush administration but misunderstand what "liberalism" was doing in those policies. It is argued that such policies had everything to do with a neoconservative attempt to reassert a

12. Rasch, *op. cit.*, pp. 130, 137–144. Jürgen Habermas, *The Divided West* (Cambridge: Polity, 2006). For a very different reading of the Wilsonian tradition, one that locates its source in the kind of Republican theory that overlaps with the Kantian-inspired cosmopolitanism of Habermas, see Daniel Deudney, *Bounding Power. Republican Security Theory from the Polis to the Global Village* (Princeton and Oxford: Princeton University Press, 2007).

13. Odysseos, *op. cit.*, pp. 134–135.

sense of American power and purpose, and nothing whatsoever to do with liberal cosmopolitanism. In this respect, Schmitt is wrong to argue that liberalism alone is to blame for the disproportionate nature of modern wars, and his followers are doubly wrong to suggest that this is also a trait of liberal cosmopolitanism.

The first charge made by Odysseos is one that recalls E.H. Carr's now famous attack on the utopianism of the interwar years and the manner in which it was used as a veil to disguise the pursuit of particular interests.¹⁴ Like Carr, Odysseos makes the link to 19th-century liberalism and finds that its shortcomings continue to influence policy well beyond that century when Western imperialism was perhaps in its most overt phase. "By using the discourse of humanity", Odysseos writes, "the new cosmopolitanism reverberates with the nineteenth-century 'ringing proclamation of disinterested liberal principle' through which 'liberalism quite successfully conceals its politics, which is the politics of getting rid of politics'."¹⁵ The second charge is that liberal cosmopolitanism seeks to export a "modern subjectivity" based on individualism while simultaneously celebrating the "superiority" of the liberal state and exempting it from the international regimes that weaken state sovereignty.¹⁶ The third charge recalls Schmitt's argument that humanity lacks "concrete expression" and it cannot therefore be a political entity. The inference here is similar to the first point; who decides which of the many political entities in the "pluriverse" genuinely speaks for humanity?¹⁷ Often "humanity" is invoked by powerful states within international society to ignore the normal rules of treaty, which regulate relations between really existing political communities. Finally, Odysseos follows Schmitt in accusing liberals of abandoning restraint in the conduct of humanitarian or just wars. Schmitt's insistence on binary divides (e.g. friend/enemy) means that combatants fighting in the name of humanity inevitably dehumanise their opponents, and because of this there is little resistance in the move towards total war. To make the point, Odysseos quotes Schmitt's *The Nomos of the Earth*, which argues that the

interstate European wars from 1815 to 1914 in reality were regulated; they were bracketed by the neutral Great Powers and were completely legal procedures in comparison with the modern and gratuitous police actions against violators of peace, which can be dreadful acts of annihilations.¹⁸

Without stopping to question either the historical accuracy or the theoretical consistency of Schmitt's views, Odysseos takes this characterisation of liberal war,

14. E.H. Carr, *The Twenty Years' Crisis 1919–1939. An Introduction to the Study of International Relations*, 2nd edn (Basingstoke: Palgrave, 2001).

15. Odysseos, *op. cit.*, p. 132 quoting first P. Gowan. "The New Liberal Cosmopolitanism", in D. Archibugi (ed.), *Debating Cosmopolitanism* (London: Verso, 2003), and then D. Dyzenhaus, "Introduction: Why Carl Schmitt?", in D. Dyzenhaus (ed.), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham, NC: Duke University Press, 1998).

16. Odysseos, *op. cit.*, pp. 132–133.

17. See also Rasch, "Human Rights as Geopolitics", *op. cit.*, pp. 141–142.

18. Carl Schmitt (translated and annotated by G.L. Ulmen), *The Nomos of the Earth in International Law of the Jus Publicum Europaeum* (New York: Telos Press, 2003), p. 186; quoted by Odysseos, *op. cit.*, pp. 133–134. See also Rasch, "Human Rights as Geopolitics", *op. cit.*, p. 136, and Petito who argues that this is a consequence of Wendt's constructivist argument on the inevitability of a world state. Fabio Petito, "Against World Unity. Carl Schmitt and the Western-centric and Liberal Global Order", in Odysseos and Petito (eds.), *The International Political Thought of Carl Schmitt*, *op. cit.*, pp. 174–177.

applies it to recent events and then concludes that in fact the war on terror “is the quintessential liberal cosmopolitan war”.¹⁹ This is because, in her eyes, the war on terror and cosmopolitanism are both committed “to the production and spreading of modern liberal subjectivity”. The war on terror does this by perpetuating the view that terrorism thrives in areas where liberalism does not exist. Thus the discursive existence of the “failed” or the “rogue” state now acts to support liberal theory in the way that pre-colonial “America” once acted to support liberal theory of the Enlightenment. They are examples, in other words, of “the state of nature”. As Odysseos puts it:

Just as the device of the “state of nature” was able to achieve results for classical liberalism by exalting the need and desire for the Sovereign, the War on Terror can be understood to serve a similar purpose and to entail, therefore, a similar relationship with liberal cosmopolitanism ... [It] endeavours to rid us of the scourge of global terrorism, and the singular way of achieving this is to spread modern subjectivity and its attendant liberal political institutions around the globe. Recall the emphasis of the Bush administration on the desirability of a newly democratic Iraq ...²⁰

The second reason why the war on terror is seen as “the quintessential liberal cosmopolitan war” is because it displays the exact same paradoxes that Schmitt identified in his attack on liberalism. Thus, the war on terror

is an exceedingly exemplary manifestation of the paradox of liberal modernity and war: of the occurrence of ever more violent types of war within the very attempt to fight wars which would end “war” as such. Moreover, it is an example of how the cosmopolitan order’s emphasis on the erasure of geopolitical lines through universal humanity fails not only to end war, but even to bracket and limit it, causing not its humanisation but its intensification and dehumanisation.²¹

In this way liberalism, even the cosmopolitan variety, stands accused of supporting a project that is imperialistic because it seeks to deny political space for alternative political projects, because it is prone to excessive violence, and because it criminalises and dehumanises the illiberal “other” while celebrating and excusing the illiberal actions of the liberal “self”.

