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Mark Antaki

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Review Essay

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REVIEW ESSAY

CARL SCHMITT'S *NOMOS OF THE EARTH*

THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM BY CARL SCHMITT, TRANS. BY G.L. ULMEN (NEW YORK: TELOS PRESS, 2003).¹

BY MARK ANTAKI²

I. READING CARL SCHMITT IN ENGLISH

Since the path-breaking works of George Schwab and Joseph Bendersky,³ there has been a great surge of interest in the work of Carl Schmitt in the English-speaking world. This has resulted in an ever-accelerating output of writings relating to Schmitt. For the most part, Schmitt's work has been understood under the univocal label of "critique of liberalism"⁴ (though with Schmitt cast more as an arch-enemy than a critic). Most work in English on Schmitt has consisted of a defence of liberalism against his critique. This defence has been carried out via a fortification or explication of liberalism in light of his critique or via a reading of his work as being more or less—usually more—intelligible in light of, and reducible to, his involvement with National Socialism, as a jurist, after the collapse of Weimar Germany until around 1936.⁵

Despite Schmitt's understanding of himself as a jurist, much of the engagement with Schmitt in the English-speaking world has taken place outside the academic discipline of law (or legal philosophy) and within that

¹ [*The Nomos*].

² Assistant Professor, McGill University (Faculty of Law). The author would like to thank David Bates, Bogdan Iancu, an anonymous reviewer, and the assigned editor for their comments.

³ See George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* (Berlin: Duncker & Humblot, 1970); Joseph W. Bendersky, *Carl Schmitt, Theorist of the Reich* (Princeton, N.J.: Princeton University Press, 1983).

⁴ The following two titles are largely representative of the contemporary engagement with Schmitt: David Dyzenhaus, ed., *Law as Politics. Carl Schmitt's Critique of Liberalism* (Durham, Duke University Press, 1998); John P. McCormick, *Carl Schmitt's Critique of Liberalism* (Cambridge: Cambridge University Press, 1997).

⁵ For a discussion of the reduction of Schmitt's overall thought to his involvement with the National Socialists as an "abuse" of Schmitt, see Paul Piccone & G. L. Ulmen, "Uses and Abuses of Carl Schmitt" (2002) 122 *Telos* 3 [footnotes omitted]. Among other things, Piccone and Ulmen point out that "Schmitt opposed both the communist and Nazi parties during the Weimar Republic" (*ibid.* at 16). For an intellectual biography of Schmitt, see Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000). See text accompanying note 12.

of political philosophy or political theory. Whereas many of his key legal works have been translated into French—for example, his works on dictatorship, constitutional law, types of juridical thinking, and the partisan⁶—his work translated into English is more easily identified as political theory. This can be seen by a quick look at some of the titles, such as *Political Theology*, *Roman Catholicism and Political Form*, *Political Romanticism*, and *The Concept of the Political*.⁷ Indeed, the constitutional law treatise (*Verfassungslehre*) that securely established him as a scholar of public law has yet to be translated into English. Though some secondary work on Schmitt in English has attempted to grapple with Schmitt's work as a whole, for the most part the primary works of Carl Schmitt accessible to readers of English constitute but one side of his work accessible to readers of French (and, of course, German).

The recent translation of Schmitt's *Der Nomos der Erde*, first published in German in 1950, appears noteworthy on two fronts. First, it finally makes accessible to English readers his major work in international law. A word of caution is in order, however: one should not simplistically embrace the division of Schmitt's work into legal and political texts. Rather, his entire work can be thought of as an extended meditation on the belonging together of law and politics. His work on international law is no exception and constitutes one entry point into this theme. Second, the translation of *Der Nomos der Erde* emerges from Telos Press, an "intellectual camp" (formerly) on the left of the political spectrum. This camp has turned to the admittedly conservative Schmitt with the aim of learning from him in order to move beyond what is taken to be the fruitlessness of contemporary forms of liberalism. Gary Ulmen, the English translator of *Der Nomos der Erde* is a Senior Editor at the journal *Telos* and

⁶ See Carl Schmitt, *La dictature*, trans. by Mira Köller & Dominique Ségald (Paris: Seuil, 2000); Carl Schmitt, *Théorie de la Constitution*, trans. by Lilyane Deroche (Paris: Presses Universitaires de France, 1993); Carl Schmitt, *Les trois types de pensée juridique* (Paris: Presses Universitaires de France, 1995) [Schmitt, *Les trois types*]; and Carl Schmitt, *La Notion du Politique et La Théorie du Partisan*, trans. by Marie-Louise Steinhauser (Paris: Flammarion, 1972). See also Carl Schmitt, *Le Nomos de la terre dans le droit des gens du jus publicum europaeum*, trans. by Lilyane Deroche-Gurcel (Paris: Presses Universitaires de France, 2001), the translation of the work that this article is about [Schmitt, *Le Nomos de la terre*].

⁷ See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. by George Schwab (Cambridge, Mass.: MIT Press, 1985) [Schmitt, *Political Theology*]; Carl Schmitt & G. L. Ulmen, *Roman Catholicism and Political Form*, trans. by G. L. Ulmen (Westport, Conn.: Greenwood Press, 1996); Carl Schmitt, *Political Romanticism*, trans. by Guy Oakes (Cambridge, Mass.: MIT Press, 1986); and Carl Schmitt, *The Concept of the Political*, trans. by George Schwab (New Brunswick, N.J.: Rutgers University Press, 1976) [Schmitt, *The Concept*]. See also Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. by Ellen Kennedy (Cambridge, Mass.: MIT Press, 1985); Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, trans. by George Schwab & Erna Hilfstein (Westport, Conn.: Greenwood Press, 1996) [Schmitt, *The Leviathan*].

has translated several of Schmitt's pieces for Telos. Further, Telos has devoted two special issues to Schmitt.⁸ The treatment of Schmitt in the pages of Telos can be distinguished from much of that in the mainstream press, academic and non-academic, where Schmitt tends to be reviled⁹ or dismissed.

