Saving friends or saving strangers? Critical humanitarianism and the geopolitics of international law

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Abstract. What can critical geopolitics contribute to an understanding of the political dynamics of humanitarianism within International Relations? This article demands a reconsideration of the concept of humanitarianism by examining the spatial ordering of international society and the geopolitics of international law that condition our understanding of humanitarian agency and conduct within IR. The focus on critical geopolitics seeks to identify the normative structure of humanitarianism and how humanitarian claims – which are seemingly universal – are constituted through specific geopolitical discourses that structure agency and conduct within international life. Considering how humanitarianism is discursively structured as a geopolitical concept involves taking humanitarianism beyond its methodological privileging of impartiality, neutrality, and universality in making sense of humanitarianism. Critical humanitarianism does not accept the grounding of humanitarianism within an intuitive moral framework but instead locates humanitarian agency and conduct within a spatialised understanding of the international system. Such a spatialised ordering of humanitarianism takes the analytical focus away from 'saving strangers' (Wheeler) and 'global conscience' (Linklater) towards a consideration of the ways in which international law is the product of historical particulars that reflect a complex political sociology of the state (Schmitt).

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Introduction: Humanitarianism and the geopolitical order

The use of military power for humanitarian ends without due consideration of the geopolitical assumptions within humanitarian discourse fundamentally undermines the capacity of humanitarianism to operate as a valid category for intervention within international law. The tendency to invoke the normative category of the 'stranger' within humanitarian discourse fails to represent the political basis of intervention

within International Relations. Many have drawn upon the stranger as the subject of humanitarian intervention (Wheeler, 2000; Walzer, 2006; Geras, 1999) but this generic rendering of the subject to be saved or rescued overlooks the political constitution of subjectivity in international law. A humanitarianism which appeals to the moral responsibility of alleviating the suffering of distant strangers (Habermas, 2000) is not sufficiently embedded in the geopolitical and historical landscape of International Relations. Not only does it assume that the Kantian project of cosmopolitan law has achieved legitimacy in a clearly defined international society, but it overlooks the ways in which modern militaries are still located within bordered logics of security. Critical humanitarianism challenges the capacity of a universal account of 'the stranger' to perform the work of humanitarian international law. Rather than look to international law as the framework in which vulnerable subjects are rescued from their states (and, sometimes, themselves) this article argues that the Schmittian friend-and-enemy grouping provides a useful basis to critique the universality of the humanitarian project.

Much has been made of the humanitarian turn within International Relations and its potential to reimagine the normative contours of sovereignty within the international system. The sizeable literature discussing the ramifications of the 'humanitarian turn' in the aftermath of the Cold War has raised important questions about the predominance of Westphalian norms in determining our conceptions of political agency in international discourse. Whilst the term 'humanitarianism' has circulated widely within political discourse since the 1990s it is important to avoid assuming that the term 'humanitarianism' can be expressed definitively and decisively. Humanitarianism is a political discourse, involving the constitutive patterning of political subjects and establishing levels of agency which speak to specific geopolitical constructions of identity and action. Laclau and Mouffe provide us with a critical platform to challenge the singularity of humanitarianism, allowing a reading of humanitarianism as political discourse. This understanding of humanitarianism focuses on the conceptual architecture of humanitarianism and how this is linked to social logics which are inscribed within specific discourses.[1] As Laclau and Mouffe observe in relation to key concepts in political discourse, 'all of them are contingent social logics which, as such, acquire their meaning in precise conjunctural and relational contexts, where they will always be limited by other – frequently contradictory – logics'.[2]

It is important to note the connection between discourses of humanitarianism and forms of intervention within the discipline of International Relations. This has clear implications for understanding the humanitarian turn within International Relations since the end of the Cold War. If we follow the claim that humanitarianism is always conjunctural and relational then we should exercise caution in exclusively binding humanitarianism to military intervention within International Relations. It is important to note that discourses of humanitarian intervention are not necessarily compatible with discourses of international law. Humanitarian intervention and international law occupy different spatial and political categories.[3] When we understand humanitarian

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[1] Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 2001), p. 142.
[2] Ibid.
[3] I am particularly grateful to one of the anonymous reviewers for highlighting this demarcation.

intervention as automatically synonymous within international law the underlying geopolitical dynamics of both international law and humanitarian discourses are supressed. Martti Koskenniemi has noted that international 'legal argument proceeds by establishing a *system of conceptual differentiations* and using it in order to justify whatever doctrine, position or rule (that is, whatever argument) one needs to justify'.[4] Discussing humanitarianism, whether reflected in discourses of humanitarian intervention and/or international law, necessarily involves a justificatory claim about the scope and capacity of international community. This article seeks to understand how these traditional discourses of geopolitics are inadequate to the task of making sense of humanitarianism. Traditional geopolitics has involved the privileging of the state as the primary actor within International Relations. As Eudaily and Smith have argued, this has meant a focus on 'the placement, arrangements, and disposition of borders that neatly circumscribe a particular territory'.[5] Critical geopolitics, on the other hand, understands these territorial divisions as political imaginaries that condition our understanding of humanitarianism itself. By questioning the rigid certainty of traditional formations of geopolitics there is an implicit challenge to accounts of sovereignty that underpin the state system model within International Relations. Nonetheless, it is through such a critical appraisal of sovereignty that might encourage what Eudaily and Smith refer to as 'experiments in possibility'.[6] Thinking about how humanitarianism contains a geopolitical dimension should not entail looking at humanitarianism through the conceptual lens of the Westphalian state. On the contrary, a critical geopolitics of humanitarianism allows us to see how the Westphalian state has structured sovereignty as the central discourse of both international law and International Relations and, in so doing, allows for a deconstruction of the hegemonic formations are embedded within humanitarian discourse itself.

When we define humanitarianism we do so constitutively. This is not to say that words mean what we choose them to mean but, more critically, to acknowledge how humanitarian discourses constitute forms of knowledge about the capacity of international law within International Relations. The tendency to universalise is implicit within the construction of the category of humanitarianism itself. In this regard, Alex Bellamy has drawn attention to the diverse deployment of the term 'humanitarian' within International Relations, both in academic work and in foreign policy formulations. According to Bellamy, the term 'humanitarian' 'is linked to activities as diverse as the pursuit of universal human rights, the prosecution of those guilty of offending the ''conscience of mankind'', the delivery of emergency aid for human subsistence, and the use of military force in a variety of circumstances'.[7] Nonetheless, despite the lack of clarity associated with the term 'humanitarian' Bellamy thinks it possible to identify four principles associated with a humanitarian outlook. These include:

(1) The principle of humanity. This is the idea that humanitarianism aims to 'prevent and alleviate human suffering wherever it may be found'. (2) The principle of impartiality. Humani-

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[4] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), p. 10.
[5] Sean Patrick Eudaily and Steve Smith, 'Sovereign Geopolitics? – Uncovering the ''Sovereignty Paradox''', *Geopolitics*, 13:2 (2008), p. 313.
[6] Ibid., p. 315.
[7] Alex J. Bellamy, 'Humanitarian responsibilities and interventionist claims in international society', *Review of International Studies*, 29:3 (2003), p. 335.

tarianism does not distinguish between people according to race, sex, religion, nationality, class, whether they live in a powerful state or strategically, or whether 'we' have interests there. It distinguishes only according to need. (3) The principle of neutrality. Humanitarianism does not take sides in a conflict and is only interested in ensuring that people have access to food, shelter, clothing and medical care. (4) The principle of universality. Humanitarianism is universally applicable and all humans have identical humanitarian rights.[8]

For this reason, universalising claims about humanitarianism need to be understood through the constitutive patterning of order and sovereignty within International Relations. Critical geopolitics furnishes us with both normative and spatial cognition of how claims about *humanity*, *impartiality*, *neutrality*, and *universality* operationalise specific humanitarian discourses. The deconstructive approach suggested by critical geopolitics allows for greater awareness of the limitations of these grounding principles of humanitarianism and, in so doing, allows us to sharpen our analytical framework to consider how 'the political' informs the humanitarian. It proposes to insert the political into humanitarianism by tracing the dimensions of geopolitics within both discourses of international law and humanitarianism. Carl Schmitt's legal theory assists us in understanding how international law emerges through geopolitical regimes and cautions against universalising what is particular to political orders in the name of 'humanity'. This article proceeds by examining some of the limitations of defining humanitarianism in terms of universalism. It then considers how claims about humanitarianism contain a spatial dimension, which challenge the universalis-ability of humanitarianism as a normative discourse. Finally, it considers how the spatial mapping of humanitarian discourses through critical geopolitics allows for a renegotiation of humanitarianism through critical perspectives on sovereignty and violence in International Relations.

