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Work on International Law as Answers to the
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Puzzles and Solutions: Appreciating Carl Schmitt's Work on International Law as Answers to the Dilemmas of his Weimar Political Theory

Christoph Burchard*

Introduction

Carl Schmitt and his impressive oeuvre have become focal points of today's academic interest, whilst his work on international law and international relations does so far not conjure intense discussions. It seems common to deem Schmitt's turn to geopolitics awkward and abrupt or to consider it a mere tactical maneuver to overcome academic and political isolation. Schmitt's early and deep-going entanglement with Nazi Germany and his prominent role as the *Kronjurist* of the Third Reich not only made him a *persona-non-grata* on the international parquet or in Germany's post-War scholarship, but already before the end of the Second World War had the German jurist been isolated in Nazi circles. To report an anonymous commentator, whose view seems to prevail today: Schmitt 'seeks a new field of activity in which he would like to avoid his complete marginalization, hoping eventually to regain his momentum.'¹ Somewhat ironically, this view is not referring to the contemporary disregard for Schmitt's turn to foreign affairs, but the anonymous commentator served as an operative for the Nazi secret service.

In this article, I intend to challenge the contemporary academic indifference for Schmitt's reflections about the international arena. I will not argue that Schmitt's ideas on the international realm are worthwhile being introduced into contemporary debates on how to reframe the global architecture; rather, I will submit that his foundational works on international law and international relations provide answers for various dilemmas and puzzles that pervaded and even dictated his Weimar pieces on domestic political theory.

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¹ Reported by Gopal Balakrishnan, *The Enemy – An intellectual Portrait of Carl Schmitt* (Verso, New York, 2000) at 227.

My analysis will show that considering Schmitt's shift to the international as a break in his academic life fails to notice that his foundational works on international law present continuous lines of thought. In Part I of this paper, I will focus on two interrelated parts of Schmitt's Weimar period: *Der Begriff des Politischen* ('The Concept of the Political') and his theory of democracy. I concentrate on *Der Begriff des Politischen* and Schmitt's theory of democracy not only because they are integral parts of his Weimar period, but also because they deal with substantive topics that were important for Schmitt. Both, *Der Begriff des Politischen* and his theory of democracy, hold various puzzles, dilemmas, and questions that leave open Schmitt's underlying normative agenda; questions that cannot be answered by just focusing on his Weimar writings. Firstly, I will demonstrate that the ambiguous, sometimes superficial, and brief style of *Der Begriff des Politischen* renders highly controversial the correct interpretation of Schmitt's de-moralizing concept of war and of the externalization of conflict to the international plane. As an initial puzzle, *Der Begriff des Politischen* holds the question whether Schmitt intended to limit or to unlimit recourse to force. *Der Begriff des Politischen* also raises the dilemma of whether Schmitt foresaw any intrinsic limits to international conflicts or whether he conceptualized the possibility of their total escalation. Secondly, I will turn to Schmitt's theory of democracy. I will submit that Schmitt sought to rescue a delegitimized state system by accommodating the democratic empowerment of the masses. However, as a permeating dilemma, I will suggest that Schmitt's theory of democracy failed to overcome the legitimacy crisis of the state; that Schmitt eventually had to acknowledge that his theory failed to create a conceptually stable framework for democratic government.

In Part II, bearing these dilemmas and puzzles in mind, I will turn to Schmitt's foundational works of international law. Having first presented the factual convictions that led Schmitt to configure a new world order, I will briefly deal with Schmitt's *Großraum* ('greater space') concept before discussing *Der Nomos der Erde* ('The Nomos of the Earth'). In this work, Schmitt transcends – even rejects – his previous democratic ideas and pursues new ways to legitimize the state system. Not only does *Der Nomos der Erde* demonstrate Schmitt's uneasiness about his views on democracy, but it also responds to the dilemma of *Der Begriff des Politischen* on how to de-escalate international war. Further, *Der Nomos der Erde* elaborates extensively on the background to the de-moralizing concept of war, which had been advanced in *Der Begriff des Politischen*.

As I will submit in this paper, all these parallels and similarities between Schmitt's Weimar and post-Weimar writings indicate that Schmitt's turn to the international realm was far from a mere tactical maneuver. I rather suggest that reading Schmitt's foundational works on international relations proves vital for correctly interpreting *Der Begriff des Politischen* and his theory of democracy. His later works, therefore, should be reconsidered as developments and not as breaks in Schmitt's academic life.

Part I: Der Begriff des Politischen and Schmitt's Theory of Democracy and its inherent nihilism

Der Begriff des Politischen

One of the most striking facets of *Der Begriff des Politischen* is Schmitt's separating morality, aesthetics, economics, and politics.² Being the most prominent theme in *Der Begriff des Politischen*, the nature of politics, or in Schmitt's terminology: the political, materializes in a friend-enemy dichotomy. Distinguishing the political from other considerations and ultimately reducing politics to the demarcation of friend and foe bears several implications – the most troublesome that state warfare is to be only guided by politics, whilst moral or ethical reflections are conceptually foreclosed from guiding conflict behavior. This leads, for instance, Howse to conclude that the normative agenda behind *Der Begriff des Politischen* is overtly bellicose,³ because it removes 'any moral constraint from the conduct of war.'⁴ Drawing on a reading of *Der Begriff des Politischen* and *Politische Theologie* ('Political Theology'), which was published in 1922, Howse seeks to demonstrate that Schmitt's 'last word is the unconstrained rule of the strong over the weak as the one authentic form of order implied in the universality of man's animal striving.'⁵ The de-moralization of war and peace nicely fits this paradigm – moralistic

² 'Der politische Feind braucht nicht moralisch böse, er braucht nicht ästhetisch häßlich zu sein; er muß nicht als wirtschaftlicher Konkurrent auftreten, und es kann vielleicht sogar vorteilhaft scheinen, mit ihm Geschäfte zu machen. Er ist eben der andere, der Fremde, und es genügt zu seinem Wesen, daß er in einem besonders intensiven Sinne existenziell etwas anderes und Fremdes ist, so daß im extremen Fall Konflikte mit ihm möglich sind' 'The political enemy is not automatically morally evil, he does not have to be aesthetically ugly; he does have to act as an economical competitor, and it is very well possible that it is advantageous to make business with him. Now, he is the other, the stranger, and his being is sufficiently determined, if, in a particularly intensive way, he is something other and alien so that, in an extreme case, it is possible to conflict with him.' (Author's translation). See Carl Schmitt, *Der Begriff des Politischen* (4th edn, Duncker & Humblot, Berlin, 1963) at 27. In the following text I will refer to the 1963 edition of *Der Begriff des Politischen*.

³ See Robert Howse, 'From Legitimacy to Dictatorship – and Back again, Leo Strauss's Critique of the Anti- Liberalism of Carl Schmitt', 10 *Canadian Journal of Law and Jurisprudence* (1997) 77, at 86.

⁴ *Ibid.*

⁵ *Ibid.*, at 80.

limitations to waging war would impede high men from dominating the weak, whilst a concept of politicized, i.e. unlimited, conflict entails all the instruments for a *Herrschaft* ('rule') of the strong.

On the one hand, the polemical tone of *Der Begriff des Politischen* supports Howse's interpretation to a certain extent. Historic incidents – like Cromwell's (verbal) attacks of papal Spain – where national antagonisms had spiraled to an extreme, and where an intensive friend-enemy contrast had surfaced, are cast in a positive light.⁶ Indeed, according to Schmitt, these moments mark 'the culmination of high politics.'⁷ On the other hand, several other passages of *Der Begriff des Politischen* cannot be explained by Howse's approach. These passages point to a different normative background for Schmitt's separating war from morality. For example, Schmitt warns that wars seeking to promote humanity or other supposedly ethical goals necessarily imply the eradication of the enemy. According to Schmitt, resorting to moral justifications for waging wars is but an ideological instrument that eventually degrades the enemy and places him *hors-la-loi* or *hors l'humanité*.⁸ Schmitt hence introduces, however briefly, the idea that conflicts that go beyond the sphere of mere politics will become exceptionally inhumane, intensive and brutal.⁹

Therefore, the interpreter of *Der Begriff des Politischen* is confronted with seemingly contradicting lines of thought. Keeping politics and other considerations (namely economics, morality or aesthetics) apart either unlimits conflicts, or it actually limits them by foreclosing moral discrimination against the enemy. The rather pointed and brief style forbids solving this puzzle entirely by only reading *Der Begriff des Politischen*; it gives, however, several hints about the convictions that dictated Schmitt's political philosophy.

This philosophy is a perplexing crucible of, on the one hand, empirical determinations, factual assumption and existential experience, and, on the other hand, normative goals. Schmitt was a political 'realist' who did not spend much time considering utopias, ideal worlds or romantic idylls; his objectives found their boundaries in 'concrete situations,'¹⁰ or rather in his perspectives on these concrete situations. Political philosophy, for Schmitt, was not reflecting *on* ideal politics, but a reflection *of* actual human affairs. This reflection was heavily influenced by

⁶ See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 67.

⁷ (Höhepunkte der großen Politik). *Ibid.*

⁸ *Ibid.*, at 55.

⁹ *Ibid.*, at 37.

¹⁰ (konkrete Existentialität). See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 65.

his experiences during the breakdown of the *Kaiserreich*, the revolutions and counter-revolutions predating the establishment of the Weimar Republic, and the social disruption of the Weimar society by antagonized political parties ready to overturn the Weimar Constitution. His grim and almost apocalyptic convictions can only be understood against this background, in the context of a *Reichspräsident*¹¹ ruling by decree to ensure minimal stability, and of Schmitt's living in society at the brink of civil war. Schmitt was convinced that, since man was a dangerous and dynamic being,¹² there is no, or at least no imminent, possibility to create just society,¹³ the *civitas dei* on earth.¹⁴

Pointing to his most fundamental empirical determination, Schmitt thought that the validity of theories and their conceptualizations depended on their appreciating and accepting the immutability of enmity and mortal conflict. As he asserted in the foreword to the 1963 edition of *Der Begriff des Politischen*, nothing less than reality necessitates a theory's descriptive part to acknowledge the ontological dimension of human enmity.¹⁵ In his terminology, enmity isn't directed against the economic rival or the opponent in a debate,¹⁶ but describes the potentiality of mortal clash. War and conflict, then, became the basis and focal point as well as the object and subject for Schmitt's reflections on human interactions and their reflections in politics. In *Der Begriff des Politischen*, Schmitt refrains from advancing a definition of politics and rather introduces his famous friend-enemy distinction that serves as a phenomenological criterion to capture an 'aggregate condition'¹⁷: the political. The friend-enemy dichotomy enshrines the antagonism that surmounts human relations and embraces enmity as its concrete source and foundation. 'Friend and enemy signify the outer limits of an association or dissociation.'¹⁸ Once the extreme pole of dissociation is reached, i.e. once the enemy has been marked, an intense existential fight (as a matter of life and death) cannot be prevented – politics is a 'realm of

¹¹ The president of the Weimar republic.

¹² See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 61.

¹³ See William Rasch, 'Conflict as a Vocation', 17 *Theory, Culture and Society* (6/2000) 1, at 11.

¹⁴ This has to be marshalled against all those who reduce Carl Schmitt to a political theologian and assert that he was heavily influenced by the teaching of the Catholic Church. However, this paper is not so much concerned with deconstructing the building blocks of Schmitt's thought but rather with gaining an overall impression of Schmitt's work, which then might be used to deconstruct Schmitt.

¹⁵ See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 15.

¹⁶ *Ibid.*, at 28.

¹⁷ See Ellen Kennedy, 'Hostis not Inimicus: Toward a Theory of the Public in the Work of Carl Schmitt', 10 *Canadian Journal of Law and Jurisprudence* (1997) 35, at 43.

¹⁸ See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 27.

danger, not safety.¹⁹ Note, however, that fighting itself is neither virtuous, nor a social ideal for Schmitt.²⁰

It is crucial to appreciate that the insecurity raised by the ever-present potentiality of lethal conflict is not the Hobbesian state of nature, i.e. not the war of all against all. Rather, the antagonisms that Schmitt has in mind exist between groups of people. According to Schmitt, only communities that are structurally capable of deciding on an enemy and waging war against him, are political units²¹ properly so called. These units can either appear in the form of a state, which Schmitt merely comprehends as a specific status within the historic narrative on human coordination²², in the form of a party, of a union or of a church. The (so called) *Kulturkampf* in Bismarck's Prussia between the Catholic Church and the state, the first world war between various nations, the October Revolution and the fight between Lenin's communist party and Russian aristocracy, the clash of far-left and far-right parties in the Weimar Republic, all this experience is mirrored in Schmitt's thinking that hostility between *groups* is immutable.²³ However, Schmitt is far from conceptualizing an all-encompassing, ever-present state of war. The political only appears as the exception,²⁴ as the existence of an enemy is not the rule. In 'the stable state the political in this sense is latent, unseen, mere potential.'²⁵ But this must not obfuscate that the immutability of conflict determines Schmitt's thinking, a thinking that, so I would argue, saw the political lurking everywhere.

¹⁹ See Carlo Galli, 'The Critic of Liberalism: Carl Schmitt's Antiliberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning', 21 *Cardozo Law Review* (2000) 1597, at 1607.