Hard Wilsonianism or Liberal Cosmopolitanism?

By representing its enemies in the war on terror as “unlawful combatants”, the Bush administration undoubtedly saw itself fighting a “police war” that criminalised the opponent. In the context of its Manichean rhetoric of good and evil, the Bush administration can also stand accused of seeking to deny the political roots

19. Odysseos does note those cases where cosmopolitans opposed the actions taken by the United States in the name of international security. Yet her argument is still that the Bush administration’s liberalism is the same as liberal cosmopolitanism. Odysseos, *op. cit.*, pp. 134–136.

20. *Ibid.*, pp. 138–139.

21. *Ibid.*, p. 137.

of the terrorists' actions. Moreover, its denial of the applicability of the Geneva Conventions to the war on terror, and the acts of torture that took place in the legal black holes that were a consequence of this decision, is also evidence of the dehumanising consequences of such an approach.²² Yet to equate this approach with "liberal cosmopolitanism" is confusing on several fronts.

Firstly, it overlooks the rejection of the "war" paradigm by other states in the liberal community of states, perhaps most notably the United Kingdom.²³ The "law-enforcement" paradigm may still be a political move that seeks to deny the political motivations of the enemy that is identified as a "terrorist", but it does so within the context of national and international human rights regimes that check the dehumanising and radicalising consequences of such politics. Secondly, equating the Bush administration's policy with liberal cosmopolitanism overlooks the extent to which the "war" paradigm and the "new kind of war" discourse has been contested within the United States.²⁴ Perhaps more significantly, it overlooks the extent to which the decision not to apply the Geneva Conventions to the war on terror was overturned within the Bush administration itself and the US Supreme Court.²⁵

Liberal cosmopolitanism, in other words, is an *alternative* to the war on terror. From this perspective, national and international legal structures were in place such that the United States could have responded by criminalising al-Qaeda rather than elevating it to the status of a combatant. In fact, by raising detainees to the level of enemy combatants, and by losing its fight in the Supreme Court over the applicability of the Geneva Conventions, the United States has put at risk the legal framework that delegitimises certain "terrorist" actions.²⁶ The point here, however, is that liberal cosmopolitanism offers an alternative to the war on terror. This is overlooked by the Schmittian critique of liberal war, possibly because it makes liberalism look entirely reasonable next to the Bush administration's concept of the political, which of course

22. See de Benoist, *op. cit.* for an elaboration on how the representation of the terrorist as a criminal risks denying the political grievance behind his acts of violence. In the US context, Reagan administration officials rejected the application of the laws of war to national liberation movements in Protocol I of the Geneva Convention in part because it feared this would deny Israel the political benefit that came from criminalising Palestinian terrorist groups. See, in particular, Douglas J. Feith, "Law in the Service of Terror—The Strange Case of the Additional Protocol", *National Interest*, Vol. 1 (1985), pp. 36–47. When the Bush administration did apply the "war" rather than "law-enforcement" paradigm to al-Qaeda, Feith drew on this experience and was reportedly instrumental in the classification of detainees as *unlawful* combatants. See Philippe Sands, *Torture Team. Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008), pp. 29–36.

23. Most notably, because the United Kingdom is often considered America's most compliant ally. See the Cabinet Office, *The National Security Strategy of the United Kingdom. Security in an Interdependent World*, March 2008, p. 25; David Milliband, "After Mumbai. Beyond the War on Terror", speech at Taj Hotel, Mumbai, 15 January 2009, available: <<http://www.fco.gov.uk/>>.

24. See, for example, Seth G. Jones and Martin C. Libicki, *How Terrorist Groups End. Lessons for Countering Al Qaida* (Santa Monica: RAND Corporation, 2008).

25. On the withdrawal of the infamous "torture memo" produced by the Department of Justice, see Jack Goldsmith, *The Terror Presidency. Law and Judgment inside the Bush Administration* (New York: Norton, 2007); see also *Hamdan v. Rumsfeld* 548 US (2006).

26. In 2008 a military commission on Guantanamo Bay found bin Laden's bodyguard, Salim Hamdan, not guilty of conspiracy to commit terrorist acts on the grounds that he may have been a "lawful combatant". For a discussion of the implications, including the concern that it risks regression to the concept of private war, see The Complex Terrain Laboratory, *Social Sciences in War. Defending Hamdan*, available: <<http://www.terraplexic.org/>>; see also Stirck, *op. cit.*, p. 40.

involved indefinite detention, extraordinary rendition, aggressive interrogation and regime change.