The interest in reading Schmitt goes beyond the perceived need to defend liberalism against one of its most formidable foes¹⁰ or beyond the utility of turning to Schmitt to reinvigorate the left or post-left. Far beyond the need to buttress contemporary political positions, Schmitt is worth turning to because of the manner in which he points to foundational issues of law and politics and can be helpful, along with thinkers such as Hannah Arendt, in the construction of a properly phenomenological account of politics and law.¹¹ In addition, *Der Nomos der Erde* raises timely questions regarding international law. Though these questions are timely from a practical perspective they may also be untimely—and unsettling to the spirit of the age.

Schmitt's turn to international law began after 1936,¹² before which he had devoted himself mostly to domestic public law. Nevertheless, this turn to international law did not constitute a break in his thought. First, and as we shall see further below, the notion of a sharp separation of domestic law and international law was not one to which Schmitt subscribed. He believed that adherence to this sharp separation belonged to an intellectually sterile positivism that abstracted law from its concrete historical context. Second, there is a true continuity in themes from his Weimar-era writings to his international law writings.¹³ In his turn to international law, Schmitt furthered the critique of normativism and positivism that he had begun in the Weimar era. Finally, in such writings as

⁸ *Special Issue on Carl Schmitt* (1987) 72 Telos; *Carl Schmitt Now* (1996) 109 Telos.

⁹ See e.g. Jeffrey Herf, *Reactionary Modernism: Technology, Culture, and Politics in Weimar and the Third Reich* (Cambridge: Cambridge University Press, 1984); Richard Wolin, "Carl Schmitt: The Conservative Revolution and the Aesthetics of Horror" (1993) 20 *Pol. Theory* 424.

¹⁰ On the "foe," see G.L. Ulmen, "Return of the Foe" (1987) 72 Telos 187; George Schwab, "Enemy or Foe: A Conflict of Modern Politics" (1987) 72 Telos 194; and the discussion of "the enemy" below. The foe is not a just enemy against whom a limited war is fought but an absolute enemy against whom a total war is fought.

¹¹ See also Julien Freund, *L'essence du politique* (Paris: Sirey, 1965). Freund was a student of both Schmitt and Raymond Aron.

¹² The year 1936 marked the end of Schmitt's close association with National Socialism. See especially Bendersky, *supra* note 3 at c. 11; Balakrishnan, *supra* note 5 at c. 15.

¹³ Note the title of Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles 1923-1939* (Berlin: Duncker & Humblot, 1988).

The Concept of the Political, one can already see a serious and marked concern with international law and with the changing legal status of war (evident in, for example, Germany's postwar treatment in the Versailles treaty).

Schmitt's Weimar-era writings reflect the concrete crisis with which Germany was faced. As with many—if not most—of his writings, they are polemical in nature, attacking rival understandings of law such as Hans Kelsen's normativism. At the time, Schmitt's critique pointed to the Weimar Republic's inability to respond to its internal enemies. Schmitt understood this inability as an evasion of the political. Indeed, before his turn to National Socialism, Schmitt had tried to save the Weimar Republic by arguing for a broad interpretation of the Weimar Constitution's emergency provision (Article 48). He had also argued that parties seeking to subvert the constitution (that is the Communists and National Socialists) ought not be allowed to seize control by legal means.¹⁴ In these arguments, Schmitt called for a strong federal executive and perhaps, despite his misgivings about liberalism, for something like a "political liberalism."¹⁵

The (liberal) evasion of the political, of the need to make difficult decisions involving emergencies and the identification of enemies, is a recurrent theme in Schmitt's writings. Liberalism, Schmitt explains, has no account of the political, but rather attempts in vain to escape the political. In its denial of the political, liberalism denies the dangerousness of human beings.¹⁶ It also misapprehends the nature of law, forgetting that law is a concrete phenomenon rooted in a political order that needs to be defended and secured in the face of emergencies and enemies. Liberalism, with its liberal "neutrality," as exemplified in the Weimar Republic, avoids making demanding decisions. Rather, liberalism elides the conflictual character of politics and attempts "to transform the enemy from the viewpoint of economics into a competitor and from the intellectual point into a debating adversary."¹⁷ Liberalism systematically evades the political and "moves instead in a typical always recurring polarity of two heterogeneous spheres,

¹⁴ See e.g. Carl Schmitt, *Legalität und Legitimität* (Munich: Duncker & Humblot, 1932). *Legalität und Legitimität* has been translated into French in A. de Benoist, ed., *Du Politique "Légalité et légitimité" et autres essais* (Puisseaux: Pardès, 1990). See also David Dyzenhaus, "Legal Theory in the Collapse of Weimar: Contemporary Lessons?" (1997) 91 *Am. Pol. Sci. Rev.* 121.

¹⁵ It can be argued that actual developments in liberal states answered Schmitt's call. However, whether contemporary accounts of "political liberalism" deal adequately with Schmitt's critique is another question. See e.g. David Dyzenhaus, "Liberalism after the Fall: Schmitt, Rawls and the Problem of Justification" (1996) 22 *Phil. & Soc. Criticism* 9.

¹⁶ Schmitt, *The Concept*, *supra* note 7 at 58ff.