²⁰ 'Es ist also keineswegs so, als wäre das politische Dasein nichts als blutiger Krieg und jede politische Handlung eine militärische Kampfhandlung, als würde ununterbrochen jedes Volk jedem anderen gegenüber fortwährend vor die Alternative Freund oder Feind gestellt, und könnte das politisch Richtige nicht gerade in der Vermeidung des Krieges liegen. Die hier gegebene Definition des Politischen ist weder bellizistisch oder militaristisch, noch imperialistisch, noch pazifistisch. Sie ist auch kein Versuch, den siegreichen Krieg oder die gelungene Revolution als »soziales Ideal« hinzustellen, denn Krieg oder Revolution sind weder etwas »Soziales« noch etwas »Ideales.«' 'By no means, political existence is neither only bloody war, nor is every political action only a military combat action, neither are all nations relentlessly confronted with all other nations and with the alternative friend or enemy, nor is it impossible that the politically correct action lies in avoiding war. As coined here, the definition of the political is neither bellicose nor militaristic, neither imperialistic nor pacifistic. Similarly, this definition is not the attempt to project the victorious war or the successful revolution as a social ideal, because war or revolution is neither something social nor something ideal.' (Author's translation). See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 33. Kennedy correctly asserts that other conservative contemporaries of Schmitt like Ernst Jünger and Erich Kaufmann did in fact idealize struggle as virtue. See Kennedy, 'Hostis not Inimicus', *supra* note 17, at 44 and footnote 34. In his 1936 article 'Politik' ('Politics'), Schmitt differentiates between a bellicose (kriegerisch) and a political approach, siding with the latter. (Reported by Wolfgang Palaver, *Die mythischen Quellen des Politischen* (Kohlhammer, Stuttgart/Berlin/Köln, 1998) at 14).

²¹ The following sections of the paper will take up Schmitt's definition of a political unit. When I refer to political unit or political community, etc., I mean units, communities, etc., in the Schmittian sense.

²² See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 20.

²³ For a review of the sources of Schmitt's conviction in political theology, see Palaver, *Die mythischen Quellen des Politischen*, *supra* note 20, at 16.

²⁴ See Kennedy, 'Hostis not Inimicus', *supra* note 17, at 42.

²⁵ See Benedetto Fontana, 'Notes on Carl Schmitt and Marxism', 21 *Cardozo Law Review* (2000) 1515, at 1519.

Bearing in mind that Schmitt was not prepared to theoretically challenge his empirical convictions, his normative project has to be explored where he refines the political, where he frames and conceptualizes conflict. Schmitt's early prescriptive focal point is the state.²⁶ He seeks the advantages of this specific political unit and is projecting the ideal state that is capable of guaranteeing 'peace, safety, and order'²⁷ within its territory. But because the state is but a certain way of regulating human relationships, is but a concrete group of people, Schmitt has to find the *demos* which constitutes the state: the *Volk*. Already in one of his first works on political philosophy, *Der Wert des Staates und die Bedeutung des Einzelnen* ('The Value of the State and the Significance of the Individual')²⁸, Schmitt had laid the foundation for rejecting the focus on the individual and for rather opting for a broader group-based prism.²⁹ In his opinion, the political unit³⁰ is superior to the individual: The empirical individual is neither able to protect himself or herself nor his or her rights or freedom without or even against a political unit. Rather, the individual owes his or her individuality to the law that is created and realized by a political community.

The foregoing does not, however, provide an answer for why Schmitt concentrated on the state and *Volk*, why he was not indifferent as to the form and constituting *demos* of the political community. Certainly, the first response is that he was 'an occasional nationalist.'³¹ Exploring further reasons we are again confronted with the question of why Schmitt reduced conflicts to politics and cleansed warfare from moral or ethical considerations: Was Schmitt focused on limiting or unlimiting war? *Der Begriff des Politischen* gives several, albeit minor, hints that Schmitt considered the Westphalian state system capable of mitigating a scenario characterized by immutable enmity. Schmitt's grand opening of *Der Begriff des Politischen*, 'the concept of the state presupposes the concept of the political,' eventually equates a distinct role of the state with a solely politicized understanding of conflict. For Schmitt, only the state ensures that antagonism remains in the public sphere so that war is not continued on non-political, for instance social or economical, realms. The state thus guarantees that an enemy is '*hostis, not*

²⁶ Schmitt equates pre-state conditions with a condition of insecurity. Cf. Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes* (Hanseatische Verl.-Anst., Hamburg, 1938) at 69.

²⁷ See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 10.

²⁸ See Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (2nd edn, Duncker & Humblot, Berlin, 2004).

²⁹ A second possible explanation for Schmitt's focus on the group might be that Schmitt wanted to circumvent a problem of the individual centred approach of Thomas Hobbes. Hobbes rested his theory on the protection of the individual. This led to the problem, why the state, the protective body, was allowed to obligate the individual to sacrifice itself for the sake of protection.

³⁰ In *Der Wert des Staates und die Bedeutung des Einzelnen* Schmitt generally focuses on the state.

³¹ See Jan Müller, 'Carl Schmitt – An Occasional Nationalist?', 23 *History of European Ideas* (1997) 19, at 19.

inimicus,³² since ‘one does not have to hate the political enemy in a personal way.’³³ The constraining power of the state might also drive Schmitt’s warning that once the state loses its unchallenged authority to wage war against a declared enemy, the political will reappear as civil war.³⁴ Whilst the state-system offers a framework to regulate the political, civil war does not know any inherent limits and the political can lash out untrammelled by any constraints. To a certain extent, this analysis disentangles the first-glance paradox that Schmitt dreads civil war whilst cherishing inter-state war. Although the state cannot transcend, let alone challenge, the existence of a mortal conflict, it can provide for de-escalation. Accordingly, Schmitt’s rejection of Communism³⁵ is eventually rooted in its inherent lack of any protective limitations. Rather, by employing the idea of the class struggle, Communism re-introduces the political into the domestic realm and thus destroys the civilizing function of the state.

Some thirty years after the initial publication of *Der Begriff des Politischen*, Schmitt explicitly linked this piece to his international relations theory, namely to the advantages of the Westphalian world order.³⁶ Again, however, the original text only implies that the allocation of an enemy as an internal affair and the inter-national plane are mutually intertwined. In Schmitt’s opinion, a community that discards the friend-enemy criterion cannot be called a state; rather, a people rejecting the political is doomed to perish³⁷ and a state only exists if its *demos* is united³⁸ by a common enemy.³⁹ This enemy, then, generates domestic solidarity with the state; it conjures the internal cohesion, which is primordial for a state to radiate legitimacy and authority. From this point of view, external⁴⁰ enmity is integral for upholding a functioning state, i.e. a concept that inhibits the political from appearing as civil war. To use Schmitt’s words: the ‘political

³² See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 29.

³³ (Den Feind im politischen Sinne braucht man nicht persönlich zu hassen). *Ibid.*

³⁴ See Kennedy, ‘Hostis not Inimicus’, *supra* note 17, at 44.

³⁵ Cf. Stephan Holmes, *The Anatomy of Anti-Liberalism* (Harvard University Press, Cambridge, 1993) at 41-43.

³⁶ Cf. the foreword to the 1963 edition of *Der Begriff des Politischen*.

³⁷ See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 54.

³⁸ The German word *Einheit* translates as ‘unit’ and ‘unity’.

³⁹ In his 1932 *Legalität und Legitimität* (‘Legality and Legitimacy’), Schmitt clarifies his opening sentence of the concept of the political (‘The concept of the state presupposes the concept of the political’): ‘In Zeiten stabiler Rechtsanschauungen und konsolidierten Besitzes wird der Jurisdiktionsstaat vorherrschen Von einem “Staat” könnte man übrigens in einem solchen Gemeinwesen kaum noch sprechen, weil an die Stelle einer politischen Einheit eine bloße, wenigstens der Fiktion nach unpolitische, Rechtsgemeinschaft getreten wäre.’ ‘In times of stable jurisprudence and of consolidated property relationships, a jurisprudential state will prevail By the way, one could hardly describe such a community as a “state”, because a political unit would have been replaced by a legal community that is, at least in fiction, apolitical.’ (Author’s translation). See Carl Schmitt, *Legalität und Legitimität* (Duncker & Humblot, Berlin, 1932) at 10-11.

⁴⁰ Carl Schmitt saw the possibility to find an internal enemy, too. However, the civilizing thrust of his state focus could only work on the inter-state plane, so that Schmitt’s primary concern was the external ‘other’.

world is a pluriverse, not a universe. Insofar, every state theory is pluralistic [...].⁴¹ It follows that the state assumes national homogeneity through international heterogeneity. Schmitt rests his state theory on two distinct levels: to ensure the absence of the political domestically, i.e. to prevent civil war, the political has to be possible on the inter-state realm. This approach is illustrated by Schmitt's interpretation of the 1928 Kellogg-Briand Pact:

Ein politisch existierendes Volk kann also nicht darauf verzichten, gegebenenfalls Freund und Feind durch eigene Bestimmung auf eigene Gefahr zu unterscheiden. Es kann feierlich die Erklärung abgeben, daß es den Krieg als Mittel für die Lösung internationaler Streitfälle verdammt und auf ihn »als Werkzeug nationaler Politik« verzichtet, wie das im sogenannten Kellogg-Pakt 1928 geschehen ist. *Damit hat es weder auf den Krieg als Werkzeug internationaler Politik verzichtet* (und ein der internationalen Politik dienender Krieg kann schlimmer sein als der Krieg, der nur einer nationalen Politik dient), *noch den Krieg überhaupt »verdammt« oder »geächtet«.*⁴²

Schmitt's understanding of the Kellogg-Briand Pact blatantly contradicts the outlawry of war that was (and still is) commonly associated with this international treaty. Since international enemies ensure internal unity and homogeneity, and thus are crucial for the composure of the state, Schmitt wasn't prepared to acknowledge a ban of international war – after all, doing so would have made impossible the very statist approach that he was still following in his Weimar work. As we will see later, Schmitt's *Großraum* concept eventually challenged the traditional Westphalian idea of the state – but quite strikingly, Schmitt was only prepared to conceptualize the *Großraum* after he had recognized changes in the concept of armed conflict after the First World War.

The initial question of *Der Begriff des Politischen* was whether Schmitt intended to distinguish politics from morality, aesthetics and economics in order to limit or unlimit war. Finding a solution to this puzzle, solved to the latter by internationally reputed Robert Howse, has to be linked to other facets of *Der Begriff des Politischen*. First, we saw that Schmitt held the factual conviction that enmity would always be immutable. Second, *Der Begriff des Politischen*

⁴¹ (Die politische Welt ist ein Pluriversum, kein Universum. Insofern ist jede Staatstheorie pluralistisch ...). See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 54.

⁴² 'A people that exists in a political sense cannot abstain from, if necessary, making its own distinction between friend and enemy at its own risk. It can declare solemnly that it desists from war as a way of solving international disputes and that it gives up war as an instrument of national politics, like it has happened in the so called 1928 Kellogg Pact. With such a declaration it neither dispenses with war as an instrument of international politics (and war that serves international politics might be worse than war that merely serves national politics) nor does it condemn or outlaw war as such.' (Author's translation). See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 51. (Emphasis added).

indicates that domestic homogeneity and the possibility of inter-state conflict are interrelated. Several passages imply that Schmitt saw transferring war from the domestic to the international plane as an instrument to tame the political by reducing the chance for civil war. Finally, *Der Begriff des Politischen* contains several brief arguments against the introduction of non-political motivations into conflicts. Rather cryptically, Schmitt suggests that moral considerations only aggravate wars; that they lead to utmost inhumane conflicts. In this respect, Schmitt's appreciation of the state system might well be read as mitigating the political – only the state can ensure that wars remain in a strictly public, not private, sphere.

All these facets and possible interpretations of *Der Begriff des Politischen* reveal a further dilemma: assuming that the state is capable of mitigating the political and assuming that internal allegiance to the state is assured by transferring the political from the domestic to the international plane (i.e. that a condition of domestic order rests on international anarchy), what prevents international conflicts from total escalation? *Der Begriff des Politischen* does not provide any answer to this dilemma – as a matter of fact, Schmitt even seems to hold dear extreme conditions of international antagonism.⁴³ All the various levels of the supposed restraining influence of the state seem to be inherently flawed. A systemic framework that constrains the outbreak of unchecked civil war whilst allowing ever increasing and aggravating inter-state conflicts does not refine the political – rather, Howse's evaluation seems eventually correct: The state system and the sole focus on political considerations in times of war would lead to unlimited conflicts; Schmitt's summary of the *cogito ergo sum* of the state: *protego ergo oblige*⁴⁴, would be meaningless.

By way of a preliminary conclusion, *Der Begriff des Politischen* still raises the questions of whether Schmitt intended to erect constraints for war and conflict and whether this central Weimar piece aimed at refining and taming the immutability of enmity. In *Der Begriff des Politischen*, Schmitt's suggestion that (re)introduction of morality into conflicts would lead to atrocious consequences remains superficial and requires an in-depth analysis. After all, moral considerations are rather thought to limit warfare, instead of aggravating its effects. Further, although Schmitt indicates the importance of the international plane to bolster the domestic state system, their exact relationship remains unexplored. The German constitutional lawyer

⁴³ 'Die Höhepunkte der großen Politik sind zugleich die Augenblicke, in denen der Feind in konkreter Deutlichkeit als Feind erblickt wird.' 'At the same time, those moments where the enemy is actually and in concrete perspicuity recognized as the enemy represent the culmination of high politics.' (Author's translation). See Schmitt, *Begriff des Politischen*, *supra* note 2, at 67.