Aligning Carl Schmitt with a critical discourse of geopolitics *and* humanitarianism requires an awareness of the embedded nature of time and space within International Relations. As Hutchings has observed in relation to conceptions of time in Interna-tional Relations, we should be careful of endowing 'international political time with a unified meaning (principles of freedom and/or reason) that does not match the plurality of political temporality across the realm of international politics'.[9] The liberal project of humanitarianism has overwhelmingly treated international law as the slow (but nonetheless progressive) realisation of normative principles within international legal jurisprudence. Jürgen Habermas expresses this in terms of creat-ing 'a constant and stable acknowledgement of human rights' which initially is characterised by 'low level institutionalisation of international law'.[10] For Habermas, this international normative order of human rights cannot be separated from the international legal order. Such a legal order is the enactment of cosmopolitanism and allows for the radical reconfiguration of principles of sovereignty in International Relations. Habermas expresses this as the *systematic legalisation of international relations*: 'It is precisely the institutionalization of legal procedures that will protect the juridically-tamed manner of dealing with violations of human rights from both

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[8] Ibid., p. 337.

[9] Kimberly Hutchings, 'Happy anniversary! Time and critique in international relations theory', *Review of International Studies*, 33:S1 (2007), p. 78.

[10] Jürgen Habermas, 'Bestiality and Humanity: A War on the Border between Legality and Morality', *Constellations*, 6:3 (1999), p. 269.

a dedifferentiation of the law and an unmediated moral discrimination against "enemies"'.[11]

Habermas' cosmopolitan order is predicated on the functional *and* moral utility of universal justification within the international legal order. Formulating international law as a cosmopolitan question – that is, linking developments in international law with the institutional enactment of cosmopolitan principles – is a particularly strong feature of recent, largely liberal, scholarship in International Relations. Anne-Marie Slaughter has argued that '[i]nternational law and international politics cohabit the same conceptual space' and that 'it makes little sense to study one without the other'.[12] In projecting a liberal vision of international law Slaughter calls for the *Grundnorm* of sovereignty to be reimagined so that it reflects liberal assumptions about state functioning. The assumption being that *liberal* international law is distinct from Realist conceptions of international law that dominate the field of international politics: 'The young discipline of international relations surged to respectability on the tide of Realism, proffering a hard-boiled code of conduct for the Cold War and disdaining the dangerous moralism of international law.'[13]

A critical geopolitics of humanitarianism must therefore tread a fine line between saying that all law that is humanitarian is cosmopolitan *and* all law that is based on the brute exercise of political power is the enemy of humanitarian norms. Chandler has argued in relation to the changing discourse of sovereignty that '[r]ather than starting from politics, from social forces and the clash of interests in society, many theorists start from ethics and norms and then seek to derive (non-exclusionary) political frameworks from this basis'.[14] A critical geopolitics of humanitarianism acknowledges the co-constitutive nature of humanitarian law. International legal norms are inscribed by social forces (material as well as ideational) that generate new understandings of ethical agency within international politics. There is a danger in thinking that cosmopolitanism provides the normative blueprint for the 'humanitarian turn' within international law. This would overlook the complex historical sociology of sovereignty within international politics and the ways in which claims about humanitarianism entail the spatial ordering of knowledges about the capacity of international law.

Using Carl Schmitt to understand the critical geopolitics of humanitarianism must also take into account the historical dimensions of his scholarship on law, politics, and constitutionalism in the early twentieth century. At the same time, it is important to consider the strategic reinvention of Schmitt's ideas for political theory and how scholarship within International Relations has framed questions of state violence through a critical engagement with Schmitt's key works.[15] Without a doubt, Carl Schmitt is a divisive figure in the intellectual milieu of the early twentieth

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[11] Ibid., p. 268.

[12] Anne-Marie Slaughter, 'International Law in a World of Liberal States', *European Journal of International Law*, 6:1 (1995), p. 503.

[13] Ibid.

[14] David Chandler, 'Potemkin Sovereignty: Statehood Without Politics in the New World Order', *The Monist*, 9:1 (2007), p. 94.

[15] There has been an extensive discussion amongst IR scholars within the past decade concerning the critical reception of Carl Schmitt within international political theory. Notable contributions include: David Chandler, 'The Revival of Carl Schmitt in International Relations: The Last Refuge of Critical Theorists?', *Millennium: Journal of International Relations*, 37:27 (2008), pp. 27–48; Louisa Odysseos, 'Dangerous ontologies: the ethos of survival and ethical theorizing in International Relations', in Fabio Petito and Louisa Odysseos (eds), *The International Political Thought of Carl Schmitt: Terror, Liberal*

century. Gopal Balakrishnan warns against treating Schmitt as a 'period piece' claiming that his ideas are 'still unexplored contents of a time capsule'.[16] Mark Lilla has argued that the 'left-wing case made for studying Schmitt is certainly a curiosity but also more interesting and radical than the conservative one'.[17] At the same time, we should not evaluate Schmitt's contribution to international politics on the basis of ideological conceptions of international order; rather, we should think about how Schmitt's spatial framing of international order provides a platform to understand the contemporary dynamics of continuity *and* change in international politics.

The friend and enemy distinction has played a central role in the dissemination of Carl Schmitt's ideas within international political theory. This is expressed most decisively in *The Concept of the Political* where Schmitt argues that the friend and enemy distinction 'denotes the utmost degree of intensity of a union or a separation, of an association or dissociation'.[18] The friend and enemy distinction underscores the importance of political judgment and geopolitical framing (as contained in his account of *nomos* discussed below) for making sense of our conceptions of international order within world politics. It is important not to take this distinction at face value, as the categorisations of 'friend' and 'enemy' are themselves the products of discourses that emerge from social forces within political communities.[19] The current discussion does not set out to provide a critical biography of Schmitt's *oeuvre* from a historical perspective; on the contrary it seeks to identify the critical potential of his geopolitical writings for unpacking the spatial assumptions that are present within the humanitarian turn within International Relations. In evaluating whether humanitarianism is a discourse concerned with *saving strangers* or *saving friends* the intention is to challenge the highly normativised account of humanitarian agency within international politics.

International law should be understood in terms of multiple articulations of legality (and illegality) within international politics. Scholars of International Relations are no different from 'the lawyers' in conceptualising international law from both different *starting* points (and ultimately *end* points) within public discourse. Koskenniemi has observed this in relation to the politicisation of international law, arguing that '[t]his is why much about the search for political direction today takes the form of jurisdictional conflict, struggle between competing expert vocabularies, each equipped with a specific bias'.[20] Law has always had a geopolitical dimension, framed through dominant discourses of geopolitical enmity within international politics. But increasingly, as can be evidenced through the humanitarian turn, international law has been

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War and the Crisis of Global Order (London and New York: Routledge, 2007); Michael C Williams, 'Words, Images, Enemies: Securitization and International Politics', *International Studies Quarterly*, 47 (2007), pp. 511–31; and Roland Axtmann, 'Humanity or Enmity? Carl Schmitt on International Politics', *International Politics*, 44 (2007), pp. 531–51. The special edition of the *Leiden Journal of International Law*, 19:1 (2006) contains some insightful interventions concerning the status of Carl Schmitt's ideas within international legal thought.