¹⁷ *Ibid.* at 28.

namely ethics and economics, intellect and trade, education and property.”¹⁸

On the one hand, as we have seen in the example of the Weimar Republic, the failure of a state to acknowledge the political can lead to its demise. On the other hand, a purported evasion of the political can itself constitute a political strategy or mode of being. The turn to ostensibly “neutral” spheres¹⁹ such as the market and abstract morality (including moral categories such as “humanity”) can be a potent political means by which one discredits and defeats one’s enemies.²⁰ Schmitt locates such a turn in the criminalization of war and in Germany’s treatment at Versailles. Though Schmitt and others trace the rise of this dangerous moralism in politics to the French Revolution, it was only in the late 19th and early 20th centuries that this moralism in politics achieved a position of dominance, speeding along the dissolution of the only truly global international order the world had known: *the jus publicum europaeum*.

Der Nomos der Erde tells the story of this first truly global international legal order. It tells of the emergence of the *jus publicum europaeum* (public law of Europe) out of the dissolution of the *respublica Christiana*²¹ and of its own dissolution into an abstract and universal international law in which war is deemed criminal in theory but not necessarily avoided or limited in practice. Schmitt does not simply lament the passing of the *jus publicum europaeum* but wonders about its successor—a successor which would have to fulfill the function of any proper international legal order: the limitation of war by way of the recognition of a *justus hostis* (just enemy).

The English translation of the book is divided into five parts. Part I, “Five Introductory Corollaries,” sets the tone for the book by introducing and explicating key words while also providing a brief account of the *respublica Christiana* out of which the *jus publicum europaeum* emerged. Part II, “Land Appropriation of a New World,” tells of the birth of the *jus publicum europaeum* out of the “discovery” of the new world. Part III, “The *Jus Publicum Europaeum*,” tells of the era and accomplishments of the *jus*

¹⁸ *Ibid.* at 70.

¹⁹ On neutralization see also Carl Schmitt, “The Age of Neutralizations and Depoliticizations” (1993) 96 *Telos* 130.

²⁰ This theme is present in Schmitt, *The Concept*, *supra* note 7. See also Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge, Mass.: MIT Press, 1988), which should be read alongside the work of Schmitt.

²¹ Schmitt understands the *respublica Christiana* as the unity of Christendom in Europe, under the power of the Holy Roman Emperor and the authority of the Pope. It lasted roughly until the fourteenth and fifteenth centuries.

publicum europaeum. Part IV, "The Question of a New *Nomos* of the Earth," tells of the decline of the *jus publicum europaeum* and raises the question of what is to succeed it. Part V consists of three concluding corollaries on *nomos*. These were written by Schmitt after the completion of the book and are included by the translator as an appendix.

II. NORM AND NOMOS

Along with *themis*, *dike*, and *ethos*, *nomos* is one of the great Ancient Greek words for law. The root verb of *nomos* is *nemein*, which means to distribute and also to pasture, or to graze. *Nomos* carries within it the sense of *moira*, which, though commonly translated as fate or destiny, signifies the granting to each being of its own share. *Nomos* points to the primordial truth that each being is allotted its own place. It is for both its richness and concreteness that Schmitt chooses the word *nomos* to speak of a legal order. Listening to the word carefully points to the way Schmitt understands law as well as to his understanding of several other key words in his account of the international legal order.

In *nomos*, Schmitt hears the succession of appropriation (*nehmen* or taking), distribution (*teilen* or division), and production (*weiden* or pasturage).²² It is crucial for Schmitt that *nomos* has an inescapable (though sometimes forgotten) concrete and spatial character. As opposed to the characterization of law as mere norms or oughts (to which Schmitt refers as normativism and links to positivism), *nomos* designates the belonging together of place and law, of is and ought. Thus, Schmitt writes of law as "a unity of order and orientation"²³ (*Einheit von Ordnung und Ortung*). Noting the connection between utopia—no place—and nihilism, Schmitt remarks that, "only a conclusive and fundamental separation of order and orientation can be called 'nihilism' in an historically specific sense."²⁴ Schmitt believes contemporary times are characterized by such a nihilism and lack a true *nomos*. Much of his critique of contemporary juridical thinking is aimed at the way norms are understood in abstraction from the concrete orders to which they necessarily belong. Norms without a *nomos* do not constitute law proper. Laws cannot be understood as mere oughts detached from time and place.

As Schmitt explains in *Political Theology*, "[a]ll law is 'situational

²² See especially the first concluding corollary, *The Nomos*, *supra* note 1 at 324.

²³ *Ibid.* at 42.

²⁴ *Ibid.* at 66.

law.”²⁵ For Schmitt, norms always presuppose a “normal situation.” In *Political Theology*, Schmitt identifies the decision on the exception as the constitutive element of sovereignty: “For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists.”²⁶ According to Schmitt, the sovereign decision on the exception is a legal decision. In other words, the sovereign decision belongs to law even if its validity is not to be found in adherence to a prior legal norm. For this reason, Schmitt appears to embrace a kind of decisionism rooted in the person of the sovereign.²⁷ Though, as is pointed to below, sovereignty (and freedom of decision with respect to the waging of war) figures prominently in *The Nomos of the Earth*, there Schmitt emphasizes much more the idea of “concrete order,” of *nomos*, than that of “decision.”

At the heart and origin of every *nomos* is “a land-appropriation that founds an order.”²⁸ As a founding act, the land-appropriation (*Landnahme*) is a legal fact and is prior to the distinction between public and private law.²⁹ The land-appropriation constitutes the radical title upon which any successive claim “within” the legal order is based. As Schmitt explains, “[a]t this origin of land-appropriation, law and order are one; where order and orientation coincide, they cannot be separated.”³⁰ Schmitt asserts, contrary to positivists, the importance of considering from a legal viewpoint this constitutive act that makes possible the belonging of law to a concrete place. Jurists cannot, and should not seek to, “purify” law³¹ from the historical events and political decisions that make law possible.