⁴⁴ *Ibid.*, at 51.

entertains, even seems to welcome, an unconstrained intensification of international antagonism. Hence, his state system might de-escalate internally, but it does not provide safeguards against the total escalation of international war. Therefore, *Der Begriff des Politischen* seems to hold unfinished and under-examined thoughts. As I will argue in Part II of the paper, Schmitt's foundational pieces on international law theory not only come back to the puzzles and dilemmas raised in *Der Begriff des Politischen* – his international work contains the answers.

Schmitt's theory of democracy and its inherent nihilism

We can yet find an additional dilemma which permeates an integral part of Schmitt's Weimar theory and which will only find a solution in his international writings: his theory of democracy. Again, Howse's critique paves our way – according to him, Schmitt's 'romantic ideal of the nation, i.e. the dignity of a people and its way of life, ... turns out to be of secondary and derivative importance.'⁴⁵ As Böckenförde aptly demonstrates, *Der Begriff des Politischen* and *Verfassungslehre*, which contains crucial reflections about the nature of democracy, share several common grounds and are systematically coherent.⁴⁶ Going a small step further, I suggest that both pieces were aimed at overcoming the legitimacy crisis of the Weimar state. In the following section, I will demonstrate that Schmitt's theory of democracy eventually proved incapable of legitimizing the state apparatus and of justifying its encompassing influence on the citizens. Somewhat parallel to *Der Begriff des Politischen*, Schmitt sought domestic homogeneity in order to foster allegiance to the state. The substance of this homogeneity was to be erected by a democratic national identity. This substance, nevertheless, turns out to be linked to a mere myth (be it a strong *Reichspräsident* or, later, the *Führer*). Like his antagonist Kelsen, Schmitt was caught in a *cul-de-sac*, incapable of providing more than mere hypothetical foundations for a legitimate state.

In order to present Schmitt's theory of democracy as aimed at legitimizing an increasingly challenged state, I will first examine the genesis of Schmitt's acceptance of democracy, before considering his views on the origins and on the concrete manifestation of democratic statehood. After having established that Schmitt sought to reinvent a strong state under changed paradigms, namely the empowerment of the masses, I will turn to the conceptual

⁴⁵ See Howse, 'From Legitimacy to Dictatorship', *supra* note 3, at 92.

⁴⁶ Cf. Ernst-Wolfgang Böckenförde, 'The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory', 10 *Canadian Journal of Law and Jurisprudence* (1997) 5, at 5 *et seq.*

problems of his democratic views. I will consider Schmitt's inability to formulate absolute criteria about what constitutes national democratic homogeneity. Then, I will refer to Schmitt's pessimistic approach to modernity in order to show the inherent nihilism of his democratic concepts.

Again, in order to realize Schmitt's normative goals, we have to understand the factual determinations that underlie his theory of democracy. Since the ideal of democracy is the self-rule of a people, we have to explore how and why a conservative thinker like Schmitt – who was raised in the Wilhelmian era only to see the overthrow of *Kaiser Wilhelm II* and his replacement by a *bürgerlicher Rechtsstaat* – could accept the sudden empowerment of the masses.

As a starting point, his 1922 *Politische Theologie* indicates that Schmitt, then, had not yet accepted that the legitimacy of the state rested on the integration of the people. Rather, Schmitt adopts an authoritarian, dictatorial approach to his theory of a functioning and unchallenged state. In *Politische Theologie*, Schmitt examines the concept of sovereignty and concludes: 'Sovereign is the one who decides on the state of exception.'⁴⁷ This slogan serves Schmitt to enunciate his theory of hard decisionism: Schmitt cherishes the dictator who is free to decide that the normal situation has ended and that a state of emergency has occurred. In this crisis (in Schmitt's terminology: the exception) the dictator is unbound by any normative limitations; untrammelled by law, the dictator has become absolute.⁴⁸ Schmitt's reasoning challenges rule-based legal thinking and constitutional provisions regulating emergency powers – for Schmitt, this is a futile attempt: 'The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated.'⁴⁹ By asserting that the exception is more interesting than the normal case, by stating that while the latter proves nothing, the former proves everything,⁵⁰ Schmitt indicates that his thrust goes to instigating a permanent exception⁵¹ - this

⁴⁷ See Carl Schmitt, *Politische Theologie* (Dunker & Humblot, Munich, 1922), at 9.

⁴⁸ Cf. Giacomo Marramao, 'Schmitt and the Categories of the Political: The Exile of the Nomos: For a Critical Profile of Carl Schmitt', 21 *Cardozo Law Review* (2000) 1567, at 1576-1577.

⁴⁹ See Oren Gross, 'Exception and Emergency Powers: The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy', 21 *Cardozo Law Review* (2000) 1825, at 1844. Cf. Schmitt, *Politische Theologie*, *supra* note 47, at 9-10.

⁵⁰ Cf. Marramao, 'Schmitt and the Categories of the Political', *supra* note 48, at 1574.

⁵¹ For a more detailed overview, see Gross, 'Exception and Emergency Powers', *supra* note 49, at 1825 *et seq.* Gross presents the sound argument that Schmitt developed a hard decisionist theory in *Politische Theologie*. What Gross fails to take into account, however, is that the unrestrained dictatorship, as promoted by Carl Schmitt in *Politische Theologie*, was to re-establish order and stability. Gross is wrong when stating 'there is no substantive content against which legitimacy of such actions [sovereign decisions] can be measured'. What Gross really seems to be saying, and in this I share his critique, is that Schmitt didn't construe any procedural restraints on the

might well have been his evaluation of the chaotic first years of the Weimar republic. Schmitt reduces ‘the state to the moment of decision, to a pure decision not based on reason and discussion and not justifying itself, that is, to an absolute decision created out of nothingness.’⁵² By calling for the indefinite, unrestrained and absolute reign of a dictator and by drawing on theorists like de Maistre and Donoso Cortés to develop his theory, Schmitt reveals that only actions taken by a dictatorial regime⁵³ can overcome the authority crisis of the state. Therefore, in *Politische Theologie*, Schmitt is part of the conservative counter-revolutionary camp. The state is validated through the decision of a strong leader, who provides the substance that justifies the state’s influence and authority. We see, however, that, as a primordial theme, *Politische Theologie* responds to the legitimacy crisis of the early Weimar state.

The disintegration of the state also proved crucial in Schmitt’s later writings, although he was soon to abandon⁵⁴ the dictatorial approach of *Politische Theologie*. In his 1923 article, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*⁵⁵ (‘The Intellectual-Historical Condition of Contemporary Parliamentarism⁵⁶’), Schmitt explicitly sides with the democratic camp, although he wants to (drastically) reform parliamentary rule. Being a political realist, Schmitt had determined that the legitimate state could no longer be based on a monarch’s divine right, nor on tradition, but it had to accommodate the empowerment of the masses. The legitimacy of the state thus rested on the incorporation of the *Volk*. Substance as national identity, then, was a necessary precondition to reinvent the state’s authority. However, *Politische Theologie* shows Schmitt’s deep suspicion about the maturity of the masses. Because of its unpredictability, the masses represent an element of instability and disorder that had to be tamed.⁵⁷ From what has been said, Schmitt’s theory of democracy had to reconcile two contradicting, paradoxical convictions: The masses are both, the foundation and the possible

absolute dictator. As a matter of fact, Schmitt later saw this flaw himself and moved to an institutional legal thinking, or as Schmitt put it: ‘concrete order thinking’.

⁵² Cf. Renato Cristi, ‘Carl Schmitt on Liberalism, Democracy and Catholicism’, 14 *History of Political Thought* (1993) 281, at 293-294.

⁵³ Schmitt distinguishes the ‘sovereign dictator’ and the ‘commissarial dictator’ in *Die Diktatur* (Duncker & Humblot, Munich, 1921). The sovereign dictator establishes a *nouveau régime*, whereas the commissarial dictator defends the *ancien régime* and, by fending off the threat to the pre-existing system, makes himself superfluous. In *Politische Theologie* it seems as if a commissarial dictator isn’t enough to overcome the legitimacy crisis that Schmitt thought to see in the surrounding world.

⁵⁴ See generally, Balakrishnan, *The Enemy*, *supra* note 1, at 67.

⁵⁵ See Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (8th edn, Duncker & Humblot, Berlin, 1996).

⁵⁶ As to this translation cf. Balakrishnan, *The Enemy*, *supra* note 1, at 278.

⁵⁷ He shared this view with 19th century liberals. See Benedetto Fontana, ‘Notes on Carl Schmitt’, *supra* note 25, at 1518.

destruction of the state. Unlike elitist theorists, who only saw a ‘mob’ driven by primal instincts, Schmitt had to transfer and convert the masses into the *Volk*, into the public.⁵⁸

Schmitt conceptualized this transferral in his 1928 *Verfassungslehre*, although its paradoxical nature might obfuscate that Schmitt theorized democracy to counter the collapse of the Weimar state. *Verfassungslehre* promotes radical, Rousseauist democratic ideals, only to abandon them in the concrete suggestions for a democratic constitutional order. Untangling the tensions between Schmitt’s theoretical outlook and his practical constitutional proposals, I suggest that Schmitt’s ideas about the latter again signal that democracy was but a way to transcend a chaotic and unstable social environment and to reinvent a strong and orderly state. In *Verfassungslehre*, Schmitt develops the core of his theory of democracy around a deconstruction of the French revolution. In his typical polemical style, Schmitt sees two antithetical traditions in the Weimar Constitution: the liberal tradition of the *bürgerlicher Rechtsstaat* that raises limitations to the state’s power, and a truly democratic tradition linked to the theorist of the French Revolution, Emmanuel Sieyès.⁵⁹ Schmitt unequivocally sides with the latter tradition. The French Revolution presents, for Schmitt, the most basic principles of democracy because it mirrors the first moment of the constitution: the founding moment.⁶⁰ In this very moment, the French nation used its *pouvoir constituant* to originate a new way of being, a new constitution that has to be distinguished from constitutional laws. In Schmitt’s account, the French people discovered that the true democratic sovereign is the indivisible (in Schmitt words: homogeneous) nation. The nation’s constituent power (and here Schmitt draws on an absolutist interpretation of Jean Bodin’s⁶¹ theory of sovereignty) is free from restraints; it is absolute, ‘originary and groundless.’⁶² The constitution arising from the omnipotent decision of the sovereign nation demonstrates that this nation pre-existed the state. Hence, this constitution is superior to the state and to the legal institutions – among them constitutional law – attempting to enshrine the way of being willed in the founding moment. The term constitution, Schmitt argues, doesn’t represent

⁵⁸ For a concept of the public and Schmitt’s difference from elitist theories, see Kennedy, ‘Hostis not Inimicus’, *supra* note 17, at 46-47.

⁵⁹ Jeffrey Seitzer, and William E. Scheuerman have independently illustrated that Schmitt presents, at best, a partial and one-sided interpretation of Sieyès. See Jeffrey Seitzer, ‘Carl Schmitt’s Internal Critique of Liberal Constitutionalism: *Verfassungslehre* as a Response to the Weimar State Crisis’, *10 Canadian Journal of Law and Jurisprudence* (1997) 203, at 203 *et seq.* and William E. Scheuerman, ‘Revolutions and Constitutions: Hannah Arendt’s Challenge to Carl Schmitt’, *10 Canadian Journal of Law and Jurisprudence* (1997) 141, at 141 *et seq.*

⁶⁰ Andreas Kalyvas rightly points to the various stages of democracy. See Andreas Kalyvas, ‘Schmitt and the Categories of the Political: Carl Schmitt and the Three Moments of Democracy’, *21 Cardozo Law Review* (2000) 1525, at 1525 *et seq.*

⁶¹ Again, Schmitt only presents a limited reading of Jean Bodin, who was far from establishing an absolute and unrestricted prince and rather limited the sovereign prince by natural law. Cf. Jean Bodin, *Six Livres de la République* (Du Puys, Paris, 1577), Book 1, chapter 8.