[16] Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000), p. 9.

[17] Mark Lilla, *The Reckless Mind: Intellectuals in Politics* (New York: New York Review Book, 2001), p. 63.

[18] Carl Schmitt, *The Concept of the Political* (New Brunswick, NJ: Rutgers University Press, 1976), p. 26.

[19] For further consideration of the paradoxical dimensions of the friend and enemy distinction within Carl Schmitt's writings see Thomas Moore, 'The Paradox of the Political: Carl Schmitt's Autonomous Account of Politics', *The European Legacy*, 15:6 (2010), pp. 721–34.

[20] Martti Koskenniemi, 'The Politics of International Law – 20 Years Later', *The European Journal of International Law*, 20:1 (2009), p. 7.

understood in terms of normative categories of value. Carl Schmitt's account of international law challenges this normativisation by emptying international law of its ideological pretensions and exposing the false teleologies contained within the respective traditions of international law outlined in classic political thought (liberal, socialist, Marxist, realist, etc.).

These political dynamics of international law (and, by implication, humanitarianism) are evident in the allied relationship between just war theory and humanitarian intervention within International Relations. It is not surprising that the key texts in the field of humanitarian intervention draw explicitly on the just war tradition in locating humanitarianism within a moral framework. Contemporary just war theory highlights the role of public deliberation about the use of violence by militaries and largely embeds decisions concerning *jus ad bellum* within a communitarian framework. At the same time, this awareness of the communitarian basis of deliberations about warfare and humanitarianism is not sufficiently informed by geopolitical understandings about the spatial divisions within International Relations. For this reason, Walzer's classic definition of humanitarianism within just war theory appeals to a universal on the one hand (acts which 'shock the moral conscience of mankind') but the decision about military intervention are necessarily worked out through the particulars of specific political communities. Walzer's vocabulary is decidedly universalist and is based on an intuitive understanding of morality:

It is not the conscience of political leaders that one refers to in such cases. They have other things to worry about and may well be required to repress their normal feelings of indignation and outrage. The reference is to the moral convictions of ordinary men and women, acquired in their course of their everyday activities.[21]

The ability of political elites to draw upon the abstract moral vocabulary of the just war tradition lends the justification of a given military intervention a greater degree of credibility. The tendency to treat the just war tradition as a rigid set of criteria – just cause, legitimate authority, right intention, last resort, proportionality, probability of success – undermines the possibility of comprehending the complex nature of the just war tradition within International Relations. The dimensions of the just war cannot be reduced down to a list of criteria that need to be satisfied in order to make war just and thereby legitimate. On the contrary, it is important to take into account the very basis of the just war tradition and how these are negotiated through individual political communities. For this reason, drawing attention to the geopolitical basis of claims about humanitarianism and the discourse of the 'just' war reveals the content of humanitarian values (their motivation, their circulation as political concepts, and their implementation militarily).

The tension between localism and universalism has important implications for the way in which humanitarian claims about intervention are legitimated within public discourse. Justifying the use of force for humanitarian ends is not simply an exercise in political rhetoric but entails an assessment of the types of justification used within humanitarian discourse. In this regard, there appears to be a contradiction between localism and universalism in Walzer's understanding of humanitarianism and how this is related to questions of democratisation. This is expressed in Walzer's claim that 'struggles for democratization, whatever help they receive from outsiders, are

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[21] Michael Walzer, *Arguing About War* (New Haven: Yale University Press, 2004), p. 107.

always local struggles. Their protagonists do not aim at the triumph of cosmopolitan principles around the world. They want a state of their own, in the literal sense of that term – a state governed'.[22] Yet this localism, expressed in terms of the struggle of 'local' people, should not overlook the global dimension of democracy promotion and how these are linked to geopolitical identities within international relations. Moral justifications for democracy and humanitarian intervention are invariably tinged with the preferences of individual actors within the international system. This is not liberal domestic preference formation as such, but more a question of how humanitarian framing generates from within particular identities, interests, and discourses.

Borrowing from Agnew, this article puts forward a critical understanding of humanitarianism which acknowledges the dilemmas of sovereignty and how there is a danger of falling into the 'territorial trap' traditionally associated with conventional understandings of geopolitics.[23] The division of the earth into 'mutually exclusive territorial states' has operated as the dominant paradigm of geopolitics within International Relations. The assumptions behind traditional geopolitics are significant to this discussion; namely, (a) states as fixed units of sovereign space; (b) a division between domestic politics and international politics; and (c) states as the 'containers' of society.[24] This epistemological framework has conditioned our understanding of how international life has been decisively structured as a relational space of states *vis-à-vis* other states against the backdrop of hegemonic power relations. Critical geopolitics, contrastingly, forces us to think about the discursive structuring of space within International Relations, allowing us to move beyond the 'old school' conclusions of classical geopolitics.

With this in mind, the current focus on critical geopolitics seeks to identify the normative structure of humanitarianism within International Relations: how are humanitarian claims – which are seemingly universal – the products of specific geopolitical discourses that are the very foundations of the discipline of International Relations? Humanitarian claims need to be understood as 'speech acts' well before they are deployed as justificatory devices for armed intervention within international society. Talk about 'humanitarianism' within International Relations has too often focussed on the capacity problem; namely, the extent to which states and international institutions can develop capacity to successfully implement and achieve the 'responsibility to protect' (Bellamy: 2009; Evans: 2008; Pattison: 2008; Weiss: 2004). Nonetheless, focussing on the capacity problem without due consideration of the normative foundations of humanitarian discourse neglects the tendency of policymakers and political leaders to invoke the humanitarian alongside other political discourses, notably that of 'international security'. This tension between localism and universalism can be discursively structured as the mutual compatibility between humanitarian values and security strategy. This is most evident in the 2002 US National Security Strategy which projects both localism and universalism in order to demonstrate the affinity between normative conceptions of democracy and America's strategic interests. As the 2002 National Security Strategy affirms, 'The US national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests.'[25]

[22] Michael Walzer, 'On Promoting Democracy', *Ethics & International Affairs*, 22:4 (2008), pp. 351–5.
[23] John Agnew, 'The Territorial Trap: The Geographical Assumptions of International Relations Theory', *Review of International Political Economy*, 1:1 (1994), pp. 53–80.
[24] Ibid.
[25] US National Security Strategy (2002), {http://georgewbushwhitehouse.archives.gov/nsc/nss/2002/nss.pdf} accessed 15 May 2011.

For this reason, Walzer's valorisation of local struggles for democracy highlights a key problem in the justification of humanitarian discourse and, more significantly, humanitarian intervention within international relations. This relates to the fact that just war theory provides for both permission and restraint in the use of force within international relations. Broadly speaking, just war theory is typically represented as a compromise between unfettered realism on the one hand and an ungrounded idealism on the other.[26] Walzer acknowledges that states that carry out an intervention have a particularly 'heavy burden' in justifying the violation of another state's territorial integrity and political sovereignty.[27] Whilst Walzer does not establish a ban on 'boundary crossings' (or more correctly, on intervention) the presumption is that the concept of sovereignty is so important for the international order that its violation undermines the integrity of political community.[28] In revising the legalist paradigm – the grounding principle of the international order which establishes a presumption in favour of territorial integrity and political sovereignty – there is an allowance made for exceptions to the rule. For Walzer, this is 'when the violation of human rights within a set of boundaries is so terrible that it makes talk of community or self-determination or "arduous struggle" seem cynical, that is, in cases of enslavement or massacre'.[29]

When advocates of just war theory authorise the use of force beyond the boundaries of the legalist paradigm the question of selective and uneven derogation arises. Whilst derogation in international law largely been understood from the perspective of human rights discourse it is important to consider how the use of military force for humanitarian objectives involves derogating from the classic legalist paradigm within International Relations. Discussion of derogation jurisprudence in the post-9/11 context has involved negotiating the relationship between fundamental rights and state security. This is reflected in legislative responses to terrorism at the national, regional, and international levels. The widespread deployment of derogation jurisprudence – whether the Patriot Act (USA), the Prevention of Terrorism Act (UK), or the Border Protection Bill (Australia) – involves states agreeing new limits to fundamental rights against the backdrop of new security threats. The emplacement of terrorism within an 'armed conflict paradigm' has meant that questions of criminality are now explicitly linked to *jus ad bellum* and *jus in bello*.[30]

Derogation from just war norms under international law has attracted significant discussion from both legal and political scholars in the aftermath of the Global War on Terror. Whether international law has been disregarded (Brunnée and Toope) or used to extend the scope of security exceptionalism in the Global War on Terror (Johns) requires an appreciation of the normative and geopolitical dimensions of international law.[31] It is these dimensions which are significant to understanding

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[26] Mona Fixdal and Dan Smith, 'Humanitarian Intervention and Just War', *Mershon International Studies Review*, 42:2 (1998), p. 307. See also, Noberto Bobbio, *Peace, War and International Politics* (Turin: Centro Studi Di Scienza Politica Paolo Farneti, 2007), p. 49.

