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Carl Schmitt's "State of Exception" and the Logic of Power Politics

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ABSTRACT

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Schmitt's (mis)conception of sovereignty is at the roots of his totalitarian state doctrine. Instead of rooting sovereignty in the autonomy of the citizen as subject of politics, he makes a secondary, or procedural, aspect its defining criterion. Linking it to the power to decide on the "state of exception," Schmitt reverses the sequence of *origin* and *exercise* of sovereignty and, thus, confounds the categories of *legislative* and *executive* power. In a secular and democratic context, the sovereign will of the people is the foundation of any legitimate political order and, subsequently, the "rule of law." Emergency rule – under a state of exception – serves the purpose to preserve that very order; it is not an end in itself. Thus, emergency powers are not an expression of sovereignty *per se*, but merely a tool to defend it. Accordingly, in all democratic constitutions, those powers are not absolute. They are subject to revision by the legislative authority. Their isolated interpretation – that neglects subordination to popular sovereignty – has no basis in the domestic legal order, except under a totalitarian constitution.

As regards relations between states, however, Schmitt's doctrine of the state of exception could well be seen as a blueprint for a Machiavellian exercise of power. The UN Charter is a case in point. The decision-making rules of the United Nations Security Council allow that body's permanent members (P5) – as a group as well as individually – to operate under a kind of permanent state of exception. Under Chapter VII of the UN Charter, the Council's authority is virtually absolute.

The Council's decisions are binding upon all member states, and without the possibility of judicial review. According to Article 39, it is the Council that decides when those powers are to be invoked. It alone determines the "state of exception" – namely, in the Charter's language, "the existence of any threat to the peace, breach of the peace, or act of aggression." According to Articles 41 and 42, it is up to the Council to decide which coercive measures to apply. Their scope is effectively unlimited, and solely at the discretion of the Council.

These provisions perfectly mirror Schmitt's characterization of sovereign rule under the state of exception – where the sovereign (a) determines the existence of an emergency and (b) decides on the measures to eliminate it. In tandem with the provisions of Article 27(3) (veto privilege), their authority under the Charter makes the permanent members legally immune in their action on behalf of the international community. They are "sovereign" in the Schmittian sense: standing outside of the commonly valid legal order, but part of it nonetheless (*Politische Theologie*, 14); or, in the words of John Foster Dulles: "The Security Council is not a body that merely enforces agreed law. It is a law unto itself." In the statutory terms of the Charter, the P5 indeed enjoy what Schmitt described as *grenzenlose Machtvollkommenheit* ("power-in-itself beyond any limits"). Because of the compromises of realpolitik among its founding fathers, Chapter VII of the United Nations Charter – more or less obliquely, though not unwittingly – embodies the logic of power politics according to Schmitt's conception of sovereignty.
