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"

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Abstract. One year ago in this Journal Carty offered a reassessment of Schmitt's writings on international law, in an attempt to present them as a still valuable theoretical tool in a contemporary critical discourse on (neo)liberalism. Carty's proceedings, thought provoking as they may be, is unconvincing, because Schmitt's views on international law are indissolubly tied up with Nazi ideology and political purposes. Paradoxically a transfer in our time of Schmitt's *Großraum* concept provides a less critical argument against neoliberalism than at the best a dubious bolster to it.

1. International Law Academy and the Challenge of Globalization

Undoubtedly globalization shakes some traditional creeds of international law. States are progressively losing their position of main actors on the world stage against others – like non-governmental organizations, transnational corporations, groups of interest, individuals – and through their waning some other fundamental concepts are likely to disappear, like that of sovereign equality.[1] International lawyers are reacting to the new challenges with different attitudes, some with preoccupation,[2] some with satisfaction,[3] and others proposing alternative theories capable of interpreting international law and which will enable it to cope with the new trends and challenges.[4]

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1. *Cf.* M. Koskenniemi, *The Future of Statehood*, 32 Harv. Int'l L. J. 397 (1991); N. Mac Cormick, *Beyond the Sovereign State*, 56 MLR 1 (1993); C. Schreuer, *The Waning of the Sovereign State*, 4 EJIL 447 (1993); O. Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 Colum. J. Transnat'l L. 7 (1997); A. Hurrell & N. Woods, *Globalization and Inequality*, 24 Millennium 447 (1995); B. Kinsbury, *Sovereignty and Inequality*, 9 EJIL 599 (1998).
2. *Cf.* P.-M. Dupuy, *International Law: Torn Between Coexistence, Cooperation and Globalization*, 9 EJIL 278 (1998).
3. *Cf.* M. Reisman, *Designing and Managing the Future of the State*, 8 EJIL 409 (1997).
4. For an excellent survey of current debate on globalization from political, sociological and legal perspectives *see* A. Paulus, Die internationale Gemeinschaft im Völkerrecht 97 *et seq.* (Munich, 2001).

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Among these new theories, the one which seems better to capture the present *Zeitgeist* and the reality of globalization as a process of westernalization or outright americanization of the world,[5] is neo-liberalism, or as it was recently labelled "liberal antipluralism."[6] Neoliberalism reveals self-isolating and intolerant features, which stand in contradiction to its purported goal to offer a more unbiased view on international relations than the handed down and now despicable theories more or less directly inherited by the liberal conceptions of the 19th century. The assumption that international law would be possible and meaningful only in a world of liberal states,[7] led by the principles of liberal democracy and market economy and made up by individuals and groups as primary actors and "disaggregated" states as subordinate to individual choices, and a world in which relations to non-liberal states would be marked by exclusion and confrontation,[8] bears striking similarity, despite its "new clothes," to old fashioned cold war stances and evergreen hegemonic schemes. As was rightly observed, such a theory plays, consciously or not, in the hands of hegemonic "unaccountable, self-selected, non-transparent, elite groups, which are, more often than not, wholly US-centred."[9]

On the side of liberalism's discontents, even more questionable is the attempt to apply a critical approach to international legal theory and to dispel the dangers of globalization by resuscitating Nazi ghosts, as has been recently done by Carty in this Journal.[10]

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5. *Cf.* S. Latouche, L'occidentalisation du monde (Paris, 1989); S. Sur, *The State between Fragmentation and Globalization*, 8 EJIL 421 (1997).
6. G. Simpson, *Two Liberalisms*, 12 EJIL 537 (2001).
7. *Cf.* A.-M. Slaughter, *International Law in a World of Liberal States*, 6 EJIL 503 (1995).
8. Actually Slaughter still owes us an explanation on how she sees the relations between the world of liberal states and the non-liberal ones. She acknowledges that the division between liberal and non-liberal states "is likely to recall the 19th century distinctions between 'civilized' and 'uncivilized' States," but limits herself to observe that "exclusionary norms are unlikely to be effective" in regulating the relationships between the two worlds (Slaughter, *id.*, at 506). Anyway, given the demonization of the non-liberal states, it is quite obvious that the relations between liberal and non-liberal states would be reduced to a minimum and would be hostile. This outcome is implied in the author's thoughts on the "liberal peace" that would characterize the relations between liberal states, unlike their relations to non-liberal states (*id.*, at 509), and in the further reflection that the new liberal concept of sovereignty "would exist side by side with more traditional conceptions, which are still accurate and important in relations between liberal and non-liberal States." In clear text, the sovereignty of non-liberal states is "subject to violation primarily by coercive intervention" by other states or by international institutions (*id.*, at 536, n. 68). Simpson, *supra* note 6, at 562 counts Slaughter among the "mild antipluralists," in contrast to F.R. Teson and M. Reisman whom he considers "strong antipluralists," because he finds that "the question of outlawry is not exercised much by Slaughter." I am rather inclined to think that Slaughter's vagueness on this central point was intended.
9. *Cf.* P. Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EJIL 435, at 441 (1997). For more criticisms on Slaughter's premises and thesis *see* S. Marks, "The End of History". *Reflections on Some International Legal Thesis*, 8 EJIL 449, at 470–472 (1997); M. Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, *in* M. Byers (Ed.), The Role of Law in International Politics 17 (Oxford, 2000); J.E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EJIL 183 (2001); Paulus, *supra* note 4, at 205 *et seq*.