What can explain this? It is argued in this section that these recent attacks on US foreign policy repeat Schmitt's mistake by misunderstanding the processes that lead so-called "liberal" states to declare an exception and to abandon restraint in warfare. This lack of restraint is due not to the influence of liberalism per se, but, in the American case at least, to the influence of a neoconservative synthesis of liberalism, nationalism and realism. What the Schmittian critique fails to understand is that American nationalists often *use* liberalism merely as a rhetorical device to perpetuate a narrative of American exceptionalism.²⁷ It is only after a synthesis between liberalism and nationalism has been established that the universal fate of liberalism can be seen to rest on the *political* strength of the United States.²⁸ It is, moreover, only after a synthesis of liberal nationalism and realism has been established that the American exception to international law and to human rights regimes can begin to make sense from the liberal viewpoint. This is the strand of US foreign policy thinking that Max Boot has called "hard Wilsonianism"; and because it in fact shares the Schmittian concept of the political, it tends to draw lines between friends and foes and can easily act without restraint in its fight against the latter. It is this strand of American foreign policy that contemporary Schmittians see when they write about the war on terror, but the point here is that this is far removed from a liberal cosmopolitan mindset.

That Schmitt's account of American foreign policy and the influence that liberalism has on the conduct of war is guilty of this kind of error is made clear in several commentaries on his work. For instance, William Scheuerman and Martti Koskenniemi both attack Schmitt for his account of how American liberalism contributed to the abandonment of restraint during war. At the heart of Schmitt's thesis, of course, is the idea that once European sovereigns accepted the right of each other to wage war, violence was "bracketed". In other words, because *jus ad bellum* dropped out of Europe's normative equation, violence on that Continent became rationalised as a duel between *justus hosti*. Civilian casualties were kept to a minimum because wars between sovereign states were not wars of annihilation but merely political contests. American liberalism, according to Schmitt, disturbed this happy arrangement by criminalising the sovereign's right to wage war and by dehumanising the "other". The opponents of liberalism, in other words, became uncivilised foes to be either punished or annihilated.²⁹ For Koskenniemi, however, this argument is based on a false history. He accuses Schmitt of allowing an unreflective nostalgia and "a political theology conceived in support of domestic

27. Richard Hofstadter's well-known claim that "[i]t has been our [America's] fate as a nation not to have ideologies but to be one" captures this point. Quoted in Anatol Lieven, *America Right or Wrong. An Anatomy of American Nationalism* (London: HarperCollins, 2004), p. 49; and although this might be contested by the likes of Michael Lind, who claims that a "nation may be *dedicated* to a proposition, but it cannot *be* a proposition", it would be pointless denying the influence that liberalism has had in defining what America is. Michael Lind, *The Next American Nation. The New Nationalism and the Fourth American Revolution* (New York: Free Press, 1995), p. 5.

28. This is what Fine identifies as the "universal nation", which substitutes "the simulacrum of cosmopolitan thought for the seriousness of the genuine article". Robert Fine, "Cosmopolitanism and Violence: Difficulties of Judgment", *British Journal of Sociology*, Vol. 57 (2006), p. 62.

29. On Schmitt's distinction between enemy and foe see G. Schwab, "Enemy or Foe: A Conflict of Modern Politics", *Telos*, Vol. 72 (1987), pp. 194–201; G.L. Ulmen, "Return of the Foe", *Telos*, Vol. 72 (1987), pp. 187–193.

absolutism" to exaggerate the extent to which European warfare was restrained.³⁰ Likewise, Scheuerman accuses Schmitt of "historical mythmaking" because there was no age of restraint, even among the sovereigns of 17th- and 18th-century Europe. "A closer look at the *jus publicum Europaeum*", Scheuerman writes,

quickly suggests that this "golden age" not only permitted and perhaps even required the exploitation, enslavement, and slaughter of non-Europeans around the globe, but that it still engendered significant misery for those on the European continent itself.³¹

Neither could America's "deadly brand of messianic universalism" be blamed for bringing an end to Europe's relatively benign order. Here, Scheuerman notes that a consensus among historians suggests that the resurgence of total warfare was the consequence of nationalism and militarism rather than American liberalism. It was, Scheuerman concludes

the idea of a "nation in arms" that not only posed a direct threat to earlier absolutist images of "king's wars," but also opened the door to the many pathologies of modern warfare: the full scale mobilization of the "nation" and subsequent militarization of society, and killing of "enemy" civilians.³²

This insight is significant because it should force contemporary analysts to re-examine why America's policy in the war on terror seemingly fits the Schmittian account. Following Scheuerman's and Koskeniemi's correction of Schmitt, one should in fact argue that the exceptional response to 9/11 had little to do with the influence of cosmopolitan thinking and everything to do with the influence of nationalism and realism.

Indeed, a closer examination of the neoconservative mindset of the Bush administration demonstrates the particular role that liberalism has played in recent US foreign policy. For instance, neoconservatism simultaneously rejects and embraces liberal universalism. On the one hand, it adopts a Schmittian-type realist critique of liberal multilateralism, which maintains that the idea of a global international society is superficial because it lacks "concrete" bonds and the capacity to make a decision. This kind of "soft" Wilsonianism is considered to be naive because it plays directly into the hands of America's (and for that matter liberalism's) enemies; enemies who happen to understand politics in the Schmittian sense and are therefore able to exploit liberal naivety by turning international law and organisation against the United States.³³ Yet

30. Martti Koskeniemi, "International Law as Political Theology. How to Read *Nomos der Erde*?", *Constellations*, Vol. 11, No. 4 (2004), p. 499; see also Brown, *op. cit.*, pp. 58, 63–64. On the "politically defensive and even nostalgic" tone of *The Nomos* see Scheuerman, *op. cit.*, p. 109.

31. William E. Scheuerman, "International Law as Historical Myth", *Constellations*, Vol. 11, No. 4 (2004), p. 544; see also Koskeniemi, *op. cit.*, p. 495.