⁶² See Kalyvas, ‘Schmitt and the Categories of the Political’, *supra* note 60, at 1535.

the (written) foundational law of a new political community, but distils the way of being of an already existing one.⁶³ From his reading of the French Revolution Schmitt deduces that democracy presupposes an inseparable, unified nation;⁶⁴ this homogeneity, for Schmitt, is distorted by a liberal focus on individual rights and privileges. Further, the only viable form of democratic government is the identity of the ruler and the ruled, so that parliamentary representation⁶⁵ and its struggle of interest groups are outdated.⁶⁶

At first glance, Schmitt's 'devotion' to democratic ideals seems radical. However, in the light of an examination of Schmitt's concrete ideas about democratic government and statehood, he (somewhat expectedly) turns out not to be interested in a permanent revolution, but only in a constitutional order informed by the empowerment of the masses.⁶⁷ Holmes once attacked these definite ideas about democracy as 'perverse' and classified them as a 'soccer-stadium democracy.'⁶⁸ Basically, Schmitt aims at installing a strong leader, the *Reichspräsident*, who represents and upholds the unity of the *Volk* by articulating the *volonté générale*.⁶⁹ Being the guardian of the constitution (i.e. of the way of being of the German *Volk*), the *Reichspräsident* and his decisions make 'an invisible being publicly visible'⁷⁰; his decisions radiate the substance that – allegedly – inheres in the *pouvoir constituant*. The state is re-legitimized by a leader hypostatizing a nation's identity through his actions. For this task, Schmitt conceptualizes Caesarism.⁷¹ Whilst the government is openly and vitally elected, the actual influence of the *Volk* is reduced to mere acclamation. There is no discourse, no rational consideration, and only irrational masses cheering or booing.⁷²

⁶³ See generally, Balakrishnan, *The Enemy*, *supra* note 1, at 91.

⁶⁴ According to Schmitt 'democracy requires, therefore, first homogeneity and second – if the need arises – elimination or eradication of heterogeneity.' (Reported by Müller, 'An Occasional Nationalist?', *supra* note 31, at 23).

⁶⁵ Schmitt shares this view openly with Rousseau.

⁶⁶ Cf. Marci A. Hamilton, 'Discussion and Discourse: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation', 69 *New York University Law Review* (1994) 477, at 487.

⁶⁷ For Schmitt, as Kalyvas correctly contends, 'the sovereign [i.e. the *Volk*] is also the one who "creates" the normal situation.' (Kalyvas, 'Schmitt and the Categories of the Political', *supra* note 60, at 1549). Schmitt's seeing the sovereign as the creator of peace is also apparent in his 1938 *Leviathan*, where he approves that Thomas Hobbes' 'Souverän ist nicht *Defensor Pacis* eines auf Gott zurückgehenden Friedens; er ist Schöpfer eines nichts als irdischen Friedens, *Creator Pacis*.' Thomas Hobbes' 'sovereign is not the *Defensor Pacis* of peace that relates back to god; he is the creator of no more than earthly peace, *Creator Pacis*.' (Author's translation). See Schmitt, *Leviathan*, *supra* note 26, at 50 (original italics).

⁶⁸ See Stephen Holmes, *The Anatomy of Antiliberalism*, *supra* note 35, at 49.

⁶⁹ With open approval, Carl Schmitt describes Thomas Hobbes' rector: 'Die souverän-repräsentative Person ist unverhältnismäßig mehr, als die summierte Kraft aller beteiligten Einzelwillen bewirken könnte.' 'The sovereign and representative person is disproportionately more than the added up power of all participating individual wills could bring about.' (Author's translation). See Schmitt, *Leviathan*, *supra* note 26, at 52.

⁷⁰ See Müller, 'An Occasional Nationalist?', *supra* note 31, at 25.

⁷¹ *Ibid.*, at 26.

⁷² 'Das Volk kann nur Ja oder Nein sagen; es nicht beraten, deliberieren oder diskutieren; es kann nicht regieren and nicht verwalten; es kann auch nicht normieren, sondern nur einen ihm vorgelegten Normierungsentwurf durch sein Ja sanktionieren. Es kann vor

Schmitt's initial commitment to democracy is almost diametrically opposed to the concrete projects to shape a constitutional order. For instance, Hamilton maintains, 'Schmitt's embrace of dictatorship oversteps the problems he identifies. His democratically elected dictator is just as vulnerable as the parliamentarian to the ideal of self-rule because self-rule delegitimizes representation at any level.'⁷³ Schmitt's existentialist pathos and his admiration for the raw power of the *pouvoir constituant* are radically tamed – the omnipotent sovereign only resonates in yes-no decisions. The ideal of unlimited self-rule, the basis of Schmitt's theory of democracy, is degenerated to a publicly enthroned leader.⁷⁴ In my opinion, Schmitt did not construe a blatantly inconsistent system; rather, returning to the factual determinations that shaped Schmitt's thinking about the masses, his theory of democracy tried to maneuver between conceiving the masses as the only source of legitimacy and, at the same time, as signaling decline and decay. Schmitt's authoritarian solution to this difficulty reveals that his ideal of democracy is, to a large extent, a function to surpass the legitimacy crisis of the Weimar state. In this respect, Howse's interpretation is correct and democracy is only of derivative importance.

Similarly, the secondary significance of democracy resonates in Schmitt's indifference as to what unifies the *demos*. What is more, this indifference points to the inherent inability of his theories to thoroughly legitimize the state domestically. Schmitt only postulates that the identity of the *Volk* is crucial to ensure substantive equality and homogeneity in order to accommodate the democratic empowerment of the masses. However, Schmitt cannot advance absolute criteria that design the substance that he eventually needs to legitimize the state. In an early, yet selective⁷⁵ flirt with Mussolini's fascism, Schmitt proposes a nationalist identity. In Schmitt's opinion, the images of nationalism create stout bonds; bonds that are, for instance, stronger than Georg Sorel's Communist appeal to the general strike. Schmitt notes that even Lenin was aware of this and, accordingly, mobilized his followers by a national ideology. But by favoring Sieyes' term 'nation' over *Volk* ('a term which merely identifies a somehow ethically or culturally

allem auch keine Frage stellen, sondern nur eine ihm vorgelegte Frage mit Ja oder Nein beantworten.' 'A people can only say yea or nay; it cannot consult, deliberate or discuss; it can neither reign nor administer; it cannot legislate, but is only capable of sanctioning a submitted legislative bill with its yea. Above all, it cannot raise questions, but is only able to answer a submitted question with yea or nay.' (Author's translation). See Schmitt, *Legalität und Legitimität*, *supra* note 39, at 93.

⁷³ See Hamilton, 'Discussion and Discourse', *supra* note 66, at 490.

⁷⁴ Cristi uses the terms 'democratically elected sheriff'. In my opinion, the term sheriff is sensible, but I cannot see how an open and vital acclamation of this sheriff is to be considered 'democratic'. See Cristi, 'Liberalism, Democracy and Catholicism', *supra* note 52, at 285.

⁷⁵ See generally Balakrishnan, *The Enemy*, *supra* note 1, at 122.

connected group of people that not necessarily exist in a political sense'⁷⁶) Schmitt denotes that his quest for democratic legitimacy is relative and lacks objectivity. Eventually, Schmitt acknowledged that all nations show distinct concepts of, and individual criteria for nationality.⁷⁷

Going even a step further, Schmitt degraded democratic substance to a fiction, to but a decision of a leader filling a cultural nothingness. Eventually building democracy on a volatile myth, on a spectre, Schmitt's theories failed to stop the domestic disintegration of the state. Rooted in his cultural perspective on modernity – on the *Zeitgeist* – published in the article *Das Zeitalter der Neutralisierungen und Entpolitisierungen* ('The Age of Neutralizations and Depoliticizations'), Schmitt advances that the contemporaneous religious faith in technological progress is only the last step in a passage from theology, to metaphysics, to humanitarian morality and then to economics. Each of these steps were taken by the European nations⁷⁸ to find neutral territory where groups could interact safely, but each attempt to outrun the political failed and the neutral terrain became the new battle ground.

Auf dem neuen, zunächst für neutral gehaltenen Felde entfaltet sich sofort mit neuer Intensität der Gegensatz der Menschen und Interessen, und zwar um so stärker, je fester man das neue Sachgebiet in Besitz nimmt. Immer wandert die europäische Menschheit aus einem Kampfgebiet in neutrales Gebiet, immer wird das neu gewonnene neutrale Gebiet sofort wieder Kampfgebiet und wird es notwendig, neue neutrale Sphären zu suchen. Auch die Naturwissenschaftlichkeit konnte den Frieden nicht herbeiführen. Aus den Religionskriegen wurden die halb noch kulturell, halb bereits ökonomisch determinierten Nationalkriege des 19. Jahrhunderts und schließlich einfach Wirtschaftskriege.⁷⁹

Again, the immutability of conflict surmounts Schmitt's thinking. Therefore, he judged believing in technocracy dull and dangerous – for what was thought to be the final neutral ground, a sphere of peace and reconciliation⁸⁰ and the ultimate flight from the political,⁸¹ is nothing but spiritually

⁷⁶ (... nur eine *irgendwie* ethnisch oder kulturell zusammengehörige, aber nicht notwendig politisch existierende Verbindung von Menschen ...). See Carl Schmitt, *Verfassungslehre* (8th edn, Duncker & Humblot, Berlin, 1993), at 79. (Emphasis added).

⁷⁷ See Carl Schmitt, *Das Zeitalter der Neutralisierungen und Entpolitisierungen*, at 84, reprinted in Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 79 *et seq.*

⁷⁸ (Europäische Menschheit). *Ibid.*

⁷⁹ 'It is on this new terrain, terrain that was initially deemed neutral, where human differences and antipodal interests evolve immediately and with new ferocity – in fact, the more intensively the more thoroughly the new field of reference is occupied. The European nations always wander from a field of battle into neutral territory, the newly won neutral territory always and instantly turns into a new battleground and it becomes necessary to seek new neutral spheres. Natural sciences were also not capable of providing peace. The religious wars turned into 19th century national wars, which were still culturally determined to one half and yet already economically determined to the other half, and finally simply into economic wars.' (Author's translation). *Ibid.*

⁸⁰ *Ibid.*, at 90.

⁸¹ (Absolute Entpolitisierung). *Ibid.*, at 94

void,⁸² i.e. nothing but culturally blind.⁸³ Technocracy doesn't challenge the political, nor does it provide identity – it merely awaits to be used to either aggravate war or to improve peace.⁸⁴ Schmitt is calling for politics to usurp technocracy and fill it with substance so as to define new friend-enemy groupings. Nevertheless, since technocracy cannot inherently give any guidance, domestic friendship – homogeneity – cannot be conjured by more than a myth.⁸⁵

Schmitt's theory of democracy is characterized by an innately nihilistic attempt to create democratic identity. This identity had to create internal cohesion, which in turn was vital for legitimizing the state apparatus. The questioning of Schmitt's normative agenda for seeking a solution to the legitimacy crisis of the Weimar state brings us back to the puzzles of *Der Begriff des Politischen*: Schmitt's support for a strong and unchallenged state might eventually be rooted in the assumption that the state system proves capable of restraining the political, of limiting immutable enmity. However, from this point of view, Schmitt's theory of democracy seems flawed, contradictory and counterproductive: The mythical basis of democracy cannot provide real or true legitimacy. Rather, Schmitt's democratic state is founded on mere hypothetical authority. The democratic myth could not only be exchanged, thus challenging continuity; the myth could also be exposed, the exposure possibly bringing about a crisis. Therefore, Schmitt's theory of democracy not only proves incapable of really legitimizing the state; Schmitt rested his state on potential sparks of instability and discontinuity.

Part II: Schmitt's foundational works on international law & international relations

The following Part II presents Schmitt's foundational works on international law and international relations. The main questions will be to what extent these works take issue and advance and to what extent they break with the dilemmas and questions that underlie *Der Begriff des Politischen* and Schmitt's theory of democracy. As we saw in Part I, Schmitt's normative agenda for freeing war from non-political concerns can be interpreted in almost antagonistic

⁸² *Ibid.*, at 92.

⁸³ *Ibid.*, at 91.

⁸⁴ *Ibid.*, at 94.

⁸⁵ This nihilistic logic certainly was one of the reasons for Schmitt to join the Nazis. For with the myth of the *Reichspräsident* Hindenburg failing (Schmitt noted in his diary: 'The Hindenburg myth is at an end. ... Papen or Hitler is coming. The Old Man [Hindenburg] has finally gone mad.' Reported by Balakrishnan, *The Enemy*, *supra* note 1, at 175) Schmitt took refuge in the next myth: the racism promoted by Adolf Hitler, whom Schmitt perceived as a mythical figure. Reported by Balakrishnan, *The Enemy*, *supra* note 1, at 180.

ways – either as limiting or as unlimiting the actions taken in times of mortal conflicts. Even when choosing the first interpretation, i.e. understanding Schmitt as constraining and refining a friend-enemy contrast, Schmitt’s focus on the state seems ambiguous. First of all, his attempt to legitimize the state, which had to cope with the empowerment of the masses, rested on a myth and proved only capable of providing the state with hypothetical authority. Secondly, whilst Schmitt’s Weimar political theory transferred the political to the international realm, this theory did not entail any concepts to deescalate the political on the inter-state plane. Therefore, internally as well as externally, his Weimar writings eventually failed to conceptualize a refinement of the political – his theory of democracy did not erect any strong safeguards against civil war, i.e. conflicts lacking any inherent constraints, and nor did his concept of the political erect any safeguards against the total intensification of international war.

As I will submit in the following section, Schmitt used his foundational writings on international law to rethink the ambiguities and puzzles of his Weimar period. As we will see in *Der Nomos der Erde*, Schmitt came up with an alternative source of legitimacy, which replaced his theory of democracy as the primary basis for the authority of the state. *Der Nomos der Erde* also introduces a concept that foreclosed the indefinite escalation of international antagonism. And finally, *Die Wendung zum diskriminierenden Kriegsbegriff* (‘The Turn towards a concept of discriminating war’) and *Der Nomos der Erde* elaborate extensively on the thesis that only cleansing warfare from moral considerations sets boundaries to military conflicts. All these facets of Schmitt’s foundational international writings substantiate that his turn to the international arena must not be conceptualized as a break in his academic life or as a mere tactical maneuver. To the contrary, Schmitt’s comments on the international realm should rather be perceived as amending, completing, and developing his Weimar work on domestic issues.