[27] Michael Walzer, *Just and Unjust Wars*, p. 86.

[28] Ibid., p. 89.

[29] Ibid., p. 90.

[30] Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights', *European Journal of International Law*, 14:2 (2003), p. 264.

[31] Jutta Brunnée and Stephen J. Toope, 'The Use of Force: International Law After Iraq', *International and Comparative Law Quarterly*, 53:4 (2004), pp. 785–806; Fleur E. Johns, 'Guantanamo Bay and the Annihilation of the Exception', *European Journal of International Law*, 16:4 (2005), pp. 613–35.

how decisions about just war are enabled through interpretative networks and environments. For this reason, international law dealing with the use of force must be alert to the way in which exceptions to the rule are negotiated. The humanitarian turn within international relations has undoubtedly involved a substantial renegotiation of foundational discourse within international law and international relations. The recharacterisation of sovereignty as discussed by the International Commission on Intervention and State Sovereignty ('Responsibility to Protect') called for a twin understanding of sovereignty within international relations. In this regard, the exception to the long-standing principle of non-intervention under international law was to be reformulated through increased emphasis on sovereignty as responsibility. Arguing that '[t]here is no prospect of genuine equality among peoples unless the sovereignty of states is respected and their capacity to protect their own citizens is enhanced' the doctrinal assumptions of the responsibility to protect principle seek to entrench new exceptions within international law.[32] Whilst these exceptions are obviously motivated by a desire to redress the false promises of international human rights law (rather than their diminution) these exceptions are nonetheless negotiated geopolitically.

How the geopolitical landscape of international relations contributes to the practice of humanitarianism under international law is essential for advancing a critical humanitarianism perspective. In asking the question whether humanitarianism involves the symbolic structuring of the 'politics of rescue' in terms of friends or strangers the intention is to underscore how our understandings about friends and strangers are inscribed within a social and political discourse. Michael Walzer does acknowledge that humanitarian interventions are both politically risky and highly selective endeavours. In assessing the NATO campaign in Kosovo, involving an extensive campaign of aerial bombardment, Walzer is concerned that a 'technological fix' was deployed in order to reduce the possibility of military casualties.[33] Acknowledging that US national security was not 'at stake' in Kosovo, Walzer attempts to maintain a critical stance for just war theory against the cooption of just war by Western militaries.[34] In stating that militaries must be prepared to mobilise their citizens (and, by implication, put their own lives at risk) for the purposes of averting humanitarian disaster the focus is on the appropriateness of strategic responses to crisis. In this regard, Walzer notes that 'you can't kill unless you are prepared to die'.[35]

The question of casualty aversion arises prominently in the 1990s, specifically in the US military response to humanitarian emergency in Somalia and Kosovo.[36] But the question of casualty aversion still has contemporary significance, notably in the 2011 military intervention in Libya to implement United Nations Security Council Resolution 1973. The issue of casualty aversion brings into view the remarkable disjuncture between humanitarian claims (which are seemingly universal) and national interest (which are linked to particularism) within International Relations. Casualty aversion concerns not just the desire of individual states to protect their own militaries from harm but involves the attempt to minimise the direct and indirect political costs

[32] 'International Commission on Intervention and States Sovereignty', *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), p. 75.
[33] Michael Walzer, *Arguing About War* (New Haven: Yale University Press, 2004), p. 100.
[34] Ibid., p. 3.
[35] Ibid., p. 101.
[36] Cori Dauber, 'Image as Argument: The Impact of Mogadishu on US Military Intervention', *Armed Forces & Society*, 27:2 (2001), p. 218.

of a militarised approach to humanitarianism. For this reason, just war theory has largely failed to address the representative dimensions of humanitarian agency and action within international relations. Representation, and by implication, inter-subjective understanding are key to making sense of the categories of agency that are so prevalent within the just war tradition. These categories of political agency arise specifically from the combatant/non-combatant distinction and are explicitly linked to normative understandings of guilt and innocence within just war theory. In defining what is meant by the term 'innocence' Walzer draws again on metaphor:

An army, to be sure, has an enormous belly, and it must be fed if it is to fight. But it is not its belly but its arms that make it an army. Those men and women who supply its belly are doing nothing peculiarly warlike. Hence their immunity from attack: they are assimilated to the rest of the civilian population. We call them innocent people, a term of art which means that they have done nothing, and are doing nothing, that entails the loss of their rights.[37]

The discourse of humanitarianism presupposes a range of political subjectivities that derive from both the structure of the international system and our understanding of guilt, innocence, and responsibility within international ethics. Those who defend humanitarianism through international law assume that law is the most appropriate way to confer humanitarian responsibility: 'The Geneva Conventions and other human rights and humanitarian treaties do therefore confer obligations upon human-itarian organisations and it is absolutely right that the humanitarian system should be held accountable to these norms.'[38] The normative structure of humanitarianism is often assessed from an institutional framework that places the emphasis on response to humanitarian crisis. The failure of humanitarianism is reduced down to a failure of institutional arrangements to secure fundamental human rights during times of humanitarian crisis. This institutional failure is often linked to a lack of 'political will' which must be remedied through independent monitoring of crisis regions and communities.

To reduce the failure of humanitarianism down to a lack of political will means that the normative structure of agency and action are largely overlooked in making judgements about what constitutes a humanitarian emergency. Richard Rorty addressed the question of representing pain in his discussion of 'privileged representations' in Philosophy and the Mirror of Nature. In asking why we send 'pigs to the slaughter with equanimity, but form societies for the protection of koalas' Rorty sought to understand how representations of pain (and prohibitions against harm) are hierar-chically formed within a pre-linguistic framework.[39] Conceptions of pain are linked to intersubjective communities and this has real significance for the discourse of humanitarianism within International Relations. Rorty argued that 'moral prohibi-tions are expressions of a sense of community based on imagined possibility of con-versation'.[40] This 'imagined conversation' constitutes an important dimension of the discourse of humanitarianism and is reflected in Kantian approaches to international ethics which place hospitality at the forefront of humanitarian response.[41]

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[37] Michael Walzer, *Just and Unjust Wars*, p. 146.
[38] Nicholas Stockton, 'In Defence of Humanitarianism', *Disasters*, 22:4 (1998), pp. 352–60.
[39] Richard Rorty, *Philosophy and the Mirror of Nature* (New Jersey: Princeton University Press, 1979), p. 190.
[40] Ibid.
[41] Andrew Linklater, 'Distant Suffering and Cosmopolitan Obligations', *International Politics*, 44 (2007), p. 21.