32. Scheuerman, "International Law as Historical Myth", *op. cit.*, p. 546.

33. This kind of thinking can be found in the neoconservative rejection of certain aspects of the laws of war. As well as the arguments over the detention of unlawful combatants in the war on terror, see the reasons given for the Reagan administration's rejection of Protocol I additional to the Geneva Conventions. This reasoning can be found in the thinking of Douglas Feith, who served both the Reagan and Bush Jr administrations. See his "Law in the Service of Terror", *op. cit.*, pp. 36–47; *idem*, "Protocol I:

neoconservatives are not the kinds of realists who willingly turn their back on the liberal project.³⁴ Neoconservatives in fact embrace liberal universalism but in ways that are profoundly different to liberal cosmopolitanism. Neoconservatives tend to embrace liberal universalism mainly as a forward-looking cause that can help restore the sense of national purpose that Americans had at their founding but have since lost because of the excesses of selfish individualism at home.³⁵ This is nationalism not cosmopolitanism, and when combined with a realist concept of the political it can countenance exceptions to the rule of international law (even international humanitarian law) if it is in the interests of the (notionally) liberal state. Indeed, these exceptions are not only justified from the political realist's perspective but they also assist the nationalists in their cause, which is to sustain a narrative of American difference.

It is this neoconservative synthesis of liberal universalism, American nationalism and Schmittian realism that gave the Bush administration the confidence that its response to 9/11 was just and encouraged its lawyers to adopt the kind of linear thinking that identified zones of exception occupied by uncivilised "others". This in turn justified to the Bush administration those policies that were at the centre of so much discontent with its foreign policy. The point here is not necessarily to cast judgement on that policy. The point rather is to note that, contrary to the line adopted by contemporary analysts like Odysseos and Rasch, the Bush administration's policy in the war on terror stemmed not from the influence of liberalism as such, and certainly not from the influence of liberal cosmopolitanism. It stemmed instead from the powerful synthesis of liberalism, realism and nationalism that is at the core of America's sense of exceptionalism.

Liberal Cosmopolitanism and the International Criminal Court

It is the purpose of this section to refute the claim that liberal cosmopolitanism is necessarily imperialistic because, like the Bush administration's war on terror, it promotes a subjective view of right and because it encourages paradoxical policies whereby the opponents of liberalism suffer abuse because they are considered irrational and unhuman. As noted above, this accusation makes sense when it is directed at the exclusionary logics of those exceptionalist discourses that underpin the hard Wilsonianism of the Bush administration, yet it completely misses the mark when it is applied to liberal cosmopolitanism. This is defined here in Habermasian terms. Liberal cosmopolitanism, in other words, is understood as a political stance that is committed to nothing more than the defence of institutions that enable the expression of diverse opinions and of the defence of values that emerge

Moving Humanitarian Law Backwards", *Akron Law Review*, Vol. 19 (1986), pp. 531–535. See also Jeremy Rabkin, "The Politics of the Geneva Conventions: Disturbing Background to the ICC Debate", *Virginia Journal of International Law*, Vol. 44 (2003), pp. 169–205.

34. For an example of this kind of realism in the context of the debate on US national identity and its foreign policy see Hans J. Morgenthau, *American Foreign Policy: A Critical Examination* (London: Methuen, 1952), ch. 1; Henry Kissinger, *American Foreign Policy* (New York: Norton, 1977), pp. 197–213; George F. Kennan, "Morality and Foreign Policy", *Foreign Affairs* (Winter 1986/87).

35. For an excellent elaboration of this point see Michael Williams, "Morgenthau Now: Neoconservatism, National Greatness and Realism", in Michael Williams (ed.), *Realism Reconsidered. The Legacy of Hans Morgenthau in International Relations* (Oxford: Oxford University Press, 2007), pp. 216–240.

from a reasoned dialogue across those opinions.³⁶ It is true that even when it is understood in these terms “cosmopolitanism shows little tolerance for what it designates as ‘intolerant’ politics”.³⁷ Yet if one accepts that there is a fundamental difference between the hard Wilsonianism of the Bush administration and liberal cosmopolitanism as it is defined here then one is forced to explore further the implications of this accusation. What does it actually mean to say that liberal cosmopolitans have little tolerance for intolerant politics when all that they are committed to is the promotion of institutions that encourage cross-cultural dialogue or to the defence of values that are the result of such processes? Does it mean we should tolerate those acts (for instance genocide and torture) that inspire revulsion in everyone bar the perpetrators? To criticise liberal cosmopolitanism for not being tolerant of intolerant politics suggests that it does. This, of course, is where the Schmittian criticism of liberalism, which at first sight seems so appropriate given the imperialism of Bush’s hard Wilsonianism, descends into a kind of relativism that is dangerous because it destroys the ground on which it stands when criticising the way the powerful pursue their politics.

An interpretation of the normative regime underpinning the ICC can help illustrate this point and can help demonstrate why the Schmittian critique loses its appeal once it is directed at liberal cosmopolitanism. It is argued here that the ICC can be understood as an institution of a liberal cosmopolitan order to the extent that it sets out non-negotiable standards for the treatment of human beings and puts in place a judicial process to punish individuals who violate those standards. It cannot, however, be described as an institution of a liberal imperial order because (a) these non-negotiable standards reflect a very “thin” definition of humanity, one that has been derived not from a preconceived prioritisation of the individual but from a cross-cultural dialogue of sufficient breadth to justify its universal application; (b) the judicial process operates independently of states and the Court can therefore lay a credible claim to being a disinterested promoter of justice; and (c) the Court does not encourage liberal wars that dehumanise the opponent in ways that lead liberal states to abandon restraint during war. In fact it has the complete opposite effect. The remainder of this section offers an elaboration on each of these points.