Factual convictions: The death of the Leviathan and the rise of a discriminating concept of war

To appreciate Schmitt’s conceptual steps in international law and international relations, we first need to delve into the factual assessments that built the foundations of Schmitt’s international theories. In his Weimar time, Schmitt’s core criterion was the state. However, Schmitt’s conception of the state was highly anachronistic, as he still operated with the 19th century elevation of the state over society and economy. The irrationality of mass democracy, societies

torn apart by antagonized and diametrically opposed ideologies, technology allegedly offering a prosperous, utopian future, and politics understood as the struggle of parties and interest groups, all questioned Schmitt's understanding of the strong and unchallenged state

Under the impression of the Third Reich, a political regime that rejected the idea of the state and rather focused on the idea of empire and *Bewegung* ('movement'), Schmitt came to the conclusion that the whole European post-Westphalian system of statehood was doomed. Schmitt used his 1938 *Leviathan* to reconstruct the events leading to this conclusion. Schmitt's *Leviathan* is an idiosyncratic description of Hobbes's original Leviathan and of the Hobbesian state that characterized, in Schmitt's opinion, the European state system since the Westphalian 'revolution' of sovereignty.⁸⁶ Somewhat romanticizing, Schmitt renders homage to the grand merits of the Hobbesian sovereign and the unchallenged state that constituted the Eurocentric world order. Schmitt maintains that the Leviathan, i.e. a state concept that was thought to provide internal depoliticization in the troubled times of the Thirty Years' War, was construed by Hobbes as a *magnus homo*, a godlike sovereign person.⁸⁷ By inverting '*veritas, non auctoritas facit legem*' and by focusing on the *summa potestas* of the prince instead of intrinsic justice or spiritual logic, Hobbes built, according to Schmitt, a value-neutral system. This system detached metaphysical truth from mere commands and inaugurated a procedural, technical theory of commands.⁸⁸ In the 18th century, this original Leviathan was hollowed out, and eventually brought down, by liberals, especially Jewish liberals like Spinoza, who destroyed the Leviathan from within by employing the private-public distinction that Hobbes recklessly had left in the system.⁸⁹ Schmitt goes on by asserting that the Leviathan survived in form of the 19th century state, a state that relied on a well-organized executive branch, army and police, as well as on a functioning bureaucracy.⁹⁰ The Leviathan was transformed into the positivistic system of legality; 18th century absolutism

⁸⁶ See generally Daniel Philpott, *Revolutions in Sovereignty – How Ideas Shaped Modern International Relations* (Princeton University Press, Princeton, 2001).

⁸⁷ See Carl Schmitt, *Leviathan*, *supra* note 26, at 99.

⁸⁸ *Ibid.*, at 69. Again, Schmitt's historic reading is questionable and one-sided. Schmitt fails to appreciate Hobbes' conceptual links to natural law thinking and Hobbes' requiring his sovereign to only rule in accordance with the laws of nature.

⁸⁹ *Ibid.*, at 99. Schmitt extensively criticizes Hobbes for leaving a small gap, a minor fracture in his otherwise cohesive state theory. Hobbes asserted that miracles were a public matter and that it was for the prince to command the belief in miracles; however, Hobbes conceded that each subject was free to inwardly believe or not believe in this miracle, as long as the subject avowed to the prince's decision in public. What follows this insight is Schmitt's attaching the whole liberal tradition to this distinction between inner faith and outward adherence, between public and private: In Schmitt's narrative, liberal theorists used this minor opening in Hobbes' system to promote the autonomy of society, to invert the hierarchy between the personal sphere and public obedience and to weaken the Leviathan by extracting personal liberties from the all-embracing state.

⁹⁰ *Ibid.*

was replaced by the 19th century *Rechtsstaat*⁹¹ (or rather *Gesetzesstaat*). This state, however, and here Schmitt returns to his Weimar themes, could not adapt to mass democracy and legality was not prepared for party politics without a *pouvoir neutre*. In Schmitt's narrative, the inability of multi-party politics to provide substance and party pluralism's sole reliance on procedural legality had led to – and Schmitt uses the past tense – the second death of Leviathan.⁹² In 1938, Schmitt thus prepared a shift away from the state of the Westphalian world order, i.e. from concepts and ideas that dictated his Weimar writings.

In his *Leviathan*, Schmitt leaves the future open – if the state is dead, can it be reinvented? Does Leviathan have a third life? Before presenting Schmitt's answer to these questions, an answer that he would give in 1939, we have to pay attention to another piece that Schmitt published in 1938,⁹³ i.e. in the very year he presented his *Leviathan*. Whereas *Leviathan* marks the farewell to the European state system from a domestic point of view, in *Die Wendung zum diskriminierenden Kriegsbegriff*⁹⁴ Schmitt recognizes the end of the classical, post-Westphalian inter-state system. In *Die Wendung*, Schmitt examines a shift in paradigm in international law, from a non-discriminating concept of war to a discriminating concept of war. In Schmitt's understanding, international law had a broader meaning than today and encompassed large parts of what we would call international relations. Schmitt rejects the legal-political dichotomy, sees it as wrong alternative,⁹⁵ and rather calls for 'realistic'⁹⁶ international legal scholarship, international law being close to real world problems.⁹⁷ Similar to his rejection of legal positivism domestically, he was unwilling to take a positivistic approach towards international law. As Koskenniemi argues, Schmitt marked the end of the great civilizer of nations and rather heralded the realist school of international relations, i.e. a school not believing in the effectiveness of international coordination through law.⁹⁸ In Schmitt's thinking, international law and international relations collapse and socio-factual politics and legal theorizing share the same terrain. What is more, sketching a first link to the gloomy perspectives of the Weimar period, Schmitt holds that the core of international law is war and peace, *jus belli*

⁹¹ *Ibid.*, at 100.

⁹² *Ibid.*, 118.

⁹³ *Die Wendung zum diskriminierenden Kriegsbegriff* was finished in autumn 1937.

⁹⁴ See Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (2nd edn, Duncker & Humblot, Berlin, 1988).

⁹⁵ See Carl Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot im Völkerrecht* (Deutscher Rechtsverlag, Berlin/Leipzig/Vienna, 1941) at 24.

⁹⁶ (Wirklichkeitsnah).

⁹⁷ See Schmitt, *Völkerrechtliche Großraumordnung*, *supra* note 95, at 25.

⁹⁸ See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), chapter 6.

ac pacis. It follows that conceptual shifts within this core are not only shifts in legal paradigms but they rather mark a departure from the traditional world order and point to a novel systemic environment.

Die Wendung argues that international law reflects the phenomenon of war as a certain concept⁹⁹ of war. Schmitt juxtaposes a discriminating¹⁰⁰ concept of war and a non-discriminating concept of war. Classical international law, which Schmitt attributed to the time before the Great War, was built on the absolute equality of sovereign states, and, since every state had the *ius ad bellum*, the decision to go to war was (according to Schmitt's interpretation) extra-legal, i.e. recourse to force was a mere political decision outside the realm of international law. Classical legal doctrines did not differentiate between certain types of war (for example, aggressive war or war in self-defense) and were not prepared to distinguish between actors because of their motives for recourse to force. But the Great War marked, for Schmitt, the collapse of the concepts that surmounted classical international law – what evolved was a discriminating concept of war. Schmitt grasped several developments. First, the criminalization of war: In 1919, Article 227 of the Treaty of Versailles provided for the trial of German Emperor Wilhelm II 'for a supreme offence against international morality'¹⁰¹ – unthinkable under classical international law. Further, in *Die Wendung*, Schmitt seemed to acknowledge the outlawry of war under the 1928 Kellogg-Briand Pact, thereby contradicting his interpretation in *Der Begriff des Politischen*. The second development observed by Schmitt was the erosion of institutionalized neutrality. Classical international law conceptualized a *tête-à-tête* between states to consolidate their disputes. Conversely, a non-discriminating concept of war presupposed neutral powers (i.e. powers being able to abstain from the conflict) with recognized rights.¹⁰² Schmitt maintained that this approach was overridden by the League of Nations, which provided for an automatic sanctioning system. The third conceptual turn, similarly underlying the League of Nations, was the internationalization of war. Classical international law advanced a nationalized understanding of war – following the *Realpolitik* approach, war was the pursuit of national interests. The outlawry

⁹⁹ It is interesting to note that Schmitt was still entrenched in German positive legal thinking and used the term 'term' (Begriff) instead of 'concept' (Konzept, Denkgebäude), similar to the *Begriff des Politischen* (a literary translation: the term of the political).

¹⁰⁰ Schmitt uses the term 'discriminating' in a way that may sound odd in contemporary legal debate, and although 'discriminating' was certainly chosen due to its pejorative connotation, 'to discriminate' is in the first place a synonym for 'to distinguish' or 'to differentiate'.

¹⁰¹ See <www.lib.byu.edu/~rdh/wwi/versa/versa6.html> (visited 10 September 2004).

¹⁰² Classical international law can be understood as enshrined in 1907 The Hague Convention V and XIII.

of war delegitimized wars for national objectives and elevated war to a matter of international concern. In Schmitt's polemical tone, war had become international civil war.

Schmitt would later elaborate extensively, in his 1950 *Nomos der Erde*, why he held this turn to a discriminating concept of war in low esteem and why he thought that the classical understanding of war was more humane, less dangerous. At this point it is only crucial to note that Schmitt saw the development as irreversible.¹⁰³ Focusing on Schmitt's factual convictions, with *Die Wendung* Schmitt witnesses the decline of state sovereignty, expressed by the negation of the sovereign right to resort to war untrammelled by law or by the so-called international community. Not only was the Leviathan unable to evade his inner destruction by liberalism and pluralism, but it was also equally pierced from the outside. The clear-cut distinction between inside and outside was lost, the Leviathan lost his role as judge over its own affairs and the international community assumed this position – the all encompassing question that Schmitt poses to international law ‘*quis iudicabit?*’ had seen a shift in paradigm. With all these almost revolutionary conceptual turns, away from non-discrimination to discrimination, away from nationalization to internationalization, away from sovereignty to the international community, was Schmitt unable to uphold the classical state system under changed paradigms – in Weimar he had attempted to reinvent the Leviathan by negating pluralism and by introducing mass democracy. With this program failing and with the Leviathan being equally under pressure from the outside, Schmitt realized that he had to depart from the Westphalian strong and unchallenged state.

The Großraum concept

Only against this background can we understand Schmitt's first major theoretical attempt to reconceptualize the foundations of international law: the introduction of the *Großraum*-concept. First introduced in a lecture in 1939 in Kiel, Schmitt published this concept in *Völkerrechtliche Großraumordnung mit Interventionsverbot im Völkerrecht*¹⁰⁴ in the same year. *Völkerrechtliche Großraumordnung* employs an arrogant, overbearing tone – Schmitt doesn't write as the preserver of the *status quo*, maybe even of the *status quo ante* the Great War, but theorizes for a once again strong Germany, a Nazi *Reich* that fantasized a new world order. In his new model,

¹⁰³ See Balakrishnan, *The Enemy*, *supra* note 1, at 250.

¹⁰⁴ Hereafter: *Völkerrechtliche Großraumordnung*.

Schmitt replaces the state as the core unit of international law with *Großräume*. A *Großraum* – a literary translation would be large space or great space – depicts a bloc, a huge territorial unit characterized by a dominating *Reich* radiating its influence throughout the *Großraum*. Schmitt maintains that *Reich* and *Großraum* are distinct and novel factors, concepts that are explainable neither by reference to each other, and nor in old and established terms. Schmitt contends that *Reich* and *Großraum* are not identical. For Schmitt, a *Reich* transcends the normal state, i.e. isn't simply an enlarged state, in that it claims a *Großraum* and therefore distinguishes itself from the territorial enclosure of the state.¹⁰⁵ Schmitt extrapolates the idea of *Großraum* by a deconstruction of the 1823 Monroe Doctrine.¹⁰⁶ He suggests that the initial and basic content of the Monroe Doctrine demarcated the Western Hemisphere from European intrusion. It was the US radiating its influence and its political ideas throughout the Americas that prevented (and was intended to exclude) foreign powers from resorting to military intervention. For Schmitt, the Monroe Doctrine was a drawing of geopolitical lines and the establishment of a particular sphere of influence (that bars alien involvement) by a politically awakened *Volk*.¹⁰⁷ Schmitt finds the concrete dialectical nature of the Monroe Doctrine in its rejecting and antagonizing plans of France, Spain and the Holy Alliance (Russia, Prussia and Austria) to topple South America's new republics.

For the purpose of this article it is not essential to delve into the parallels and differences of *Großraum* and Nazi ideology.¹⁰⁸ It is not essential to delineate how much Schmitt wanted to please his masters in the Third Reich with his invention. What I would like to suggest is that, although the *Großraum* concept truly looks radical in the first place and although it appears like a complete turnaround in his thinking, Schmitt was still caught in the very paradigms he employed in his Weimar period. His existentialistic pathos points the way, though Schmitt sounds far more menacing and sinister when we appreciate the dark times, 1939, he was writing in.