For Schmitt, the word *nomos* is primordially and primarily tied to land. As opposed to the sea, he remarks, measure belongs inherently to the earth. Schmitt summarizes how “the earth is bound to law in three ways. She contains law within herself, as a reward of labor; she manifests law upon herself, as fixed boundaries; and she sustains law above herself, as a

²⁵ Schmitt, *Political Theology*, *supra* note 7 at 13.

²⁶ *Ibid.*

²⁷ It is worthwhile to read Carl Schmitt’s *Die Diktatur* (Berlin: Duncker & Humblot, 1921) and *Political Theology*, *supra* note 7, together. As mentioned above, *Die Diktatur* has been translated into French but not English. See *supra* note 6 and accompanying text.

²⁸ *The Nomos*, *supra* note 1 at 80.

²⁹ *Ibid.* at 46.

³⁰ *Ibid.* at 81.

³¹ See Hans Kelsen, *Pure Theory of Law*, trans. by Max Knight (Berkeley: University of California Press, 1967).

public sign of order.”³² Nevertheless, the sea also plays a crucial role in Schmitt’s account. The circumnavigation of the globe led to a great sea-appropriation and the first global legal order. Further, the contrast of land and sea³³ points to different ways in which law and even human polities are and hence can be understood. Thus, the global order that was the *jus publicum europaeum* was actually comprised of the relation between two spatial orders: one of firm land and one of free sea. England was of—but not in—Europe, and connected the two.

III. THE STATE AND THE *JUS PUBLICUM EUROPAEUM*

As Schmitt explains, the *jus publicum europaeum* emerged out of the decline of the *respublica Christiana* and out of the land-appropriation of the new world. Schmitt understands the Christian Middle Ages as a concrete spatial order in which territory was divided between Christian territory and non-Christian, that is missionary, territory. Wars among Christian princes were “limited” or “bracketed” wars and thus did not “negate the unity of the *respublica Christiana*”³⁴ that had as “its visible agents” the emperor and Pope.³⁵ For Schmitt, the key concept to understanding the *respublica Christiana* is the Biblical idea of the *katechon* or restrainer, that is “the historical power to *restrain* the appearance of the Antichrist and the end of the present eon.”³⁶ Schmitt understands the kingships of the Middle Ages as crowns or offices tied up with the historical and Christian work of the *katechon*. The *respublica Christiana* was already on the road to dissolution in the fourteenth and fifteenth century when “the link between Christian empire and territorial monarchy that had served to uphold the work of a *katechon* had been forgotten.”³⁷ The idea of the *katechon* points to Meier’s interpretation of Schmitt as a political theologian.³⁸

³² *The Nomos*, *supra* note 1 at 42.

³³ See also Carl Schmitt, *Land and Sea*, trans. by Simona Draghici (Washington: Plutarch Press, 1997).

³⁴ *The Nomos*, *supra* note 1 at 58.

³⁵ *Ibid.* at 59.

³⁶ *Ibid.* at 60.

³⁷ *Ibid.* at 64.

³⁸ See e.g. Heinrich Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue*, trans. by J. Harvey Lomax (Chicago: University of Chicago Press, 1995); Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction Between Political Theology and Political Philosophy*, trans. by Marcus Brainard (Chicago: University of Chicago Press, 1998).

Whether or not Meier's specific interpretation is correct, it is undeniable that the idea of a structural analogy between theology and law is central to Schmitt's work. As Schmitt explains:

All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology.³⁹

Thus, Schmitt takes very seriously Hobbes' depiction of the state as a "mortal God."⁴⁰ The state, the political form that emerged out of the dissolution of the *respublica Christiana*, was to provide a kind of transcendence (as the God of theism had) and was to secure a normal situation in which norms could obtain.

However, from its inception, the state was understood in a way that made it vulnerable to attack and, eventually, to being understood as unnecessary. In his essay "The State as Mechanism in Hobbes and Descartes,"⁴¹ Schmitt captures the way in which the future instrumentalization of the State, that is, the way in which the state was to lose its transcendence, is already to be found even in Hobbes. The state was to be understood as a mere mechanism, "a man-made product."⁴² The mere recognition, in Hobbes, of an inner moral sphere free from the jurisdiction of the sovereign was to develop into a full-blown liberalism in which each man could be his own judge in political matters—and in which the primacy of politics over morality was inverted.⁴³ Further, in this later technical age, "[r]ight became positive law, lawfulness became legality, legality became the positivist mode of operation of the machinery of the state."⁴⁴ Understood as a mere mechanism or instrument, the state would no longer be in a position to command loyalty, there could no longer be an "ethic of

³⁹ Schmitt, *Political Theology*, *supra* note 7 at 36.

⁴⁰ See Thomas Hobbes, *Leviathan*, ed. by C.B. Macpherson (London: Penguin Books, 1985) at 227 where Hobbes refers to "that great LEVIATHAN, or rather (to speak more reverently) of that Mortall God, to which wee owe under the Immortall God, our peace and defence."

⁴¹ See "The State as Mechanism in Hobbes and Descartes" in Schmitt, *The Leviathan*, *supra* note 7.

⁴² *Ibid.* at 98.

⁴³ *Ibid.* at 56 and accompanying notes. This theme of Schmitt's is elaborated by Koselleck, *supra* note 20.