If one examines closely the exact nature of the “universal” or “core” crimes that are criminalised by the Rome Statute, one notices that they are not necessarily crimes against the individual.³⁸ The crime of genocide, for example, can only be committed against a group. To be a victim of genocide one has to be part of a group that has been identified along national, ethnic, racial or religious lines. If an individual is killed without being part of a plan to kill others that are part of the same group, then that individual is a victim of murder, which falls outside the jurisdiction of the ICC.³⁹ Of course, murder is recognised in Article 7 as a crime against humanity, but again the Court cannot intervene unless the act has

36. For Habermas’s own criticism of Schmitt, and one that anticipates the creation of the ICC, see his “Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight”, in James Bohman and Matthias Lutz-Bachmann (eds.), *Perpetual Peace. Essays on Kant’s Cosmopolitan Ideal* (Cambridge, MA: MIT Press, 1997), pp. 113–154.

37. Odysseos, *op. cit.*, p. 132.

38. Articles 6–8, the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9*, available: <www.un.org/law/icc/statute/romeofra.htm>.

39. Article 6, Rome Statute.

been “committed as part of a widespread or systematic attack directed against any civilian population”.⁴⁰ Here the distinction between combatants of a state or state-like actor and a civilian population is obviously a liberal distinction, but clearly a crime against humanity is more than just an attack on an individual’s rights. Likewise, Article 8 defines war crimes that may involve individual victims but they come under the jurisdiction of the Court only when they are “committed as part of a plan or policy or as part of a large-scale commission of such crimes”.⁴¹ The point is that the Court’s definition of humanity is not “thick” enough to be accused of enforcing laws we tend to associate with the individualistic cultures of liberal societies. Individuals are certainly victims of the actions that the Court criminalises, but it offers protection only to individuals within a particular context or as members of particular groups.

It might be argued that the above argument contradicts the claim that the ICC is a liberal institution and that it is not therefore appropriate to use it as an example to illustrate how liberalism can avoid the charge of imperialism. The values being protected by the Court may not be the civil and political rights we associate with modern liberal societies, but to the extent that the Rome Statute is a document born of a multilateral dialogue across a public sphere constituted by state and non-state actors it certainly fits a definition of “liberal” as used in international relations theory. That dialogue reached a consensus on what constituted “core” or “universal crimes” at the 1998 Rome Conference, which was attended by 160 states and 250 NGOs. Many of these NGOs provided legal assistance to smaller states and to represent the voices of those communities who might not necessarily have been represented by states (e.g. women).⁴² Although this “new diplomacy” is not without its detractors, it does go some way towards opening up the international law-making process and hence some way towards addressing the concern that international law is merely the imposition of subjectivity backed by power.⁴³ The point being made here is simply that the Rome Statute cannot be described as an institution designed to impose either Western-style individualism or any other subjectively held value. Moreover, the consensus reached in Rome is so “thin” that if one cannot accept it one is left in the difficult position of having to find particular societies that would openly defend a right to commit the acts outlawed in the Statute. Those states that have not yet endorsed the ICC usually justify their opposition in terms of state sovereignty rather than any fundamental opposition to the nature of the universal crimes.

Secondly, the ICC avoids the charge of liberal imperialism because it can convincingly claim to be a disinterested defender of humanity. Of course, the impartial application of the rule of law is a key liberal principle, but it is sometimes held that international criminal justice is the continuation of politics by other means. Indeed, Schmitt himself condemned the work of the International Military Tribunal after the Second World War on the grounds that it was simply

40. Article 7, Rome Statute.

41. Article 8, Rome Statute.

42. Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law. Justice for the New Millennium* (Ardsey, NY: Transnational Publishers, 2002), p. 1.

43. For a discussion see Alistair D. Edgar, “Peace, Justice and Politics: The International Criminal Court, ‘new diplomacy’, and the UN system”, in A.F. Cooper, J. English and R.C. Thakur (eds.), *Enhancing Global Governance: Towards a New Diplomacy?* (Tokyo: United Nations University Press, 2002), pp. 133–151.

“victor’s justice”.⁴⁴ On other occasions the criticism of so-called ad hoc tribunals, like those for Rwanda and the former Yugoslavia, are tainted by a similar charge of “selective justice”.⁴⁵ They are, in other words, exceptions that simply prove the rule that the society of states is interested in international criminal justice only if it does not clash with the interests of the great powers on the Security Council. The ICC, however, transcends this problem by allowing the Prosecutor to investigate without the prior authorisation of the Security Council.⁴⁶ The fact that the Prosecutor’s jurisdiction is limited when he acts on his own volition is admittedly a concession to particular interests and this weakens the Court by enabling certain states to exploit various loopholes.⁴⁷ The point, however, is that these are concessions that liberal cosmopolitans regret because they weaken the power of the Independent Prosecutor who is otherwise best placed to respond to the global interest in a disinterested manner. Of course, it would be naive to believe that power will not work in subtle ways to influence the Prosecutor. But again the default liberal cosmopolitan position is to insist that the Prosecutor maintain his independence and to exercise his discretion in the interest of justice.