Whilst Andrew Linklater has identified the significance of the category of the stranger for making sense of cosmopolitan obligations the concern is primarily with the question of distance and how these are ontologically grounded within a discourse of 'cosmopolitan emotions'.[42] This must be supplemented by an analysis of how privileged representations of certain types of humanitarian agency condition and structure humanitarian action within International Relations. As Rorty notes in relation to the constitutive basis of humanity, '[t]o be humanoid is to have a human face, and the important part of that face is a mouth which we can imagine uttering sentences in synchrony with appropriate expressions of the face as a whole.'[43]

James Pattison has sought to extend the scope of traditional just war theory in relation to humanitarian intervention by taking representation as a necessary criteria of just intervention. Drawing upon Hannah Pitkin's work on political representation the emphasis is on the internal and external representativeness of humanitarian conduct within International Relations.[44] The criteria proposed by Pattison is that legitimate (humanitarian) intervention depends upon whether 'an intervener's decision making on the proposed intervention reflects the opinions of its citizens' and 'those individuals in the political community that is subject to the intervention'.[45] Despite the fact that Pattison acknowledges that humanitarian intervention involves 'extremely high moral stakes' there is, nonetheless, an implicit assumption that questions of internal legitimacy (justifying intervention to the political community undertaking the intervention) can be resolved if there are high levels of public support and opinion.[46] This overlooks the question of the constitution of political community and how political communities are shaped through exclusionary discourse. In acknowledging that there was a high level of public support for Australia's intervention in East Timor must take into account the fact that Australian political community was fuelled not only by humanitarian concerns but anxieties about asylum and immigration policy towards East Timor.[47] Australia's supposed humanitarian outlook must be read in conjunction with a broader agenda of securitisation of immigration and regional governance in the Asia Pacific region. For this reason, it is important to evaluate the conduct of states not just in terms of how they justify intervention to their citizens but in terms of how they project a particular type of (exclusionary) ethic within political community. It is this 'constitutive outside' of humanitarianism that demands further consideration in evaluating the question of representation in humanitarian discourse.

Chantal Mouffe's understanding of the 'constitutive outside' is relevant to understanding humanitarian discourse as it explicitly links the ontology of political community to particular boundaries of exclusion. Mouffe identifies the bounded nature of political community and how liberal-democratic consensus is subject to difficulties that emerge from the 'constitutive outside'.[48] Her focus concerns the demarcation of political community (demos) in terms of a discourse of inclusion and exclusion in which the 'enemy' features prominently. 'What matters', Mouffe observes in relation

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[42] Ibid., p. 27.
[43] Richard Rorty, *Philosophy and the Mirror of Nature*, p. 189.
[44] James Pattison, 'Representativeness and Humanitarian Intervention', *Journal of Social Philosophy*, 38:4 (2007), p. 569.
[45] Ibid., p. 569.
[46] Ibid., p. 573.
[47] Penelope Matthew, 'Lest We Forget', *International Journal of Refugee Law*, 1:1 (1999), pp. 7–59.
[48] Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000), p. 37.

to Carl Schmitt's account of political community, 'is the possibility of tracing a line of demarcation between those who belong to the demos – and therefore have equal rights – and those who, in the political domain, cannot have the same rights because they are not part of the demos'.[49] For Mouffe, the structure of public communication and deliberation is always embedded in a network of power relations: 'Consensus in a liberal-democratic society is – and always be – the expression of a hegemony and the crystallization of power relations.'[50]

Linklater has observed that 'it is not beyond the ingenuity of the human race to rise above increasingly problematical particularistic moralities and to create global arrangements that have the primary task of implementing cosmopolitan obligations to reduce distant suffering'.[51] In tracing how humanitarian discourse emerges through considerations of the 'constitutive outside' – implicit and/or explicit – the focus is on the way in which humanitarian emergency is a function of political community. The question of humanitarian legitimacy should not be linked exclusively to consensus within a liberal-democratic model but through a broader network of power relations that arise from the conditioning of specific political communities. In this regard, the Kantian appeal to the suffering of distant others should not be understood as an intuitive morality which is forged through common experience. Linklater invokes Schopenhauer's principle 'injure no one; on the contrary, help everyone as much as you can'.[52] Such a humanitarian principle is wagered on the existence of a 'global conscience' which assumes commonalities between strangers.[53]

The critical geopolitics of humanitarian responsibility

Talking in terms of a 'global conscience' which provides the basis for humanitarian practice assumes that there is a 'universal' order of ethics and morality which underpins all human conduct. An analysis of this humanitarian framework from the perspective of critical geopolitics appreciates both the limit-points of humanitarian practice and the ways in which humanitarianism operates as a performative concept within International Relations. Dalby has noted that critical geopolitics entails an understanding of the 'performance of political acts, the specifications of friends and enemies, the designation of spaces as theirs and ours, the distinctions between hostile and friendly places and peoples'.[54]

Without a doubt, the end of the Cold War provided a new focus for humanitarian discourses within world politics. Whilst debates on humanitarian responsibility were largely 'curtained off' from mainstream scholarship in IR for most of the twentieth century it is somewhat problematic to declare that in the period from 1989 until 2001 that the humanitarian agenda 'comes of age'.[55] Duffield has noted that there has

[49] Ibid., p. 40.
[50] Chantal Mouffe, *The Democratic Paradox*, p. 49.
[51] Andrew Linklater, 'Distant Suffering and Cosmopolitan Obligations', *International Politics*, 44 (2007), p. 33.
[52] Ibid., p. 44.
[53] Ibid.
[54] Simon Dalby, 'Calling 911: geopolitics, security and America's new war', *Geopolitics*, 8:3 (2003), pp. 62–3.
[55] Barry Munslow and Tim O'Dempsey, 'From War on Terror to War on Weather? Rethinking humanitarianism in a new era of chronic emergencies', *Third World Quarterly*, 31:8 (2010), p. 1124.

been a 'marked upswing in all forms of aid-led humanitarian, development and peace interventionism following the end of the Cold War' but rightly observes that this is strongly linked to the politicisation of human development issues within IR during this period.[56] An assessment of this humanitarian framework must factor in the ways in which humanitarian issues have involved the securitisation of human rights by political actors. Conceived in terms of a 'speech act' humanitarianism involves the structuring of multiple subject positions concerning how and by whom humanitarian duties demand consequent action. Using the work of the Copenhagen School, Watson has recently noted that 'humanitarian security' differs significantly from state or societal security in terms of its priority on human life.[57] As summarised by Watson, '[w]hile state and societal security discourses also concern human life, they serve to prioritize the state or society as the means of protecting human life and dignity, whereas the discourse of humanitarian security attempts to prioritize human life over the interests of states and/or societies.'[58] Claiming that humanitarianism prioritises 'human life' at the expense of the interests of states is loaded with significant normative content. Not only does it assume that 'human life' can be separated from the fate of political communities, notably states, but it also presumes that there exists a line of demarcation between national interest and human life. What constitutes human life is entwined within political communities and a geopolitical perspective assists in tracing the ways in which human life is understood within multiple cultural, social, historical and geographical locations.

Considering how humanitarianism is discursively structured as a geopolitical concept involves taking humanitarianism beyond its normative claims and examining how it provides a structure of address for political claims within IR. In terms of talking about humanitarian responsibility, then it demands greater attention to the ways in which humanitarian responsibilities are assigned and ultimately acted upon within IR. Assigning humanitarian responsibility must acknowledge that sovereignty and rights, at both the individual and collective level, are inextricably linked to the emergence (and more importantly, legitimacy) of the modern state. States are unquestionably more than the sum total of their geography and for this reason a spatialised understanding of geopolitics contributes a historical dimension to the study of states within IR.