⁴⁴ Schmitt, *The Leviathan*, *supra* note 7 at 99.

state.”⁴⁵

The state’s fragile location in time between the *respublica Christiana* and the later technical age mirrors the way in which Schmitt the jurist conceived of his element, jurisprudence. In a work that he considered his “testament”⁴⁶ Schmitt explains that jurisprudence “has always been determined by two great oppositions: on the one side, to theology, metaphysics and philosophy; on the other, to mere technical craft.”⁴⁷ In the sixteenth century, jurisprudence had to oppose theology. But “[n]ow [in the twentieth century] jurisprudence must take a stand against the other side”: the instrumentalization of law and state.⁴⁸

The central achievement of the *jus publicum europaeum* was the state. From the foregoing, it should be clear that the “state” is not to be understood as a general way of referring to human polities but, rather, as a concrete and historically bounded achievement of European humanity—an “existential form” of law and politics.⁴⁹ Within Europe, the state overcame religious civil war and limited interstate wars. It was able to limit interstate wars because it transformed the medieval just cause (*justa causa*—part of what today is referred to as the “just war tradition”) into the modern non-discriminatory concept of just enemy (*justus hostis*)—which Schmitt describes as the beginning of all international law proper.⁵⁰ Within Europe, wars no longer needed to be justified but enemies had to be treated justly and as equals. States were sovereign and war was the object of a sovereign decision.

In his earlier work, Schmitt had pointed to the categories of the sovereign and the enemy as necessary for a proper understanding of legal and political orders. We have seen that, in *Political Theology*, Schmitt emphasized the decision on the exception as the constitutive element of sovereignty. In the *Concept of the Political*, Schmitt pointed to the friend-

⁴⁵ Carl Schmitt, “Ethic of State and Pluralistic State,” reprinted in C. Mouffe ed., *The Challenge of Carl Schmitt* (London: Verso, 1999) [Schmitt, *Ethic of State*].

⁴⁶ See note 31 of Paul Piccone & G.L. Ulmen, “Schmitt’s ‘Testament’ and the Future of Europe” (1990) 83 *Telos* 3.

⁴⁷ Carl Schmitt, “The Plight of European Jurisprudence” (1990) 83 *Telos* 35 at 64 [Schmitt, *The Plight*]. In the appendix to the 1958 edition of this essay in *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954* (Berlin: Duncker & Humblot, 1958) at 427, Schmitt explains that “[p]hilosophy of law is not for me a vocabulary drawn from an available philosophical system and applied to juridical questions, but rather the development of concrete concepts out of the immanence of a concrete legal and social order” [translated by author].

⁴⁸ Schmitt, *The Plight*, *ibid.* at 66.

⁴⁹ *The Nomos*, *supra* note 1 at 204.

⁵⁰ *Ibid.* at 52.

enemy distinction as the criterion by which the political could be identified (but not as an “exhaustive definition or one indicative of substantial content”⁵¹). Schmitt explained that the decision as to who was the enemy in a concrete situation could only be made by the actual participants. For this reason, the decision on the enemy was a properly political decision and, thus, in the end, a feature of sovereignty. In the *jus publicum europaeum*, the *jus belli*, the right to make war, belonged to sovereign states.

In identifying the friend-enemy distinction as the key political criterion, Schmitt drew an important distinction between the public enemy (*hostis*), that is, the enemy about whom the political decision needs to be made, and the private enemy (*inimicus*). The public enemy is understood as a political enemy, as a threat to the way of life of one’s polity. However, he need not be hated and it is possible to treat him with respect and restraint.⁵² The *jus publicum europaeum* Schmitt describes in *The Nomos of the Earth* is characterized by limited warfare among political bodies recognizing one another as sovereign and as just enemies.

Part of the point Schmitt underlines in *The Nomos of the Earth* is that mere norms cannot, in themselves, limit warfare. For war to be limited, there needs to be a concrete spatial order tied to some kind of shared history, that is, a *nomos*. Within a concrete spatial order, the limitation of warfare is also the relativization of enmity. Prior to the rise of the state, religious wars had torn apart the continent of Europe. With the rise of the state, religion, a formerly conflictual domain, was “neutralized” and “depoliticized.” A more-or-less absolute enmity had been relativized. In a later work, his *Theorie des Partisanen*, Schmitt distinguishes the absolute enemy from the real enemy. The “true” partisan, Schmitt explains, fights to defend a concrete piece of territory that is his home. The partisan aims only to repel the invader and his real—but not absolute—enemies. As we shall see further below, Schmitt fears that the decline of the *jus publicum europaeum* has ushered in an era of absolute enemies against whom “total wars” are fought.

The *jus publicum europaeum* was based on a spatial division of Europe and the rest of the globe as well as on the difference between free sea and firm land. The global lines that divided Europe from the rest of the world, or more specifically from the New World, allowed for the limitation of war within Europe by demarcating a space of law (Europe) from a space

⁵¹ Schmitt, *The Concept*, *supra* note 7 at 26. It is important to underline that the friend-enemy distinction, and not simply the enemy, is what Schmitt identifies as the criterion of the political.