Finally, Schmitt in effect argued that when it comes to war liberalism considered *jus ad bellum* to be the sole normative test. That is to say, wars fought for liberal causes were considered by liberals to be just and legal regardless of the manner in which they were fought. Conversely, wars fought on behalf of illiberal causes were by definition unjust and the liberal response was to criminalise these wars. This logic, Schmitt concluded, led humanitarians to treat their enemies inhumanely, and led liberals to countenance illiberal practices. As an institution of a liberal cosmopolitan order, however, the ICC does not provide a mandate for war and its very existence should be understood as an attempt to interrupt the logic that Schmitt identified.⁴⁸ The ICC is unable to pass judgement on *jus ad bellum* questions. The crime of aggression is mentioned in the Statute but it is not defined, and the Court’s jurisdiction in this area is thus considered “dormant”.⁴⁹ It attempts to limit the violence inherent in politics and not displace it.

44. “There are”, he is quoted as saying, “crimes against humanity and crimes for humanity. Crimes against humanity were committed by Germans. Crimes for humanity were perpetrated on the Germans.” Quoted by Habermas, “Kaut’s Idea of Perpetual Peace”, *op. cit.*, p. 142.

45. For both the positive and the negative lessons provided by the UN experience with ad hoc tribunals see Antonio Cassese, “From Nuremberg to Rome: International Military Tribunals to the International Criminal Court”, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary* (Oxford: Oxford University Press, 2002), p. 15.

46. “The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court” (Article 15, Rome Statute).

47. Article 12 of the Rome Statute limits the Prosecutor’s power to investigate *proprio motu* to those situations where the accused is a national of a state party or where the territory on which the alleged crime took place is that of a state party. For discussion see H. Kaul, “Preconditions to the Exercise of Jurisdiction”, in Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court*, *op. cit.*, pp. 583–616.

48. In this sense, military intervention is *not* “a necessary extension of the precedent set at Nuremberg” (Fine, *op. cit.*, p. 59). For that reason, liberal cosmopolitans need not feel ambiguous about supporting the ICC.

49. Article 5, Rome Statute. The Court is thus said to exercise “dormant jurisdiction” over the as yet undefined crime of aggression. See Philippe Kirsch, QC and Darryl Robinson, “Reaching Agreement at the Rome Conference”, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary Vol. I and II* (Oxford: Oxford University Press, 2002), p. 78.

This might be considered a double-edged sword. For instance, Thomas Smith has argued that the failure to define aggression enables technically advanced states to wage war without fear of prosecution because their precision-guided weaponry allows them to easily avoid *jus in bello* crimes.⁵⁰ This may be the case, but to include a definition of aggression that is not based on a consensus would be to risk the Court's legitimacy in other ways. The point here, however, is that by not defining aggression the Court cannot be accused along Schmittian lines; it cannot, in other words, be accused of giving liberal states a just cause (i.e. countering aggression) that provides them with exceptions to the rules that govern the conduct of war. Furthermore, there are obvious arguments that can be used to refute Smith's inference that precision-guided weapons guarantee adherence to the laws of war. Such weapons can, of course, be precisely targeted at civilians and if they were targeted in such a way then that would be a war crime. By making *jus in bello* the sole normative test, the Court not only counters the Schmittian claim that humanitarianism leads to inhumanity but it also provides a reasonable means of holding to account all combatants, liberal or otherwise, for the use of indiscriminate and disproportionate violence.⁵¹

International Criminal Justice as an Institution of American Imperialism

As an institution of the liberal world order that is inspired by a cosmopolitan vision, therefore, the ICC is neither complicit in the spread of a modern subjectivity nor can it be accused of encouraging disproportionate or indiscriminate violence. Neither it nor the liberal cosmopolitanism that inspires it can therefore be accused of complicity in an imperial project. This might seem blindingly obvious to liberal cosmopolitans who support the ICC, but it is stated as clearly as possible here in order to clarify the differences between the cosmopolitan and the neoconservative versions of liberalism. To drive this point home, this final section illustrates how the neoconservative synthesis of liberal universalism, American nationalism and Schmittian realism helps to explain why the United States opposes the ICC, and how that policy is itself part of a broader imperial mindset that is entirely different to liberal cosmopolitanism properly understood.

The Bush administration opposed the ICC for a number of reasons. Firstly, it argued that without the check and balance provided by the Security Council, the Office of the Independent Prosecutor will conduct *politicised* prosecutions that target US service personnel.⁵² Although the Court operates under a principle of complementarity—i.e. it will not intervene unless national courts are unwilling or unable to investigate⁵³—Bush administration officials simply did not trust it. Their faith in the American judicial process is so complete that it leads them to believe that the only reason why an international court may wish to assert a

50. Thomas W. Smith, "Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism", *International Politics*, Vol. 39, No. 2 (2002), pp. 175–192.

51. In this sense liberal cosmopolitans do not accept that the "limits on the use of force that are imposed indiscriminately on democracies and non-democracies alike by traditional international law need to be relaxed in favour of the former" (Bishai and Behnke, *op. cit.*, p. 116).

52. Marc Grossman, "American Foreign Policy and the International Criminal Court", Remarks to the Center for Strategic and International Studies, Washington, DC, 6 May 2002, available: <www.state.gov/p/9949.htm>.

53. Article 17, Rome Statute.

complementary jurisdiction is because it wishes to pursue “political” prosecutions. Jack Goldsmith, who served in the Departments of Defense and Justice during the Bush administration, makes this clear. For him and his colleagues, the creation of the ICC was an act of “lawfare”, which “is at bottom an attempt by militarily weak nations ... to restrain militarily powerful nations”.⁵⁴ Yet as Samantha Powers notes, others at the Rome Conference did not share this concern because many had already decided that it was the United States, and indeed the Security Council as a whole, that held a politicised view of international criminal justice.