Whilst it is important to consider the global distribution of political responsibility within IR, especially in relation to humanitarianism, it is nonetheless important to think about how institutional agents (whether at the local, state, or global level) self-identify their humanitarian agency not only in terms of responsibility but also as legitimate actors alongside other institutional agents within International Relations. In this regard, it is not possible to evade the question of how particular claims about international justice achieve authoritative significance across policy networks as well political communities. The discourse of humanitarianism presupposes a range of subject positions that are simultaneously grounded epistemologically and ontologically. This dimension of collective agency has been addressed by Toni Erskine in

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[56] Mark Duffield, 'The Liberal Way of Development and the Development-Security Impasse: Exploring the Global Life-Chance Divide', *Security Dialogue*, 41:53 (2010).
[57] Scott Watson, 'The 'human' as referent object? Humanitarianism as securitization', *Security Dialogue*, 42:3 (2011), p. 5.
[58] Ibid.

her discussion of institutional responsibility within International Relations. In noting the importance of linking individual agency to collective agency she identifies the fundamental communitarian aspect of just war theory: 'The individual soldier can be expected to uphold the duty not to shoot at a civilian intentionally; he cannot reasonably be burdened with the duty not to engage in a war of aggression.'[59] For this reason, talking in terms of a generalised 'international community' in relation to humanitarianism neglects the constitutive dimensions of agency within international relations: 'Not only does the international community lack an identity that is independent of the identities of its constitutive members, but it does not have a decision-making capacity.'[60]

Whilst humanitarian responsibility of necessity invokes a universal claim concerning international justice it is worth noting the importance of particular notions of responsibility within International Relations. An assessment of humanitarianism from the standpoint of geopolitics might appear to endorse Reinhold Niebuhr's reading of morality within International Relations as a zone of hypocrisy. In linking the use of force within IR to the constitution of political community Niebuhr noted that 'one method of making force morally redemptive is to place it in the hands of a community, which transcends the conflicts of interest between individual nations and has an impartial perspective upon them'.[61] According to Niebuhr, the establishment of a political collectivity which transcends discourses of national interest – an international community – is limited by the belief that 'nations are too selfish and morally too obtuse' to strive for international justice.[62] Critical geopolitics might acknowledge the limitations of universal conceptions of international justice in humanitarian discourses but this does not necessarily entail the abrogation of political responsibility from the analysis itself. Identifying the geopolitical dimensions of humanitarian discourse allows for a more complex discourse of responsibility in responding to humanitarian crisis. Erskine has remarked that if we are to grapple with institutional responsibility then we must correctly identify 'the agents' within the international system.[63] In a similar vein, critical geopolitics demands a reassessment of the universalising pretensions of humanitarian discourse. This means that is no longer sufficient to talk of humanitarianism as a value-laden discourse but instead as one which is embedded in deep forms of agency.

Both Niebuhr and Erskine share the belief that endless talk of an international community is largely meaningless when confronted with the institutional dynamics of the international system. Yet where Erskine might be willing to confer moral agency within institutions it is evident that Niebuhr is unwilling to endorse such moral resilience within the international order. Erskine places the emphasis on moral agency and how this engenders an ethic of responsibility for institutional agency within international relations.

[59] Toni Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States', *Ethics & International Affairs*, 15:2 (2001), p. 73.
[60] Ibid.
[61] Reinhold Niebuhr, *Moral Man and Immoral Society: A study in Ethics and Politics* (London: Continuum, 2005), p. 72.
[62] Ibid.
[63] Toni Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States', *Ethics & International Affairs*, 15:2 (2001), p. 73.

Nicholas Wheeler notes that humanitarian rescue, especially its military dimension, brings to the forefront the conflict between 'order' and 'justice' within international society.[64] Not only does this presume that the space of 'international society' can be clearly demarcated but it also takes for granted that humanitarian conduct involves soldiers from one political community risking their own lives for the sake of the stranger who inhabits a remote political community. There is a tension in Wheeler's framework between the moral community implied by the concept of 'international society' and the agency of individual soldiers who possess a particular form of citizenship which stands in contradistinction to those human beings who are the objects of humanitarian intervention. This tension can be understood in terms of the way in which political communities who engage in humanitarian conduct – those doing the saving – must negotiate the legitimacy of their intervention both domestically and internationally. A universalising concept of humanitarianism is not sufficient to understand these richly textured dimensions of political community. Thus, linking humanitarian discourse to the geopolitical dimensions of the international system should not be thought of as simply a mapping exercise but, on the contrary, as an analysis of how power and knowledge circulates within international life.

Critical geopolitics and humanitarian conduct

Mark Duffield has recently remarked that 'saving strangers has become a dangerous occupation'.[65] In this regard, Duffield directs us to consider how the development-security nexus is the product of the 'spatial geography of the global north and south'.[66] Critical geopolitics forces an awareness of how the normative capacity of humanitarianism is embedded in a global system of power. As expressed by Daniel Deudney, critical geopolitics is 'focused on the global-scope system of power and security relationships created by the technologies of the industrial revolution interacting with the largest geographical features of the earth'.[67] With this in mind it is important to distinguish between geopolitics which understands the world as territorialised and a critical geopolitics which understands the world as spatialised. In the analysis of humanitarianism, it is important to avoid territorialised understandings of geopolitics. Not only do they run the risk of replicating existing power dynamics, in endorsing realist claims, but they also overlook how geopolitical claims are themselves the products of historically negotiated power dynamics. In so doing, it makes explicit reference to Gearóid Ó Tuathail's understanding of critical geopolitics as 'a problematizing theoretical enterprise that places existing structures of power and knowledge in question'.[68]

Ó Tuathail rightly differentiates between geopolitics which is indebted to a European legacy and geopolitics which deconstructs this legacy to understand how power

[64] Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2002), p. 11.

[65] Mark Duffield, 'The Liberal Way of Development and the Development-Security Impasse: Exploring the Global Life-Chance Divide', *Security Dialogue*, 41:1 (2010), p. 54.

[66] Ibid., p. 69.

[67] Daniel Deudney, 'Geopolitics as Theory: Historical Security Materialism', *European Journal of International Relations*, 6:1 (2000), p. 78.

[68] Gearóid Ó Tuathail, 'Understanding critical geopolitics: Geopolitics and risk Society', *Journal of Strategic Studies*, 22:2 (2000), p. 107.

is inscribed within complex geographies of difference. According to Ó Tuathail, critical geopolitics endeavours to 'recover the complexities of global political life and expose the power relationships that characterize knowledge about geopolitics concealed by orthodox geopolitics'.[69] Invoking Robert Cox's well-known dichotomy between problem-solving and critical theory in International Relations, Ó Tuathail argues that the former concentrates on the 'balance of power' whilst the latter concerns structures of political knowledge that condition our understanding of the international system.

Reading humanitarianism through the framework of critical geopolitics raises an important question concerning the traditional focus of just war theory and its preoccupation with the legal basis of aggression and territorialised understandings of sovereignty within the international system: how do discourses of just war, when stretched to the limits of the legalist paradigm, reimagine the just use of force within international relations? Just war theory has faced two significant challenges in the aftermath of the Cold War and these have been interpolated through specific spatial histories within the post-1989 international system. The advent of 'new wars' and the new agenda for international security initiated by the September 11 attacks have forced just war theorists to reimagine the dimensions of violence within IR itself. Nonetheless, an appeal to transcendental truths about what constitutes a just or unjust use of force within international relations overlooks the embedded rationalities of judgement (and judging) within an international system that are inscribed geopolitically.

Gerry Simpson has expressed this geopolitical dimension of international law in his account of legalised hegemony; namely, the international legal order needs to be understood in terms of core-periphery relations and how these are expressions of relative power status within the international system. 'Legalized hegemony', Simpson argues, 'is indistinguishable from superpower dominance in that the former requires a commitment to long – term collective action together with a formal constitutional validation of these collective goals and processes'.[70] An awareness of the geopolitical dimensions of international law takes legality beyond the formalism or objectivism of law within the international system.[71] The critical legal studies movement has drawn attention to the ways in which law must be understood within its social context, highlighting the tendency of legal frameworks to be frozen and to thereby cast aside the political dynamics at work within law itself.

Taking geopolitics as the basis of international humanitarian law does not necessarily undermine the efficacy of law but instead draws attention to the historical sociology of law-making and law-enforcement within international relations. The centrality of the state as the referent object for both international relations and international law provides a largely ahistorical interpretation of sovereignty within the international system. A critical geopolitics – one which links legality to the political cartography of the international system – enables a more pertinent reading of the

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[69] Ibid.