⁵² *Ibid.* at 26 and generally.

of relative lawlessness (New World).⁵³ Similarly, land and sea war “[e]ach had its own concepts of enemy, war, and plunder.”⁵⁴ England, which was “of Europe, but not in Europe” was the “guardian” of the maritime legal order.⁵⁵ Indeed, England was “the agency of the spatial turn to a new *nomos* of the earth [the *jus publicum europaeum*].”⁵⁶

As we have seen, the state, the achievement of the *jus publicum europaeum*, harboured within itself the seeds of its own destruction and of its relativization in the technical age. However, England pointed forward to the technical age even more directly. For one thing, as Schmitt explains elsewhere, “[t]he English nation ... grew into the position of a world power without using the forms and means of state absolutism. The English leviathan did not become a state.”⁵⁷ Because of a maritime existence’s lack of rootedness, England, “potentially,” provided “even the operational base for the later leap into the total rootlessness of technology.”⁵⁸

Further, though Schmitt notes that “[o]ther legal institutions were developed for *sea war* that also were brought about through humane concerns,”⁵⁹ he emphasizes that land wars were the truly limited wars. Sea wars, he explains, were economic in nature and, in them, one did not distinguish between combatants and civilian populations in the same way as in land wars. Sea war pointed forward to the possible total wars of the future in a way that the limited land wars of Europe did not. Thus, though England was a guardian of the *jus publicum europaeum*, England’s maritime existence also pointed forward to the dissolution of this concrete *nomos* into an abstract international law.

⁵³ *Rayas*, the first global lines Schmitt points to, belong to the *respublica Christiana* and do not depend on the distinction between Europe and the rest of the world. Rather, they depend on the distinction between Christian territory and missionary territory that could be allocated by the Pope. Amity lines, the second global lines Schmitt points to, signal the beginnings of the *jus publicum europaeum* and the principle that “European public law,” including limited warfare, ended at the line where the New World began. The Western hemisphere, the third global line Schmitt points to, already poses a challenge to the *jus publicum Europaeum*, as the New World begins to replace the Old World as center of the earth. See *The Nomos*, *supra* note 1 at 86-100. Schmitt’s use of “amity lines” in buttressing the spatial character of the *jus publicum europaeum* has been called into question. See *e.g.* the comments of Peter Haggemacher in Schmitt, *Le Nomos de la terre*, *supra* note 6 at 38.

⁵⁴ *The Nomos*, *supra* note 1 at 184.

⁵⁵ *Ibid.* at 173.

⁵⁶ *Ibid.* at 178.

⁵⁷ Schmitt, *The Leviathan*, *supra* note 7 at 79.

⁵⁸ *The Nomos*, *supra* note 1 at 178.

⁵⁹ *Ibid.* at 310.

VI. NEW WORLD (DIS)ORDER

The decline of the *jus publicum europaeum* can be traced to a variety of factors but one in particular stands out: European humanity's forgetting of the ground and nature of the *jus publicum europaeum*. Schmitt explains that the "true title" to the New World was discovery, that is that rationalistic and scientific aspect of Western civilization that allowed it to "discover" the Americas. This radical title was common to Europe as a unity. With the belief that occupation, and then effective occupation, provided title, Europe lost the understanding of the proper ground of its radical title—a ground that might have been kept in sight had jurists not displaced theologians in international law.⁶⁰ By the end of the nineteenth century, "European powers and jurists of European international law not only had ceased to be conscious of the spatial presuppositions of their own international law, but had lost any political instinct, any common power to maintain their own spatial structure and the bracketing of war."⁶¹ Indeed, "[t]he belief in civilization and progress had become nothing more than an ideological facade."⁶²

Though he points to Western superiority as allowing both for the discovery of the New World and its legitimacy, Schmitt remarks that "[f]rom the standpoint of the discovered, discovery as such was never legal."⁶³ The point is not to take a moralistic view of the phenomenon but to see the discovery and conquest of the New World as a world-historical event that opened up the possibility of a global *nomos*.⁶⁴ Not taking a purely moralistic view of the phenomenon also allows one to raise the extremely

⁶⁰ *Ibid.* at 132. Schmitt explains that Gentili, a "true jurist" of the "transitional period" between the *respublica Christiana* and the *jus publicum Europaeum*, "formulated the battle cry and coined what may be considered to be the slogan of the epoch in terms of the sociology of knowledge: *Silente theologi in munere alieno!* [literally: Theologians should remain silent within foreign walls!]" (Ulmen's note). *The Nomos*, *supra* note 1 at 121.

⁶¹ *The Nomos*, *supra* note 1 at 224.

⁶² *Ibid.* at 226. Schmitt points to the Congo Conference of 1885 as an event signaling Europe's forgetting of the distinction between European state soil and non-European colonial soil. *Ibid.* at 214 and accompanying notes. He also points to the title of international law texts and to how a *European* international law was transformed into an international law. *Ibid.* at 227 and accompanying notes.

⁶³ *Ibid.* at 132-32.

⁶⁴ On the "mythologization" of the discovery of America as a "supreme example of a particular kind of scientific achievement," see Anthony Pagden, *European Encounters with the New World* (New Haven, Conn.: Yale University Press, 1993) at 6 and generally. Also germane is Todorov's account, which points to the superiority of the Europeans' ability to communicate with man as making possible the conquest but also signals that the Indians were superior in the ability to communicate with the world. See Tzvetan Todorov, *The Conquest of America, The Question of the Other*, trans. by Richard Howard (Norman: University of Oklahoma Press, 1999).

important philosophical question of the relation between violence (and violation) and the founding of legal and political orders. Schmitt celebrates Western rationalism and one of its highest achievements, the state. However, as we have seen, one also finds in his work the recognition that Western rationalism, mechanized and devoid of spirit, led to the technological and nihilistic thinking of the twentieth century.