In saying that it wants to protect itself from a political ICC, the United States is seeking more than reasonable assurances about the Court’s responsible execution of its mandate. The United States is reserving the right to define the term *political* in the context of the Court’s actions. Of the 180 UN members who do not hold a veto on the Security Council, only some will share America’s definition. Many deem the Security Council to be the epitome of a politically motivated institution and want an independent ICC precisely because they believe it will not be driven strictly by great power politics.⁵⁵

Secondly, the Bush administration argued that without the check and balance provided by the Security Council, the Office of the Independent Prosecutor would conduct imprudent prosecutions that threaten international peace and security. This, however, completely overlooked Article 16 of the Rome Statute, which enables the Security Council to postpone an investigation if they consider it to pose a genuine threat to international peace and security. The genius of this Article, which is known as the “Singapore Compromise” after the country that proposed it, can be found in the fact that no single state, not even a permanent member, can stop the Prosecutor from exercising his *proprio motu* powers. In order to postpone an investigation the Security Council can pass a Chapter VII resolution but this, of course, requires the vote of nine of its members. Should a permanent member veto that resolution the Prosecutor will be free to proceed.⁵⁶ The Rome Statute, in other words, is not a threat to international peace and security; rather, it is a threat to the great power’s ability to decide when “international peace and security” can be used as an excuse to ignore the call for justice.

Both of these arguments suggest that the Bush administration was not opposed to the Court as such but that it was opposed to the Court’s independence. Whether it would have supported the ICC had the sole means of referral been a UN Security Council resolution is a hypothetical question. Yet official explanations of US opposition to the ICC, which set out continued support for the Security Council ad hoc tribunals as well the possibility of intervention to rebuild the capacity of national courts, demonstrated a continuing commitment to the liberal universalist aim of punishing those who commit crimes that offend

54. Goldsmith, *op. cit.*, p. 63; see also Michael Chertoff, “The Responsibility to Contain: Protecting Sovereignty under International Law”, *Foreign Affairs*, Vol. 88 (2009), pp. 130–147.

55. Samantha Power, “The United States and Genocide Law”, in Sarah B. Sewall and Carl Kaysen (eds.), *The United States and the International Criminal Court* (London: Rowman & Littlefield, 2000), p. 171.

56. Luigi Condorelli and Santiago Villalpando, “Referral and Deferral by the Security Council”, in Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court*, *op. cit.*, pp. 627–655.

humanity.⁵⁷ This has also been borne out in practice. The US supported the Iraq Special Tribunal, which in fact lifted its definition of crimes against humanity straight from the Rome Statute, and it even abstained from the Security Council's referral of the Darfur situation on the understanding that US citizens would remain exempt from any investigation. What this demonstrates is that the Bush administration was willing to support liberal practices like international criminal justice *as long as it guaranteed immunity from similar forms of accountability for US citizens*. Limiting the process to either the UN Security Council or to national courts enabled it to do this.

The Bush administration opposed the ICC, in other words, because the Court has turned international criminal justice into a norm rather than an exception in international society. This is the significance of the Court being permanent rather than ad hoc. More to the point, the ICC has taken away the US capacity to decide the exception. That is, the decision on when and where to investigate is now in the hands of an international court and it is no longer subject to a single state's veto at the Security Council. This is why the Bush administration painted its opposition to the ICC in terms of sovereignty. Of course, Schmitt famously declared that "sovereign is he who decides the exception" and what the debate on the ICC exposed was the manner in which the United States sought to defend its internal sovereignty against the intrusion of a cosmopolitan institution. It also demonstrated how the United States sought to defend its supposed right, as international society's sovereign, to decide when and where international criminal justice should be done. This kind of "exceptionalism" cannot be captured solely by Realist explanations that point to US attempts to protect American interests. It in fact highlights the influence of something that Realist explanations are often contingent on. It highlights the influence of nationalism; in this particular case, the influence of an outward-looking form of nationalism that seeks not only to protect the sovereignty of the American people and the autonomy of their elected officials but also seeks to maintain the image of America as the guarantor (and possibly the sovereign) of a liberal world order.

This synthesis of liberal universalism, American nationalism and Schmittian realism (again) leads the United States to make claims that are consistent with the narrative of liberal empire. For instance, the United States asserts that as the provider of international public goods such as peacekeeping and international security (particularly against terrorist attack) its service members should be exempt from the ICC's jurisdiction.⁵⁸ This kind of argument, it should be pointed out, was not unique to the Bush administration; Ambassador Scheffer used it on behalf of the Clinton administration at the Rome Conference.⁵⁹ Yet the Bush administration was so committed to this argument that it put at risk other key foreign policy priorities in order to secure an exception to the Court's jurisdiction. It was, for instance, willing during the summer of 2002 and 2003 to withdraw its peacekeepers from Bosnia rather than keep them in a state where they fell under the *proprio motu* jurisdiction of the Independent Prosecutor.⁶⁰

57. See Grossman, *op. cit.*

58. Goldsmith, *op. cit.*, pp. 62–63.

59. David J. Scheffer, "The United States and the International Criminal Court", *American Journal of International Law*, Vol. 93 (1999), pp. 12–22.