[70] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004), p. 75.

[71] Roberto Unger defines objectivism within law in the following way: 'Objectivism is the belief that the authoritative legal materials – the system of statutes, cases, and accepted legal ideas – embody and sustain a defensible scheme of human association. They display, though always imperfectly, an intelligible moral order. . . . The laws are not merely the outcome of contingent power struggles or of practical pressures lacking in rightful authority.' Roberto Mangebeira Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1986), p. 2.

inability of contemporary just war theory to make commensurable the competing discourses of internal/external justifications for democracy promotion. Koskenniemi's claim that international relations is 'in the relevant respects still the realm of the exceptional and thus a proper realm not for the application of rules but for statesmanship' is relevant to making sense of the rationalities of international law.[72] These legal rationalities can be understood hegemonically (Koskenniemi) or pluralistically (Unger) but the essential character of law is its emergence through regimes of power.

If critical geopolitics dislodges the focus on the universal dimensions of humanitarianism then it is also important to think about the ways in which international law itself can be understood as a spatial ordering of specific traditions in jurisprudence. In this regard, Schmitt's *Nomos of the Earth*' presents a critique of the liberal jurisprudential model in international relations, especially its desire to establish a universally recognised model of international law. Schmitt is concerned with the inability of the European tradition of law – *jus publicum Europeaum* – to provide a structure for order within an international sphere marked by both geographical and cultural divisions. This law originally concerned the law existing between European sovereign states. One of its primary assumptions was that European public law provided a compelling template for governance and order beyond the European world. In this respect, Schmitt warns against an image of the international which rests upon 'global' assumptions about the capacity of European law to remake the world. Schmitt argues that for centuries 'humanity had a mythical image of the earth, but no scientific understanding of the whole'.[73] This mythical image of the earth failed to take seriously the division of the world into geopolitical units, each embodying their own image of law *vis-à-vis* other traditions.

For Schmitt, the belief that European public law can become a foundation for international law rests upon a faulty understanding of nomos in international relations. Schmitt warns against thinking of nomos in terms of the customary principles governing conduct at the international level. To proclaim that there is law at the international law (and that this nomos provides a structure for order) is to overlook the fact that nomos first emerges through the process of land acquisition. Schmitt wants to retain the original sense of the word nomos which means 'to divide' and 'to pasture' the earth rather than law as the regulation of the norm.[74] For this reason, Schmitt notes that we should not lose sight of the fact that nomos refers 'to a constitutive act of spatial ordering'.[75] This spatial ordering is historically grounded, and involves the establishment of clear geopolitical divisions across the earth. These divisions constitute fixed entities, each carrying with them comprehensive worldviews that invalidate universalistic claims about the capacity of international law to operate across the world. The important thing to note about Schmitt's understanding of nomos is that it places the emphasis on the geopolitical domain – the division of the world into states – rather than international law as mirror of a cosmopolitan or international ethic. In this regard, Schmitt stresses the need to think in terms of states

[72] Martti Koskenniemia, 'International law and hegemony: a reconfiguration', *Cambridge Review of International Affairs* (2004), 17:2, p. 213.
[73] Carl Schmitt, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum* (New York: Telos Press, 2003), p. 50.
[74] Ibid., p. 70.
[75] Ibid., p. 71.

rather than humanity.[76] For Schmitt, nomos refers to the fundamental process of apportioning space. In claiming that 'the original act is nomos' Schmitt does not invoke an originary myth in which the order of the earth can be understood in terms of previous geopolitical divisions. This is because each era generates its own nomos:

Such constitutive processes are certainly not everyday occurrences, but neither are they simply matters of bygone times and only of archaeological or antiquarian interest today. As long as world history remains open and fluid, as long as conditions are not fixed and ossified; in other words, as long as human beings and peoples have not only a past but also a future, a new nomos will arise in the perpetually new manifestation of world-historical events. Thus, for us, nomos is a matter of the fundamental process of apportioning space that is essential to every historical epoch – a matter of the structure-determining convergence of order and orientation in the cohabitation of peoples on this now scientifically surveyed planet. This is the sense in which the nomos of the earth is spoken here. Every new age and every new epoch in the coexistence of peoples, empires, and countries, of rulers and power formations of every sort, is founded on new spatial divisions, new enclosures, and new spatial orders of the earth.[77]

Schmitt's concept of nomos thereby involves drawing a distinction between nomos as the appropriation of the earth (territorially establishing the conditions by which the world is subsequently divided) and the notion of nomos as a normative statement about the possibility of global order. According to Ulmen, Schmitt introduces the term nomos in 1934 to talk of 'concrete order thinking' rather than positivist 'legal order' thinking which is largely grounded in the normative.[78] Mitchell Dean echoes this in noting that Schmitt's concept of nomos can be read as an attack on the 'decadence of present-day legal thinking and [a desire] to establish a theory of the preconditions of concrete social orders'.[79] In saying that men rather than law should provide the basis for understanding the dynamics of state conduct at the international level Schmitt is warning against the reification of international law. That is to say, international law should be understood in terms of the existing spatial ordering of the world (especially its divisions) rather than as the embodiment of substantive, universal truths about law. This is reflected in Schmitt's demand that international law be conceived in terms of the 'element orders' of 'terrestrial being' and how these orders have largely been shaped by a European tradition of jurisprudence.[80]

This demand for concrete level thinking about international order (as distinct from normative reflection on the international) is evident in Schmitt's rejection of

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[76] See also Carl Schmitt, 'Ethic of State and Pluralistic State', in Chantal Mouffe (ed.), *The Challenge of Carl Schmitt*, (London: Verso, 1999). Schmitt argues against the universalism of humanity and in favour of concrete political communities through the state. See, in particular, p. 205.

[77] Carl Schmitt, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum*, pp. 78–9.

[78] See the translator's introduction to Schmitt's *Nomos of the Earth*. Ulmen argues that Schmitt envisaged a 'concrete territorial spatial order' (that is, a nomos of the earth) which would allow new friend/enemy groupings to emerge in international politics. Concrete order thinking is contrasted to normative thinking. See, for deeper discussion of this point, Ulmen's claim that Schmitt is critical of those who think that 'law, not men' should rule. Ibid., pp. 19–20.

[79] Mitchell Dean, 'A Political Mythology of World Order: Carl Schmitt's Nomos', *Theory, Culture & Society*, 23:5 (2006), p. 4. Dean argues that Schmitt 'is a thinker concerned with humankind's necessarily telluric (or earth-bound) character; the philology of nomos reveals not the primacy of appropriation but the concrete existence of human communities in their occupancy of the earth and orientation on it. This nomos exists prior to nomads, movement, borders, territories, settlements and households, and above all, positive laws. Nomos – at least in the versions familiar to non-nomadic societies – is, as he sharply puts it, a "fence-word": it creates territory, defines locality, marks places, separates backyards and defines households.' Ibid., p. 7.

[80] Carl Schmitt, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum* (New York: Telos Press, 2003), p. 39.

Hellenic cosmopolitan law. Schmitt rejects the cosmopolitanism of Hellenic states as an example of international order since it endeavours to make a world-state out of a city-state.[81] The spatial order of the earth, in order to be truly global, must understand the earth as a whole. It must not generalise what it takes to be a global order from a specific legal order. Yet, for Schmitt, this is essentially what the *jus publicum Europeaum* has done in relation to international law. International law, filtered through the prism of the *jus publicum Europeaum*, fails to transcend the territorial division of the world into European and non-European peoples. Schmitt's concept of nomos thereby operates as a methodological tool by which the international system can be understood. The important thing to note is that the international is to be understood through historical particulars rather than the establishment of transhistorical universals.