As Schmitt explains in his “testament,” when belief in civilization and progress had become an ideological facade, the specifically European character of the *nomos* that was the *jus publicum europaeum* had been lost from view:

From a positivist perspective, it is mere coincidence that there happen to be European states joined by legal relations such as treaties and agreements. In this formal sense, there is nothing juridically specific about the treaties and agreements of one European state with other European states any more than those with non-European states. The European spirit developed a specifically European international law from the 17th to the 19th century. At the turn of the 19th to the 20th century, however, this international law dissolved into innumerable and indistinguishable relations between fifty to sixty states all over the world, i.e., into a general arrangement lacking any spatial concreteness.⁶⁵

In the positivistic privileging of form, Europeans lost sight of “the material [as opposed to the formal] significance of law, i.e., the political, social and economic meaning of concrete orders and institutions.”⁶⁶ For example, the concrete meaning of state recognition was lost as recognition was detached from the specifically *European* standard of civilization.⁶⁷ Similarly, positivism embraced a dualist theory of law in which there was no relation between domestic law and international law: jurists either studied the laws of their own state or those of international law. As the block quotation above illustrates, a specifically European sensibility had been lost.⁶⁸ The *jus publicum europaeum* had given way to Bentham’s “international law.”⁶⁹

⁶⁵ Schmitt, *The Plight*, *supra* note 47 at 37.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* at 37-38. On the standard of civilization, see Gerrit W. Gong, *The Standard of ‘Civilization’ in International Society* (Oxford: Oxford University Press, 1984).

⁶⁸ Schmitt, *The Plight*, *supra* note 47 at 36.

⁶⁹ On the coining of the term “international law,” see M. W. Janis, “Jeremy Bentham and the Fashioning of ‘International Law’” (1984) 78 *Am. J. Int’l L.* 405. In light of the foregoing, it is a worthwhile exercise to think through the propriety of referring to the *jus publicum europaeum* as Westphalian international law. Westphalia has become a catchword in contemporary discussion of international law and politics but, rather than point to a specifically European order “originating” (in some loose way) in the Treaty of Westphalia, it has come to name an abstract international law based on the postulate of the sovereignty of any “state.”

Intimately tied to Europe's decline as the center of the world was the rise of the New World, the United States, as the "true heir" of a Europe that had become corrupt and old. Schmitt explains that in Hobbes' time, the state of nature, that is America, was understood as a state of freedom in the sense of a field of struggle. By Rousseau's time, America was still a state of nature and freedom, but now "unspoiled by the corruption of over-civilized Europe."⁷⁰ The shift in the "center of gravity" of the world from a corrupt Europe to an uncorrupted America was tied to the shift from the monarchic-dynastic principle of political legitimacy to the democratic principle of legitimacy.

After the Holy Alliance of 1815, the United States exempted itself from the reach of the *jus publicum europaeum* and, with the Monroe Doctrine of 1823, claimed jurisdiction over its own large space (*Großraum*) of the Americas. However, the United States was not entirely absent from European affairs. Schmitt characterizes the United States' position as one of official absence but effective presence. The United States, though it was often politically absent, was present in the ostensibly "neutral" sphere of economics through which it exercised political power.⁷¹

In the twentieth century, Europe's loss of self-understanding and the United States' position contributed to the paralyzing of the League of Nations. Though the United States did not join the League, the League recognized the Monroe doctrine (in Article 21 of the *League Charter*) and thereby "renounced its own spatial system, which was neither specifically European nor consistently global. In so doing, it also renounced a clear spatial order."⁷² Schmitt points to the transformation of the recognition of foreign governments and to the way the United States and President Wilson⁷³ "raised this standard of democratic legitimacy in the Western Hemisphere to the level of a principle in international law."⁷⁴ By so doing, the United States effectively controlled "constitutional and governmental" changes within Central and South America.⁷⁵

⁷⁰ *The Nomos*, *supra* note 1 at 288.

⁷¹ See G.L. Ulmen, "American Imperialism and International Law: Carl Schmitt on the US in World Affairs" (1987) 72 *Telos* 43 at 61.

⁷² *The Nomos*, *supra* note 1 at 254.

⁷³ On Wilson, see Ronald Steel, "The Missionary" *New York Times Review of Books* 50:18 (20 November 2003) 26. "Woodrow Wilson today is rightly honored not as the prince of peace but as the inspiration for constructing the world according to American principles. If any one person can be said to exemplify both the idealism and the hubris of the American century, it is Wilson" (*ibid.* at 26).

⁷⁴ *The Nomos*, *supra* note 1 at 305.

⁷⁵ *Ibid.*

In general, Schmitt paints a picture in which the United States' position was one of vacillation between the establishment of a Western hemisphere *Großraum* and its transformation into a global power. As we shall see below, according to Schmitt, the possibility of a world of several *Großräume* harbours the possibility of a concrete order, a true *nomos* of the earth. On the other hand, with the United States' transformation into a global power, Schmitt fears the "deployment" of an abstract international law (and of universal moral categories) for political purposes. As he writes elsewhere (modifying an expression of Proudhon's): "whoever invokes humanity wants to cheat."⁷⁶ The rise of humanity as a political category in the international sphere points in the direction of outlawing war.

V. WAR AS A CRIME

Schmitt explains that the decline of the *jus publicum europaeum* led to an international law which, though it was marked by the participation of "states" all over the world, lacked any spatial mooring. This decline also manifested itself in the criminalization of war, of wars of "aggression." With the criminalization of war, neutrality—previously a symbol of peace, and thus of the international community—became a symbol of war.⁷⁷ Schmitt traces this criminalization from the First World War and the treatment of Germany and Wilhelm II in the Versailles Treaty to the 1924 Geneva Protocol and the 1928 Kellogg Pact. In 1932, with the Stimson doctrine, the United States, relying on the Kellogg Pact, asserted that it would refuse to recognize, in Schmitt's words "territorial changes anywhere in the world that were brought about by illegal force."⁷⁸

Schmitt points out that the criminalization of aggression is fundamentally problematic. The more precise and easily applicable a legal definition of aggression is (for example, "first strike") the less it can capture the substantive justice or injustice of an act or a war as a whole. Further, though the criminalization of war might protect a merely factual *status quo*, a proper *status quo* must be anchored in a concrete spatial order and, in some significant way, be understood as legitimate.⁷⁹ The definition of aggression continues to be problematic and to raise issues at the heart of

⁷⁶ Schmitt, *The Concept*, *supra* note 7 at 54.