Ein zum Staat auch in diesem nur organisatorischen Sinne unfähiges Volk kann gar nicht Völkerrechtssubjekt sein. Im Frühjahr 1936 zum Beispiel hat sich gezeigt, daß Abessinien kein Staat war. Nicht alle Völker sind imstande, die Leistungsprobe zu

¹⁰⁵ See Schmitt, *Völkerrechtliche Großraumordnung*, *supra* note 95, at 67.

¹⁰⁶ *Ibid.*, at 30.

¹⁰⁷ *Ibid.*

¹⁰⁸ For an evaluation, see Peter Stirk, 'Carl Schmitt's Völkerrechtliche Großraumordnung', 20 *History of Political Thought* (1999) 357, at 357 *et seq.* and Andrea Gattini, 'Sense and Quasisense of Schmitt's Großraum Theory in International Law – A Rejoinder to Carty's Carl Schmitt's Critique of Liberal International Legal Order', 15 *Leiden Journal of International Law* (2002) 53, at 53 *et seq.*

bestehen, die in der Schaffung eines guten modernen Staatsapparates liegt, und sehr wenige sind einem modernen Materialkrieg aus eigener organisatorischer, industrieller und technischer Leistungskraft gewachsen. Zu einer neuen Ordnung der Erde und zu der Fähigkeit, heute Völkerrechtssubjekt ersten Ranges zu sein, gehört ein gewaltiges Maß nicht nur natürlicher, im Sinne 'naturhafter' ohne weiteres gegebener Eigenschaften, dazu gehört auch bewußte Disziplin, gesteigerte Organisation und die Fähigkeit, den nur mit einem großen Aufgebot menschlicher Verstandeskraft zu bewältigenden Apparat eines modernen Gemeinwesens aus eigener Kraft zu schaffen und ihn sicher in der Hand zu halten.¹⁰⁹

This passage perfectly relates to Schmitt's *Der Begriff des Politischen* and his notion that a weak *Volk* will perish. Breaking down formal equality, Schmitt introduces a hierarchical thinking into international law, where the *Reich* and its *Volk* are rated highest. The state and its *Volk* only hold a secondary rank since they are wrapped up in a *Großraum* and are thus under the influence of a *Reich*. And *Völker* that are unable to establish a functional state are falling off the scale, i.e. they are not subjects of international law. It is illustrative that Schmitt's focus is not the natural elevation of a certain people over others, i.e. that he does not take up the biological racism of the Nazis. Rather, the new ranking reflects a people's ability to create a functioning and ordered community. The superiority of a people is deduced from its establishing and upholding a political unit, i.e. its ability to demarcate an enemy and to wage war against him. In Schmitt's hierarchical reconfiguration of international law resonates his own call on international legal scholarship to find a way to implement what was hitherto the state's task, the provision of order¹¹⁰, within new models.¹¹¹

This is one of the reasons for why Leviathan should be seen as the godfather of the *Großraum* concept. In my understanding, Schmitt translated the characteristics of the Hobbesian inter- and intra-state system into his rethinking international law. The Hobbesian system construed the state as a territorially enclosed unit with monopolized violence. In exchange for providing internal neutral, depoliticized grounds, i.e. domestic peace, the state delegitimized the

¹⁰⁹ 'Unquestionably, a people which is, merely from this organizational point of view, incapable of forming a state cannot possess international legal personality. For example, in spring 1936 it became visible that Abyssinia was no state. Not all nations are capable of passing yon challenge to their own capacity of building a good and modern state apparatus, and very few possess the organizational, industrial, and technical abilities to cope with modern matériel intensive warfare. A new world order and the aptitude to hold international legal primacy today is not only composed of an enormous amount of natural capacities, i.e. capacities given by nature herself, it is also composed of deliberate discipline, of heightened organizational capabilities, and of the ability to self-create and to reliably control the modern community's apparatus, an apparatus that can only be mastered with a great array of human reason.' (Author's translation). See Schmitt, *Völkerrechtliche Großraumordnung*, *supra* note 95, at 59.

¹¹⁰ (Ordnungsleistung).

¹¹¹ See Schmitt, *Völkerrechtliche Großraumordnung*, *supra* note 95, at 59.

right to resist the sovereign¹¹². Conversely, seen from an external point of view, international or transnational interference with national affairs was precluded – the stronger and more absolute the internal domination, the weaker and less regulated the international interaction. The *Großraum* concept is built on these very facets: the provision of order within and the prohibition of intervention from the outside¹¹³. What is more, like the Hobbesian fragmentation of Europe into separate states, Schmitt implicitly recommends the world's division into different *Großräume* (Germany, Italy, Japan, the Soviet Union, the US). Both, the *Hobbesian* and the *Großraum* world order, presuppose a pluralistic world. Therefore, Schmitt rejected founding international law on universal values, on the hunt for total pacification, or on the elimination of war as a legal condition in international law's vocabulary. Therefore, transferring his challenges to liberalism to the international plane, *Völkerrechtliche Großraumordnung* has to be understood as refuting a (anti-pluralistic¹¹⁴) liberal approach to international law. Revisiting *Der Begriff des Politischen*, Schmitt held that universalization cannot accommodate the political, whereas the pluriverse under the *Großraum* framework would be open for it. Conceptually, the *Großraum* world order proves capable of drawing lines of demarcation – since the eradication of internal enmity depends on the externalization of conflicts, particularization has to re-enter the modeling of international law.

Essentially, *Völkerrechtliche Großraumordnung* has to be seen as a snapshot – it was presented only one year after Schmitt had published his conviction of the end of the post-Westphalian inter-state system. Although Schmitt's attempt to remodel international law was well received by Nazi politicians, and although Schmitt provided new slogans for Nazi propaganda, for example, the proclamation of a German Monroe Doctrine, *Völkerrechtliche Großraumordnung* was highly disputed among Nazi academic circles. *Völkerrechtliche Großraumordnung* is characterized by vague and ambiguous language, and it lacks directions as to where the journey will go, as to what future its author envisages. For example, Reinhard Höhn, one of Schmitt's Nazi antagonists, criticized Schmitt for not having elaborated on the nature of the internal order of the *Großraum*.¹¹⁵ Schmitt equally failed to specify the structure of

¹¹² (Ständisches Widerstandsrecht).

¹¹³ Underlining the importance of the principle of non-intervention, Schmitt included it into the title of his lecture and book.

¹¹⁴ Cf. for the distinction of pluralistic and anti-pluralistic liberalism, See Gerry Simpson, 'Two Liberalisms', 12 *European Journal of International Law* (2001) 537.

¹¹⁵ Cf. Stirk, 'Carl Schmitt's Völkerrechtliche Großraumordnung', *supra* note 108, at 364.

interaction and Schmitt accepted that there should be interaction, especially world trade¹¹⁶, between the hierarchically ranked players on the international arena. After all, at least nine different kinds of geopolitical – I refrain from using the term international – laws are necessary under a paradigm that distinguishes *Großraum*, *Reich* and state.¹¹⁷ However, the incompleteness of *Völkerrechtliche Großraumordnung* has interpretative value as it allows an insight into what was essential for Schmitt when reshaping the basics of international coordination, and when answering the question he was asked after he had presented *Die Wendung*: 'What now?'.¹¹⁸ Since order and non-intervention are the keywords in *Völkerrechtliche Großraumordnung*, and since these keywords are but flip sides of the Leviathan paradigm, Schmitt reveals that his primary focus was establishing internal order and protection. It is equally illustrative that Schmitt had nothing to say, as Höhn pointed out, about the internal structure of the *Großraum*. Being open to assigning a *Großraum* to such different political systems as national-socialism (Germany), fascism (Italy), monarchy (Japan), communism (the USSR) and liberal democracy (the US), the specific nature of domestic governance seems only of derivative importance for Schmitt.

Apart from the overt congruence with his 'untainted' work, *Völkerrechtliche Großraumordnung* reinforces the unanswered dilemma of *Der Begriff des Politischen*: The remodeling of international law is based on a pluriverse that accepts the political, i.e. conflicts between *Großräume*. At the same time, Schmitt – from my point of view: seriously¹¹⁹ – raises a strong principle of non-interference. The *Großräume* are supposed to uphold internal order by transferring antagonism, and eventually war, to an inter-*Großraum* plane, while they are precluded from intervening in each other's sphere of influence. Like *Der Begriff des Politischen*, *Völkerrechtliche Großraumordnung* externalizes enmity to ensure internal cohesion. Yet, both pieces face the problem of finding a middle ground between total enmity and friendship, the question of how to mitigate enmity how to render antagonism relative, and how to forestall the

¹¹⁶ See Carl Schmitt, *Völkerrechtliche Großraumordnung*, *supra* note 95, at 62.

¹¹⁷ The following diagram should illustrate that nine different kinds of geopolitical laws would be necessary for coordinating the interaction of different *Großräume*, *Reiche* and states.

	Großraum X	Reich in Großraum X	State in Großraum X
Großraum Y	1	2	3
Reich in Großraum Y	4	5	6
State in Großraum Y	7	8	9

¹¹⁸ Schmitt reports this question in: *Völkerrechtliche Großraumordnung*, *supra* note 95, at 63.

¹¹⁹ Basically, there are two reasons for my belief: First, the idea of non-intervention fits the translation of the Hobbesian paradigm in a novel concept of international law. Second, Schmitt obviously withdrew from the *Großraum* concept by the time Germany invaded the USSR and thus crossed into another *Großraum*.

total intensification of the political.¹²⁰ A partial answer to these difficulties is at the core of Schmitt's *Nomos der Erde*.

Nomos der Erde

*Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*¹²¹ was published in 1950 but it is commonly believed that it was in fact completed as early as by 1945. The leitmotif of *Der Nomos der Erde* can be found in the preface of the 1963 edition of *Der Begriff des Politischen*. With the end of the Westphalian era, Schmitt found himself unable to resort to its 'marvelous concepts.'¹²² Schmitt only saw two ways out: the flight into aphorism or seeking shelter in historic analyses – being a jurist, Schmitt maintained that he has to follow the latter path. *Der Nomos der Erde*, then, is Schmitt's account of the history of international law or rather of the paradigms governing international relations. In *Völkerrechtliche Großraumordnung*, Schmitt had turned to geopolitics, to perceiving international coordination as the distribution of space: spheres of influence, global lines of demarcation, the idea of the inseparability of order and its spatial allocation¹²³ built the framework of Schmitt's approach to international law. This approach is the prism through which he tells his story of international law's history in *Der Nomos der Erde*. For Schmitt, the keyword in rethinking international law is *Nomos*. In a highly idiosyncratic interpretation of its denotation – he maintains that already the Greek philosophers misinterpreted the Greek word *nomoi* as *shedon*, i.e. as rule or law¹²⁴ –, Schmitt understands *Nomos* as expressing the primordial partition and allocation of space, i.e. as the first seizure of land.¹²⁵ With the dawning of the global age, international coordination was based on certain spatial arrangements. With the end of the common agreement on this arrangement, i.e. with the end of this *Nomos*, an end Schmitt sees in 1890, the world was left in a condition of confusion, order was separated from its spatial allocation, and politics wasn't provided the means to attribute different meanings to different regions of the world. Schmitt advances this uncertainty as one of the reasons having led to the First and Second World War. By showing that international interaction historically was – allegedly – founded on an agreed upon *Nomos*, and

¹²⁰ See Palaver, *Die mythischen Quellen des Politischen*, *supra* note 20, at 15.

¹²¹ Hereafter: *Der Nomos der Erde*.

¹²² See Schmitt, *Begriff des Politischen*, *supra* note 2, at 17.

¹²³ (Ordnung und Ortung).

¹²⁴ See Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Greven, Cologne, 1950) at 37.

¹²⁵ (Landnahme). *Ibid.*, at 36

that the historic concepts under classical international law were based on this very *Nomos*, Schmitt calls on international lawyers to compose a new *Nomos* for a changed world and warns against the employment of obsolete concepts that are bound to the past *Nomos*.