For Schmitt, the concept of nomos can be understood as the 'constitutive legal process' of the international system.[82] Paying attention to the historical development of nomos – between and within states – invalidates the claim of the *jus publicum Europeaum* to operate as a foundation for international law and order. This is because nomos should be framed in relation to three processes which, by their very nature, undermine the very notion of the international. These three processes – appropriation, distribution, and production – are fundamental to the spatial order of the international system. They involve the fusion of the territorial (an ability to distinguish mine from thine) with a concept of the political (an ability to distinguish friend from enemy). For Schmitt, the first notion of nomos involves the appropriation of land which was recognised in Locke's concept of property. Schmitt endorses Locke's notion of property as jurisdiction over the land. Thus, Schmitt argues that land appropriation is 'the archetype of a constitutive legal process externally (*vis-à-vis* other peoples) and internally (for the ordering of land and property within a country)'.[83] Distribution is the second dimension of nomos. Looking at the way in which the resources of the world are divided across the international system is necessary to understanding the spatial ordering of the globe.[84] The third dimension of nomos involves a qualitative assessment of the internal workings of a given territorial space, especially consideration of its processes of production. Thus, Schmitt assigns nomos a primary role in the internal and external workings of the state:

Each of these three processes – appropriation, distribution, and production – is part and parcel of the history of legal and social orders. In ever stage of social life, in every economic order, in every period of legal history until now, things have been appropriated, distributed, and produced. Prior to every legal, economic, and social order, prior to every legal, economic, or social theory are these elementary questions: Where and how was it appropriated? Where and how was it divided? Where and how was it produced?[85]

Schmitt regards states as the primary vehicles of appropriation, distribution, and production across the earth. Expressing a disbelief in the capacity of law to govern

[81] This is evident in Schmitt's claim that 'we can disregard the philosophical generalizations of the Hellenistic period, which made a cosmopolis [world-state] out of a polis [city-state], because they lacked a topos [orientation], and thus had no concrete order'. Ibid., p. 50.
[82] Ibid., p. 47.
[83] Ibid.
[84] Schmitt expresses this in the following terms: 'Concretely speaking, nomos is, for example, the chicken in every pot that every peasant living under a good king has on Sunday, the parcel of land every farmer cultivates as his property, and the car every American worker has parked in his garage.' Ibid., p. 327.
[85] Ibid., pp. 327–8.

the earth ('in the name of humanity') Schmitt looks to the specific distribution of the earth through territorially bounded states. A system of international law that invokes 'humanity' overlooks how law is legitimated through the original act of appropriation. Thus, speaking in terms of a 'world unity' would require there to be a spatial order in which the world was held in common. This would mean the suspension of established geopolitical divisions and the possibility of preventing future divisions from emerging. International law would thus require humanity to 'appropriate' the earth:

Has humanity today actually 'appropriated' the earth as a unity, so that there is nothing more to be appropriated? Has appropriation really ceased? Is there now only division and distribution? Or does only production remain? If so, we must ask further: Who is the great appropriator, the great divider and distributor of our planet, the manager and planner of unified world production? This question should warn us against ideological short-circuits. At work here are widespread and generally forceful, although scientifically superfluous simplifications. They suggest fictional unities. Their simplifications can be overcome only by the deeper simplicity of original concepts.[86]

Schmitt's treatment of the global as a fictional entity implicitly questions the capacity of 'the international' to function in two respects. Firstly, the international cannot be adopted as the organising principle by which the pluriverse can be understood. The very notion of 'the international' is at odds with the radical plurality that exists between and amongst states. Schmitt assumes that states can achieve a democratic homogeneity within their own territories. No such assumption exists for Schmitt when states confront each other as states; that is to say, the system sustains itself through an ethic of statecraft. This ethic of statecraft does not allow for the grouping of states into a universe. Secondly, the international cannot be denoted, yet alone established, as a site of rational deliberation about the terms of political discourse between states. Individual states may frame their claims for justice in terms of the international but these should be regarded as expressions of national sentiment rather than a truly international one. In this regard, Schmitt demands that the international be assessed through the lens of instrumental rationality. There is no such thing as 'the international' writ large; merely a constellation of states each endeavouring to give their image of world order a foundation in the actual. International law can thus be understood as a form of 'political myth-making' because its legality is not bound up in the processes which give domestic law its legitimacy.[87] A concern with the geopolitics of humanitarianism stresses the relational dimension of political actors within the international system, whether conceived in terms of national collectivities or shared values that emerge from geopolitical groupings. In this regard, international law should be understood in terms of its historical sociology rather than an impartial set of rules which regulate the conditions of international life. A concern with the geopolitics of humanitarianism would therefore involve the refusal of the stability of international judicial processes and mechanisms. Schmitt expresses this in terms of the ontology of international law and, in so doing, draws attention to how international law should be understood: 'There are relations between states wherever political unities exist alongside each other peacefully or hostilely. International law is the sum of customary or conventionally recognized rules for these

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86 Ibid., p. 335.
87 Ibid., p. 117.

relations of mere coexistence.'[88] In thinking of international law as relations of mere coexistence there is a theoretical move against objectivism in international law; namely, international law should be understood not as a series of regulations or decrees but in terms of its capacity to negotiate relations between and amongst states within the international system. International law is recognised through legal convention and involves shared understandings about the validity and authority of law. This means, for instance, that talk of the 'international legal communit' must be contingently understood. The international legal community only refers to a particular moment in a particular space-time horizon. Schmitt expresses international law as the 'preponderance of rules that in fact varies from case to case from relation to relation'.[89]

Thus, to speak in terms of an international legal order requires a contingent understanding of sovereignty within the international system. The tendency to reduce international law down to a rigid body of statute overlooks this contingent understanding of legal order. For Schmitt,

One may understand the concept of order not as a closed system of norms, but rather as something that is present existentially. This international legal community is not a contract, nor is it based on a contract. It is also not an alliance and still less a federation. It does not have a constitution in the distinctive sense. It is, instead, the reflex of the politically plural universe, which expresses itself in individual, generally recognized rules and considerations. In other words, it is a pluralistic universe understood as a multitude of political entities that exist alongside each other.[90]

To talk of the international community as having a constitution and thereby reflecting principles of international cosmopolitan law is therefore insufficient. The international community does not embody universal principles of justice but articulates a universal claim about what constitutes political right from its particular standpoint/s. The vision of international law depicted by Habermas is therefore unsustainable when international law is understood as the multitude of political entities.[91] International law should not be understood in terms of a legal contract in which states negotiate the boundary between domestic law and international law.

In establishing humanitarianism in terms of a universal discourse of humanity there are three areas – impartiality, neutrality, and universality – which present a challenge for understanding the historical sociology of international law. These all relate to methodological and political questions which arise out of the geopolitical foundations of International Relations and condition the very rationality of international legal order. The challenge of international law is therefore to reconcile the emergence of international legal order as a contingent process of the geopolitical imagination with the desire of international legal order to operate impartially, neutrally, and universally. As stated above, framing humanitarianism as purely a 'cosmopolitan' question is to overlook the multiple articulations of international law

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[88] Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2008), p. 381.
[89] Ibid.
[90] Ibid.
[91] Schmitt argues that 'one can portray general and abstract norms as the ''constitution'' of the international legal community to the same limited degree that one can find the ''constitution'' of a family in general norms such as that ''you should honor your father and mother'' or ''love thy neighbour.'' In particular, it is a fruitless endeavour to portray general principles like ''right before might'' or the ''sanctity of contracts as the constitution of the international legal community and to falsely ascribe the character of a genuine federation to the general ''international legal community''.' Ibid., p. 381.

that circulate within both the *study* and *conduct* of international politics. This article has endeavoured to challenge this framing, bringing into focus the importance of thinking about geopolitics in spatial rather than territorialised ways. Not all humanitarianism is equivalent to cosmopolitan law (as imagined by Habermas); nor should we think of international law as 'the concept of interest defined in terms of power'.[92] Humanitarian law should not wager its future on the successful implementation of Kantian cosmopolitan law but should instead *critically* understand how geopolitical meanings underpin the very notion of international legal order.

[92] Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Alfred A. Knopf, 1978), p. 4.