⁷⁷ *The Nomos*, *supra* note 1 at 297.

⁷⁸ *Ibid.* at 307.

⁷⁹ *Ibid.* at 245.

contemporary international law and its “United Nations paradigm.”⁸⁰

For Schmitt, the contemporary criminalization of aggression raises the fundamental question of the possibility and propriety of understanding humanity as a political category.⁸¹ Within the *jus publicum Europaeum*, wars between sovereign and equal states could be limited. However, the temptation to think of humanity as a political category (and of the globe as a political unity) opens up the terrifying possibility that war will be transformed into police actions or into a global civil war. In both cases, the enemy is no longer a *justus hostis* but an outlaw, an enemy of all humanity.

Thus, Schmitt points to the relation between modern means of destruction and the rise of what appears to be (but in actuality is not) a contemporary version of just-war thinking (though no longer rooted in the concrete order that was the *respublica Christiana*). He explains that “one needs a just war to justify use of such means of destruction.”⁸² This statement echoes that made by J. Glenn Gray in 1959 in his thoughtful reflection on men in battle:

Because our wars are becoming ever more totalitarian in character, this professional attitude [toward the enemy] is suspect. Increasingly, we cannot fight without an image of the enemy as totally evil, for whom any mercy or sympathy is incongruous, if not traitorous. Our wars are tending to become religious crusades once more, and the crusader’s image of the enemy is in sharp opposition to the militarist’s.⁸³

Enemies of all humanity, as Koselleck has observed, are no longer thought of as human: when politicized, the category of humanity leads to the most asymmetric counterconcept.⁸⁴

As we have seen, Schmitt believes that the invocation of abstractions such as humanity can easily serve the political ends of imperial powers, but not those of humanity. In opposition to the abstractions of a global international law celebrating humanity, Schmitt considers the possibility that a world of several *Großräume* will arise—a world in which wars will be limited and in which enemies will not be treated as enemies of

⁸⁰ See e.g. Theodor Meron, “Defining Aggression for the International Criminal Court” (2001) 25 *Suffolk Transnat’l L. Rev.* 1; Anthony C. Arend & Robert J. Beck, eds., *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London: Routledge, 1993).

⁸¹ See Carl Schmitt, “The Legal World Revolution” (1987) 72 *Telos* 73 at 85 where he writes of “humanity as a political subject.”

⁸² *The Nomos*, *supra* note 1 at 322.

⁸³ *The Warriors: Reflections on Men in Battle* (New York: Perennial Library, 1973) at 174.

⁸⁴ Reinhart Koselleck, “The Historical-Political Semantics of Asymmetric Counterconcepts” in Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time*, trans. by Keith Tribe (Cambridge, Mass.: MIT Press, 1985) 159 at 159.

all mankind. Elsewhere, with respect to the threatened dissolution of the state, Schmitt explains that “[i]n a spiritual world ruled by the law of pluralism, a piece of concrete order is more valuable than any empty generalizations of a false totality.”⁸⁵ That statement would be just as appropriate a caption for his response to the dissolution of a spatially-grounded European international law.

For some, the dissolution of a spatially-grounded European international law is merely a pre-condition for the achievement of a truly universal “cosmopolitan law” encompassing the entire world. With the rise of such a “cosmopolitan law” state sovereignty is necessarily relativized. The rediscovery of Carl Schmitt has been used in the critique of this “cosmopolitan orthodoxy” (held and disseminated by, for example, Jürgen Habermas⁸⁶). It is hoped that this article will have helped show that this contest involving cosmopolitanism and its various “opponents” is not one of power politics versus pure morality—for very rarely do contests so show themselves—but also one revolving around, in part, the political and moral pitfalls of abstraction.⁸⁷

To end our discussion of *The Nomos of the Earth* here is to end it abruptly. However, in matters that are so close to home—so timely—it is perhaps better merely to invite reflection than to propose conclusions or launch criticisms. The (un)timeliness of Schmitt’s work lies, in part, in the way he raises questions we would ordinarily think of as belonging to the realm of power politics (or of geopolitics), but does so in the context of a philosophical sensitivity to the very foundations of law and politics. By situating *The Nomos of the Earth* in relation to some of his other work, this article has attempted to bring that sensitivity to light.

⁸⁵ Schmitt, *Ethic of State*, *supra* note 45 at 206. See also Jean-Francois Kervegan, “Carl Schmitt and ‘World Unity,’” in Mouffe, *supra* note 45.

⁸⁶ See e.g. Jürgen Habermas, “Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight” in James Bohman & Matthias Lutz-Bachmann, eds., *Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal* (Cambridge, Mass: MIT Press, 1997) at 113.

⁸⁷ The problem of abstraction, the impropriety of thinking of humanity as a political category and the terrifying possibilities opened up by the willingness to conceive of the globe as a political unity are also prominent features of other thinkers, among which stands out the name of Hannah Arendt. As was mentioned at the beginning of this article, both Arendt and Schmitt can be helpful in articulating a properly phenomenological approach to law and politics. Like Schmitt, Arendt shies away from moralizing and from so-called normative theory. But this comparison of Schmitt and Arendt, of their many similarities—but also great differences—is a task for another time and place.