Before returning to how Schmitt describes the *Nomos* under classical international law, we first have to appreciate the dimension *Nomos* had in Schmitt's thinking. In his Weimar work on domestic political theory, Schmitt depended on a myth that bonded together the *Volk* and that created the homogeneity required for the functioning of the state. Turning away from the counter-revolutionary, yet idiosyncratic, eschatology of a dictatorial regime in *Politische Theologie*, Schmitt construed an inherently nihilistic mythology that was open to include the empowerment of the masses. This nihilism couldn't be satisfying for Schmitt if he was searching for substance and authenticity. In addition, as Balakrishnan rightly points out, Schmitt concluded in the mid-1930s that even the decisionist hypostatization of the *volonté générale* was only hypothetical and that it was not creating substance.¹²⁶ Before referring to the *Nomos* concept, Schmitt was incapable of following either of the traditional, bipolar paradigms: Schmitt was neither willing to accept positivism – a school that fled, for Schmitt, into the theoretical negation of politics and into pure procedural thinking and hence was conceptually disabled from enshrining substantive determinations – nor prepared to pursue a natural law approach. Natural law, its focus on reason and epistemological objectivity, and its search for ontological truth, all seemed outdated in times of the reign of irrational masses. With *Nomos*, Schmitt wanted to leave behind both, these two classical solutions, positivism and natural law, and his initial response, i.e. his seeking refuge in a nihilistic myth. An initial allocation of space, a primordial disposition over the globe, *Nomos* provides the raw and concrete guidance Schmitt is looking for. For Schmitt, *Nomos* refers to a true, a factual, a historic event¹²⁷ that supersedes any social construction. The ontological¹²⁸ dimension of *Nomos* establishes a *Grundnorm* that is not hypothetical, but real. Revisiting the dichotomy of legitimacy and legality, Schmitt characterizes *Nomos* as a legitimating act that gives sense to legality.¹²⁹ Schmitt even uses his description of *Nomos* to contradict legitimacy entailed by a 'caesaristical cult of the political ruler.'¹³⁰ With other words, Schmitt implicitly revokes his myth of the *Reichspräsident*, and thus reconfigures

¹²⁶ See Balakrishnan, *The Enemy*, *supra* note 1, at 196.

¹²⁷ See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 17.

¹²⁸ *Ibid.*, at 16.

¹²⁹ *Ibid.*, at 42.

¹³⁰ *Ibid.*, at 45.

his unsatisfying Weimar approach. In comprehending *Nomos* as the *pouvoir constituant*, as the *ordo ordinans*, as the *ordnungsbegründender Vorgang*,¹³¹ as the founding moment of a new order, Schmitt manifestly spells out that *Der Nomos der Erde* represents no break in his work; it should be rather appreciated as a continuous line of thought. Like his antagonist Kelsen, Schmitt had found his *Grundnorm* not on the domestic, but on the international plane.

Within the *Nomos* concept, Schmitt distinguishes between land, sea, and air space. Since air space was a new development, Schmitt's focus in his looking back in *Der Nomos der Erde* is on the land-sea-binominal. Knowing the integral significance of *Nomos*, and interpreting Schmitt's positive characterization of land and his pejorative description of sea, is highly instructive. Schmitt eventually reverts to meta-physics to condense the implications of land and sea. Schmitt's anti-universal stance is channelled into his view on the latter. For Schmitt, the sea – its lack of limits¹³² and its ignorance of any borders except coastal lines¹³³ – expresses universalism.¹³⁴ Commonplace mythical characteristics of the sea – the vast emptiness of the oceans, the lack of guidance, the pervading sense of insecurity, and the sea's irrepressible forces, inconceivable but ever-present depth – seem to mirror the very notions Schmitt is attempting to outrun: inhumane voids, profound and incontestable nihilism. Comparing the sea with land, Schmitt conveys, on the one hand, that the sea represents the opposite of order, symbolizes the opposite of protection and safety. On the other hand, Schmitt describes the land as radiating these very aspects. For Schmitt, land is open to lines of demarcation, whereas the sea isn't; land is open to being classified – by *Nomos* – as a safe haven, whereas the sea isn't. While land knows clear borders and while land can be distributed into territories of states and into spheres of influence¹³⁵, the sea is 'free of any kind of spatial supremacy by a state.'¹³⁶ Schmitt presents protective geopolitics and the allocation of space as necessarily tied to land, whereas the sea is described as outside of a state's spatial order.¹³⁷

Building on the land-sea binominal, Schmitt sees two entirely different regimes, a land and a sea regime, evolving after the discovery of the new world, or, as Schmitt describes it: after

¹³¹ *Ibid.*, at 50 and 51.

¹³² See Balakrishnan, *The Enemy*, *supra* note 1, at 242.

¹³³ See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 143.

¹³⁴ *Ibid.*, at 144.

¹³⁵ (Staatsgebiet und Herrschaftsräume).

¹³⁶ (staatliche Raumhoheit). See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 143.

¹³⁷ *Ibid.*

the seizure of the new world's land¹³⁸. Each of these regimes had their own concepts in international law, concepts of war, enemy, loot and freedom.¹³⁹ Seen together, these two regimes built the *ius publicum europaeum*, an international law that was inherently Euro-centric and that Schmitt dated between 1648 and 1890. The land regime distinguished between different territories: territory of European states, or of non-European states that were seen as equals to European states (the keyword was civilized), and territories that were – euphemistically, from a contemporary perspective – labeled ‘free’. Free land was construed as free for occupation.¹⁴⁰

At the core of the spatial arrangement of Europe were the state and its territorial borders. In Schmitt's narrative, the Westphalian state was conceptualized to overcome civil war, especially the religious civil wars during the Thirty Years' War.¹⁴¹ The concept of war was transformed into war between equals, i.e. sovereigns that were seen as equals. Revisiting *Die Wendung*, Schmitt reconstructs the end of the just war tradition and its replacement by a non-discriminating model of war. While the just war tradition distinguished between just and unjust wars, the concept of war in Europe during the period of the *ius publicum europaeum* didn't provide any means to differentiate between the warring parties. Schmitt suggests that the just war tradition contributed to the devastating consequences of the Thirty Years' War in the 17th century. In *Leviathan*, Schmitt had described this century with drastic language:

[Ein Jahrhundert], daß von religiösen und theologischen Kämpfen, Disputationen und blutigen Kriegen bis zur Verzweiflung und zum Ekel erfüllt war.¹⁴²

In these times, and Schmitt quotes the German jurist Johann Oldendorp, war was, depending on its qualification as just or unjust, either divine-like enforcement of god's own will and law or rebellion against it.¹⁴³ Schmitt dreads several implications of this dichotomous structure: First, the just war tradition provided the means to elevate one's cause over the enemy's, the means to depict one's mission as just and the enemy's as unjust, and the concepts to see oneself as the champion of justice and the enemy as the heinous villain. This created brutal and inhumane wars, since the enemy was degraded and demonized. Second, because wars became punitive in nature, wars of eradication, or wars of subjugation, the termination of war was infinitely complicated.

¹³⁸ (Landnahme einer neuen Welt).

¹³⁹ See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 144.

¹⁴⁰ *Ibid.*, at 143.

¹⁴¹ *Ibid.*, at 129.

¹⁴² 'A century that was filled, to the extent of desperation and revulsion, with religious and theological battles, with disputes and bloody wars.' (Author's translation). See Carl Schmitt, *Leviathan*, *supra* note 26, at 64.

¹⁴³ See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 94.

This was reinforced, because the results of a war could always be challenged on the ground that they were wrong, brought about by an unjust war. Third, the central question of ‘*quis iudicabit*’ could not be answered by an appeal to justice. Most certainly having Vattel in mind, Schmitt feared that the claim of waging a just war could very well prevail on both sides of the conflict – Vattel warns that a war in which ‘each party, asserting that they have justice on their own side, will arrogate to themselves all the rights of war, and maintain that their enemy has none, that his hostilities are so many acts of robbery ... [Such a] quarrel will become more bloody, more calamitous in its effects, and also more difficult to terminate.’¹⁴⁴

In Schmitt’s view, these problems of the just war tradition were overcome by establishing a non-discriminating understanding of war between states that replaced medieval crusades and feuds. Schmitt introduces the idea that European state war was a ‘*Hegung of war*’ (*Hegung des Krieges*). Since *Hegung* bears different implications, I refrain from translating it and rather give a brief overview over the possible connotations. First, the German verb ‘hegen’ can be translated as ‘to foster’ or ‘to nourish’. From this perspective, ‘*Hegung of war*’ implies that the *ius publicum europaeum* embraced war as such, i.e. that it reduced war, to use the common definition of war in political science, to organized violence between contending political communities. Hence, mundane war could not rise to a divine-like activity. Second, the German verbs ‘einhegen’ or ‘umhegen’ have a territorial implication¹⁴⁵ – ‘umhegen’ translates into ‘to enclose’. ‘*Hegung of war*’ thus connotes that the non-discriminating concept of war was employed in a specifically demarcated region: Europe. Ultimately, translations like ‘bracketing of war’ or ‘enclosure of war’ neither take into account the positive connotation that *Hegung* has for war, nor do they capture the paradox that the limitation of war is brought about by embracing it, nor do they enshrine the spatial dimension of *Hegung*. Only by perceiving the latter is it possible to understand that Schmitt applied ‘*Hegung of war*’ solely to land war – contrarily, war on the high seas was absolute and did not know any intrinsic limitations. Under Schmitt’s land-sea binomial, sea war was excluded from ‘*Hegung of war*’, since the sea resists enclosure.¹⁴⁶

Schmitt’s concept of ‘*Hegung of war*’ has, I shall argue, two implications for problems characterizing his earlier work. The first refers back to *Der Begriff des Politischen* and answers the question of how to externalize enmity in order to unite internally, but to simultaneously

¹⁴⁴ See Emmerich de Vattel, *Law of Nations*, Book 3 of War, § 188, <www.constitution.org/vattel/vattel_03.htm>, (visited 10 September 2004).

¹⁴⁵ This territorial implication of *Hegung of war* is enunciated in Schmitt, *Der Nomos der Erde*, *supra* note 124, at 22.

¹⁴⁶ *Ibid.*, at 155.

prevent the total intensification of the externalized political. The second implication of '*Hegung of war*' explains why Schmitt dreaded the reemergence of the discriminating concept of war in *Die Wendung* and why he already wrote against a concept of war guided by non-political considerations in *Der Begriff des Politischen*.

With '*Hegung of war*' Schmitt describes a self-reproducing system that establishes internal loyalty by reference to an external threat, which in turn is prevented from rising to total enmity in order to forestall the disintegration of internal obedience. Schmitt saw the Hobbesian state at the core of the *ius publicum europaeum*. Internal loyalty was ensured by providing neutral grounds, and civil war was precluded because the sovereign promised order and protection but demanded obedience in exchange. The first 'trick' was to externalize enmity – by projecting an international enemy, the sovereign was able to convincingly argue that his service, the provision of safety, was still needed. Keeping an international enemy proved crucial to remind the citizens that the political would always be immutable, that upholding a community could not be rested on renouncing war, and that the internal peace of the state must not be confused with (utopian) total pacification. The enemy was used to strengthen internal bonds. However, this system would have failed once enmity deteriorated into absolute antagonism – as Schmitt had already noted in *Völkerrechtliche Großraumordnung*: '... the system as a whole is only tolerable as long as war is not total.'¹⁴⁷ Total war, the ultimate intensification of the political, negates the sovereign's ability to fulfil his task and provide domestic order. '*Hegung of war*' thus points to two levels: first, embracing war and the enemy as a necessary circumstance for legitimizing the state; and secondly, the mitigation of enmity as an equally essential precondition. Both levels share the same starting point, as they are eventually rooted in the state's role in establishing internal stability. In Schmitt's thinking, the negation of international war leads to the breakdown of loyalty for the state so that the immutable political will re-enter the domestic plane and destroy internal peace. The aggravation of international war into total war similarly leads to the breakdown of loyalty because the state proves itself unable to provide any shelter. Schmitt summarized both levels in *Leviathan*: 'Once the protection stops to exist, the state also stops to exist and every duty to obey is void.'¹⁴⁸

¹⁴⁷ See Schmitt, *Völkerrechtliche Großraumordnung*, *supra* note 90, at 70.

¹⁴⁸ (Hört der Schutz auf, so hört auch der Staat selber auf und jede Gehorsamspflicht entfällt). See Schmitt, *Leviathan*, *supra* note 26, at 113.

At least in theory, '*Hegung of war*' is an answer to the dilemma left unresolved in Schmitt's earlier work, of how to preclude the absolute intensification of externalized war.¹⁴⁹ However, one has to note, that the *Hegung* concept is somewhat bound to Schmitt's historic narrative of the Westphalian Euro-centric world order. First, '*Hegung of war*' only works where Schmitt's apocalyptical factual hypotheses stand and the provision of protection legitimizes the state. Indeed, the intra-African foreign policy of several African states might follow Schmittian paradigms. In the Western world, existing in a 'depoliticized' context, establishing loyalty to the state depends on various other activities, such as policies oriented at equality or social justice.¹⁵⁰ Second, also indicating its inherent Euro-centrism, the *Hegung* concept is systemically intertwined with the Westphalian *Nomos* or world order.¹⁵¹ Reading Schmitt, '*Hegung of war*' was not only *concentrated within* Europe, but it was also *limited to* Europe. Schmitt argues that amity lines drew geopolitical spheres and '*Hegung of war*' only took place within Europe – outside Europe, violence was unrestrained.¹⁵² By portioning the world in geopolitical zones, European sovereigns provided that extra-European conflicts, however bloody they were, did not reflect back on intra-European matters – states could be at war abroad, while living in a state of peace at home.¹⁵³ Paradigmatically, Schmitt maintains that the collapse of these geopolitical areas – '*Hegung of war*' and territory of unrestrained violence –, marked the end of the historic *Nomos*. As an example, Schmitt refers to the inclusion of colonies into the territory of their European 'mother' states.¹⁵⁴ Historically, the political was allocated a sphere of total intensification and a region of only limited violence. As we saw earlier, the spatial connotation of '*Hegung of war*' is integral.¹⁵⁵ In Schmitt's account, the limitation of the '*Hegung of war*' zone signified 'an enormous relief for inner European difficulties.'¹⁵⁶ But if the mitigation of antagonism, the prohibition of total war, rested on a pressure relief valve,¹⁵⁷ i.e. a geopolitical arena of unrestrained war, '*Hegung of war*' is not as readily applied today. Obviously, the evolution of international relations, the ongoing economic and social globalization, and the

¹⁴⁹ Cf. Schmitt, *Der Nomos der Erde*, *supra* note 124, at. 159.