60. For the arguments on why the Geneva Conventions do not apply to the war on terror see John Yoo, *War by Other Means. An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press,

The Security Council was reluctant to acquiesce to American demands. Ultimately, however, it put peacekeeping ahead of a commitment to preserve the integrity of the Rome Statute and granted US peacekeepers an exemption from the ICC's jurisdiction. Read from a Schmittian perspective, these events demonstrate the logic of liberal empire.⁶¹ Confident that its cause (i.e. peacekeeping and the war on terror) is just, the United States believes that its service members need not be held accountable to the international community for the manner in which they fulfil those public duties.

Conclusion

This paper has interrogated the claim that liberal cosmopolitanism is inherently imperialistic because it promotes a subjective view of the good life, because it demonises illiberal alternatives and because it encourages the use of unrestrained violence. Liberals may not tolerate intolerant alternatives, but what defines the phrase "intolerant alternative" from the cosmopolitan perspective is not how it relates to Western notions of individualism but how it relates to a universally held conception of humanity. In this regard, the International Criminal Court was offered as an example of a really existing cosmopolitan institution that escapes the charge of being imperialistic because it rests on the outcome of a cross-cultural dialogue and acts independently of particular national interests. The fact that this dialogue delivered an outcome that is directly opposed to the concerns of those "who sincerely believe in American institutional, cultural and moral superiority"⁶² further demonstrates the error of those Schmittians who accuse Habermasian cosmopolitans of assisting the American imperial project. This does not mean the Schmittian charge of liberal imperialism is worthless, just that it is contingent on separating the imperialist tendencies of American exceptionalism from more inclusive notions of liberal cosmopolitanism. The US insistence that it maintains a sovereign's right to decide when and where international justice is done, and its demand that as the guarantor of the liberal world order its service personnel should be exempt from international accountability, was offered as an example of liberal imperialism. That conclusion, however, is only made possible because in this case "liberalism" is merely a rhetorical device; one that provides nationalists with means of representing the United States as an exceptional state.

The significance of this argument goes beyond academic curiosity. Of course, some do not worry about the exclusionary logic of the exceptionalist discourse that underpins "liberal empire", only to express surprise and regret when US policy leads to the hubris and excessive violence that Schmitt wrote about.⁶³

2006). For a discussion of the Security Council debates on the status of peacekeepers see Carsten Stahn, "The Ambiguities of Security Council Resolution 1422 (2002)", *European Journal of International Law*, Vol. 14 (2003), pp. 85–104.

61. For a similar definition of American empire, one that involves the retention of sovereignty in a globalising world (i.e. to decide the exception to international law), see Danilo Zolo, "The Re-emerging Notion of Empire and the Influence of Carl Schmitt", in Odysseos and Petito (eds.), *The International Political Thought of Carl Schmitt*, *op. cit.*, pp. 161–162.

62. Rasch, "Human Rights as Geopolitics", *op. cit.*, p. 143.

63. Sebastian Mallaby, "The Reluctant Imperialist: Terrorism, Failed States, and the Case for American Empire", *Foreign Affairs*, Vol. 81 (2002), pp. 2–7; *idem*, "Liberal Imperialism, R.I.P.", foreign-affairs.org, 30 June 2004.

Yet to those uncomfortable with the notion of empire there is seemingly an urgent need to find a counterweight to US power. Unfortunately, the Schmittian-inspired alternative is less than compelling. For instance, Chantal Mouffe is probably right when she argues that “it is the lack of political channels for challenging the hegemony of the neo-liberal model of globalisation which is at the origin of the proliferation of discourses and practices of radical negation of the established order”. One can also cautiously welcome her suggestion that we envisage “a pluralistic world order constructed around a certain number of great spaces and genuine cultural poles” because it is only in such a world that genuine political antagonism takes on a less extreme form.⁶⁴ Yet just as Scheuerman and Koskenniemi accused Schmitt of a misplaced nostalgia for *jus publicum Europaeum*, so one might accuse Mouffe of downplaying the human misery that attended previous pluralist orders based on a balance of power between alternative political and cultural poles.⁶⁵ Moreover, if the aim is to prevent “radical” or “extreme” forms of politics then it is necessary to drop the idea that the search for global ethical standards is delusional. Without an understanding of what qualifies as “radical” or “extreme” then the normative aim of Mouffe’s pluralism makes no sense. It is argued here that by criminalising the extreme politics of genocide, crimes against humanity and war crimes, the Rome Statute offers such a definition. It clearly articulates and reaffirms the kind of order that Schmittians, conscious of the relativist trap, ultimately hope for—a limitation on the violence that accompanies politics or the “humanisation” of war.⁶⁶ The liberal cosmopolitanism of the Rome Statute is therefore an essential component of a new pluralist order that is not prone to legitimising radical politics in either a unipolar or a multipolar world. In order to recognise its potential, however, pluralists must first drop their insistence that *all* those who evoke humanity wish to cheat.

64. Chantal Mouffe, “Carl Schmitt’s Warning on the Dangers of a Unipolar World”, in Odysseos and Petito (eds.), *The International Political Thought of Carl Schmitt*, *op. cit.*, pp. 152–153.

65. Indeed, Rasch describes Schmitt’s hope for an egalitarian balance of power as “a rather forlorn fantasy”. Rasch, “Human Rights as Geopolitics”, *op. cit.*, p. 143.

66. See, for instance, Bishai and Behnke, *op. cit.*, p. 120, who argue that “no moral privilege can be assigned to the ‘other’, as some post-modern ethics have tried to do. The main concern for realists like Schmitt is instead to limit the inherent violence in a system of difference that has no recourse to a higher political, judicial or moral authority.”