¹⁵⁰ Unsurprisingly, after WWII, Schmitt became a grim critic of the welfare state, as it eroded the very basis of '*Hegung of war*'. The welfare state rests, in a Schmittian analysis, the legitimacy of the state on activities that obfuscate the existence of the political.

¹⁵¹ For a brief summary compare the preface of *Der Nomos der Erde*.

¹⁵² See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 62.

¹⁵³ Cf. Schmitt's summary on the distinction between inner-European and extra-European wars. See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 155.

¹⁵⁴ *Ibid.*, at 207.

¹⁵⁵ *Ibid.*, at 43.

¹⁵⁶ *Ibid.*, at 62.

¹⁵⁷ *Ibid.*, at 66.

technological development of weaponry –in addition to the moral implications – forestall the demarcation of a region where states, civilizations or *Großräume* can clash freely. Conversely, the conceptualization of contemporary problems of international law and international relations through a Schmittian prism is, at best, a treacherous mission – Schmitt’s solutions are rooted in an outdated understanding of the state, and in an obsolete mono-polar Euro-centrism. It is highly significant that Schmitt only related ‘*Hegung of war*’ to classical international law and refrained from – and in my opinion, was incapable of – reinventing a similar concept in his *Großraum* model.¹⁵⁸

What is more, his understanding of ‘*Hegung of war*’, especially the implication of this concept to overcome the devastating Thirty Years’ War,¹⁵⁹ helps explain Schmitt’s rejection of a discriminating concept of war in *Die Wendung*. In Schmitt’s narrative, ‘*Hegung of war*’ is founded¹⁶⁰ on the principle that the enemy – the sovereign state – was accepted as an equal and thus as a *justus hostis*.¹⁶¹ Because the enemy was situated on the same ethical, moral and legal level, European inter-state war was able to show tolerance towards the enemy. Under Westphalian paradigms, since wars had become viable means of dispute settlement and since they had overcome the punitive character of wars under the just war tradition, no European war in the *ius publicum europaeum* was a war of eradication, and no European state was dissolved or subjugated notwithstanding sweeping defeat on the battle field. What Schmitt eventually suggested in *Die Wendung* was that the modern concept of war, a discriminating, internationalizing approach that erodes neutrality and sovereignty, strikingly resembled the just war tradition. Both provide the means to elevate one’s cause and one’s belligerents over the enemy, both complicate the termination of armed conflict – for example by diffusing the classical rejection of a *status mixtus* and rather introducing gray areas between war and peace – and both lead to heightened non-transparency in international relations. Schmitt fears that modern international law and its concept of war once again provides the means to portray one’s enemy as evil or ugly. The parallels to *Der Begriff des Politischen* are apparent. Here, Schmitt intentionally introduced the political as a criterion distinct from morality or aesthetics.¹⁶² He didn’t disengage conflict from moral or aesthetical considerations in order to free war from any

¹⁵⁸ This should be at least warning for all those who wish to apply the Schmittian ‘trick’ of externalizing enmity to create internal unity today.

¹⁵⁹ See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 11.

¹⁶⁰ See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 159.

¹⁶¹ *Ibid.*, at 25.

¹⁶² See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 26.

constraints – to the contrary, Schmitt wanted to preclude the total intensification of antagonism by excluding non-political motivations. Already in a 1928 letter to Wolfgang Heller had Schmitt stated that using morality in the context of enmity was dangerous and flawed.¹⁶³ By rationalizing and humanizing war, ‘*Hegung of war*’¹⁶⁴ upheld minimal internal stability and order. Therefore, Schmitt sketches ‘*Hegung of war*’ to counter the inevitable total intensification (through demeaning the enemy morally) of war. Conversely, Schmitt equates total war with ideologies of just war.¹⁶⁵

This interpretation is persuasive in that it explains Schmitt’s seemingly romanticizing¹⁶⁶ image of the wars under the *ius publicum europaeum*. In a 1938 Corollarium to *Der Begriff des Politischen*, Schmitt mentions wars that resemble tournaments or duels;¹⁶⁷ in his *Leviathan*, Schmitt refers to cabinet or combatant wars;¹⁶⁸ in *Völkerrechtliche Großraumordnung*, he relates the 18th century to cabinet wars, the following time to combatant wars;¹⁶⁹ in *Der Nomos der Erde*, Schmitt gives the following summary:

Die Auffassung des kontinentalen Landkrieges als eines reinen Kombattantenkrieges, der im wesentlichen eine Auseinandersetzung der beiderseitigen staatlich-organisierten Armeen ist und einen rein militärischen Bereich von allen anderen Bereichen – der Wirtschaft, dem kulturellen und geistigen Leben, von Kirche und Gesellschaft – abzutrennen sucht.¹⁷⁰

Overtly, all these images seem to disregard authors like Rousseau who, as a contemporary of the times Schmitt reflects on, described warfare as horrible and brutal. Schmitt later acknowledged, in *Theorie des Partisanen*,¹⁷¹ a second objection against his narrative: his ideal type of combatant war ignored the rise of irregular partisan warfare in the 19th century. Finally, *Der Nomos der Erde* lacks a detailed analysis of the potential conceptual shifts caused by the French Revolution, Napoleon’s introduction of an *armée du peuple*, and the restoration of the 1815 Vienna Congress. This article isn’t concerned with the falsity of Schmitt’s war paradigms, but notes that

¹⁶³ Reported by Palaver, *The mythischen Quellen des Politischen*, *supra* note 20, at 12.

¹⁶⁴ See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 113.

¹⁶⁵ See Schmitt, *Leviathan*, *supra* note 26, at 73 and Schmitt, *Der Nomos der Erde*, *supra* note 124, at 113.

¹⁶⁶ By Schmitt’s own description, political romanticism is characterized by the flight to the past and by glorifying far-away developments: The romantic evades the present and moves to a different, illusionary reality.

¹⁶⁷ See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 102.

¹⁶⁸ (Kabinetts- und Kombattantenkrieg). See Schmitt, *Leviathan*, *supra* note 26, at 121.

¹⁶⁹ See Schmitt, *Völkerrechtliche Großraumordnung*, *supra* note 95, at 70.

¹⁷⁰ ‘The opinion that conceptualized the continental war on land as mere combatant warfare, which is essentially a contest between two mutually state-organized armies, and that seeks to disengage a strictly military sphere from all other spheres – from economics, from the cultural, intellectual and spiritual life, from church and society.’ (Author’s translation). See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 180.

¹⁷¹ See Carl Schmitt, *Theorie des Partisanen* (Duncker & Humblot, Berlin, 1963) at 16.

Schmitt's detaching – be it his true belief or an intentionally limited perspective – of war from civilian casualties, his nostalgic, simplistic and maybe naïve tone, is directly linked to the presentation of the '*Hegung of war*'. Similarly, Schmitt's view on the antipodal character of total war can be understood as a function of '*Hegung of war*'. For Schmitt, total war (which, as a reminder, marks the end of '*Hegung of war*') meant the collapse of the combatant/non-combatant distinction, where enmity is realized in non-military ways, and where all levels of society are drawn into the conflict.¹⁷²

Manifestly, on the one hand, Schmitt's deep appreciation of '*Hegung of war*' underscores that he did not seek unlimited warfare in Europe. On the other hand, Schmitt's most basic factual conviction, the immutability of enmity, precluded him from contemplating total pacification. Schmitt was left with the option of reflecting on means to introduce constraints into the chaos of war – Schmitt theorized '*Hegung of war*' in the *ius publicum europaeum* as such a method. Certainly being a key phrase in *Nomos der Erde*, Schmitt concludes that shaping and moderating a conflict is 'the supreme degree of order that man can bring about. It is the only protection against a circle of violence and escalating reprisals, i.e. acts driven by nihilistic hatred and vengeance, acts that senselessly aim at mutual destruction.'¹⁷³

Conclusion

Comparing integral parts of his Weimar work, *Der Begriff des Politischen* and his theory of democracy, with Schmitt's foundational writings on international law, especially *Der Nomos der Erde*, confirmed that they show striking similarities. As a permeating theme, Schmitt sought to overcome the legitimacy crisis of the state and to reflect on instruments to authorize the state's powers. The *Nomos* concept was intended to justify a constitutional internal order and replaced the failed myth of Caesarism, which Schmitt had conceptualized in his Weimar period. The idea of '*Hegung of war*' answered to the dilemma, first visible in *Der Begriff des Politischen*, later in *Völkerrechtliche Großraumordnung*, of how to constrain the externalized political. Finally, Schmitt used *Der Nomos der Erde* and *Die Wendung* to explain why he reduced conflicts to politics and why he did not permit morality or economics to guide the language of war; a theme prominent in *Der Begriff des Politischen*.

¹⁷² Cf. the 1938 Second Corollarium to *Der Begriff des Politischen*. See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 109.

¹⁷³ See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 159.

Schmitt's foundational writings on international law represent no distinct and separate academic work but are rather continuous lines of thought. This insight is not only of historic or biographic interest. The interpretation of Schmitt's Weimar writings has to be linked, at least cross-referred, to his later work. A good example is Howse's interpretation of the initial puzzle of *Der Begriff des Politischen*. Only by, hermeneutically, reading this Weimar piece together with *Nomos der Erde*, can we solve the question of whether Schmitt intended to really 'remove any constraints from the conduct of war.' According to my interpretation, removing moral considerations from war and conflict was intended to limit excessive behavior, to foreclose that an enemy is ethically degraded or morally demonized. Further, by limiting his perspective on Schmitt's domestic theories, Howse could not take into account that Schmitt was never satisfied with the nihilism of his democratic theory and later withdrew from it in favor of the *Nomos* concept.

This article has focused on substantive parallels between Schmitt's Weimar and post-Weimar work. Once they are accepted, academic reflections about Schmitt might have to be broadened and receive a wider field for research. One example is the methodological similarity between the early and the late Schmitt. Schmitt often used highly idiosyncratic historic accounts to substantiate his theses. Be it in *Politische Theologie*, *Der Begriff des Politischen* or *Verfassungslehre*, Schmitt's looking back is, at best, limited. Slipping his own objectives into his historic reading, Schmitt used ancient philosophers, like Hobbes, as mouthpieces for his own views.¹⁷⁴ The same seems to hold true for *Der Nomos der Erde* or *Die Wendung*. Again, Schmitt shapes his historic narrative around the points he intends to make. For instance, dealing with authors like Grotius or Vitoria, Schmitt employs a sweeping style thus brushing aside their far more sophisticated attitudes.

A second methodological similarity can be traced in Schmitt's somewhat absolute approach. For example, Schmitt's rejection of domestic party pluralism in his Weimar period may well be interpreted as foreclosing potential sparks of instability. In Schmitt's account, the struggle of interest groups that was commonly associated with democratic pluralism only increases the scope of domestic controversies possibly developing into internal conflicts and eventually disrupting the unity of the state.¹⁷⁵ To a certain extent, Schmitt opposed theories that focused on the clash of biased parties and interest groups, without providing an intrinsic

¹⁷⁴ Cf. Balakrishnan, *The Enemy*, *supra* note 1, at 220.

¹⁷⁵ See Schmitt, *Leviathan*, *supra* note 26, at 118.

safeguard against the escalation of these clashes to the scale of civil war, because they were intra-systematically open for destabilizing incidents. The same absolute and dichotomous approach (either a theory is sound and internally resists disruption, or it has to be rejected) can be found in Schmitt's description of the novel concept of war under the League of Nations in *Die Wendung*. By equating the concept of war of the just war tradition with the post-First World War understanding of war, Schmitt failed to differentiate between *bellum justum* and *bellum legale*.¹⁷⁶ Schmitt did not conceptualize differences between intrinsic justice and formal legality or between spiritual logic and secular procedures. Instead of reflecting on means to prevent *bellum legale* from turning into the negative effects of a *bellum justum* (for instance the demonization of the enemy), Schmitt designs '*Hegung of war*' as a categorical opposite. In my opinion, the very systemic openness of the novel concept of war (i.e. of *bellum legale* à la League of Nations) for the reintroduction of morality and ethics into a conflict's legitimacy discourse led Schmitt to favor '*Hegung of war*'.

These methodological similarities reinforce that Schmitt's post-Weimar work should not be disregarded in the current debate. By only concentrating on his Weimar writings, contemporary academic debate misses a field of research that might hold keys to insights about the true Carl Schmitt. At least, as this article suggests, Schmitt's foundational pieces on international law help interpret his often ambiguous and cloudy Weimar writings. In order not to miss Schmitt's own solutions to, and corrections of the difficulties inhering his Weimar period, academia should study his post-Weimar work more intensively.

¹⁷⁶ See Josef L. Kunz, 'Bellum Justum and Bellum Legale', 45 *American Journal of International Law* (1951) 528, at 532.