Apart from lip-services to the "shocking" character of Schmitt's "avowed racism and anti-Semitism," one may wonder at the meaning of such sentences like the one in which Carty expresses his "respect for the technical competence of Carl Schmitt as an international lawyer,"[11] or the other in which he declares to be "in absolutely no doubt that Schmitt's international law writings are quite simply good."[12] In the following pages I will try to refute these assumptions by demonstrating how spurious Schmitt's theories of international law, and especially the *Großraum* theory, were from the beginning and how misconceived any attempt is to construe him as an author from whom we could still learn useful ideas on international law theory, by styling him as an earlier champion of the opposition to neoliberal conceptions of international law.[13]

2. THE AMBIGUITY OF THE CONCEPT OF *GROßRAUM* AS A THEORETICAL TOOL

In the ideological and propagandistic Nazi bric-a-brac the *Großraum* concept played an important role, as it was strictly tied to the politic of aggression and conquest. It is therefore amazing, that the critiques levelled after the war against Schmitt, who was the concept's main artificer, were mostly directed against his anti-Semitic publications or blatantly pro-nazi constitutional essays, letting by comparison in a relative neglect his international law works. Schmitt's followers too, while they are embarrassed in trying to justify the most virulent anti-Semitic utterances of their master,

10. A. Carty, *Carl Schmitt's Critique of Liberal International Legal Order Between 1933 and 1945*, 14 LJIL 25 (2001) (hereinafter '*Carl Schmitt's Critique*'). Actually, this does not come as a surprise. In his well known critique of theories on international law, Carty had proposed an "ethnical" view, based on the priority of nations in their historical reality over every possible system of international law, A. Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EJIL 66, at 93 (1991) (hereinafter '*Critical International Law*'). International law norms are seen as islands in an ocean of *lacunae*, as concretions formed by the accidental correspondence of the "cultural presuppositions" of different ethnics. It follows that an international discourse could only ever be possible between culturally homogeneous ethnics. Undoubtedly one feels reminded here of concepts similar to the "*Artverwandheit*" cherished by the Nazis.
11. Carty, *Carl Schmitt's Critique*, *id.*, at 28.
12. *Id.*, at 29. The outburst of sympathy is even more disturbing, if one recalls that some years ago it was Carty, who meticulously and critically hunted out every slightest trace of Verdross's association with National Socialism in the thirties, *see* A. Carty, *Alfred Verdross and Othmar Spann: German Romantic Nationalism, National Socialism and International Law*, 6 EJIL 78 (1995). Carty's attempt to establish a nexus between Verdross's international law theory and Nazi *Weltanschauung*, starting from Verdross's early sympathy for pangerman nationalistic political parties, is beside the point. "Verdross's catholic universalism and National Socialism are simply irreconcilable," as is concisely and perfectly rightly put by Paulus, *supra* note 4, at 175.
13. *Cf.* Carty, Carl Schmitt's Critique, *supra* note 10, at 60:

> Schmitt does offer a reasoned, in the sense of limited, critique of Anglo-American international law ideology that continues to have considerable credibility.

do point with self satisfied relief to the master's late international law writings as a sign of his increasing parting from Nazi ideology, or even as a proof of his "interior exile" in the years from 1939 to 1945.[14]

The conscious or unconscious mystification of this attitude has been sharply denounced some time ago by Rüthers, who convincingly demonstrated how Schmitt's sudden interest in the late thirties for such concepts as Empire ('*Reich*'), large space ('*Großraum*') and a new foundation of international law based on such principles fit perfectly to the war of aggression that Hitler was planning.[15] As in 1934, when at the height of the crisis provoked by Hitler's bloody repression of the competitive Rohm's SA, Schmitt had run to hail the Führer as the true and only protector of the law[16] and as in 1936, when simultaneously with the Nuremberg racial laws, Schmitt organized with an exquisite sense of timing a symposium on the "fight of the German juridical science against the judaic spirit,"[17] so in 1939 Schmitt did his best to keep faith to his self-appointed role as Hitler's *Kronjurist*.

Rüthers' analysis is substantially right, and for that matter the intertwining of Schmitt's theories and Hitler's aggressions did not escape the Allied Powers, which in 1947 seriously considered the option of bringing Schmitt to trial at Nuremberg.[18] Under detention Schmitt wrote a self-exculpatory pamphlet, which is highly interesting for the crude light it sheds on the opportunism and vileness of character of its author, and from a more general angle for its value as witness of the degree of adaptability

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14. A typical exponent of this mystification is H. Quaritsch, Positionen und Begriffe Carl Schmitts, 2nd Edn., at 121 (Berlin, 1991), who speaks of "*Abschied vom Kampf*."
15. B. Rüthers, Entartetes Recht, at 142 *et seq.* (Munich, 1988). M. Schmoeckel, Die Grossraumtheorie, at 151 (1994), notices a substantial continuity in Schmitt's post war writings on the *Großraum*, which for the author should suffice to discharge Schmitt from the reproach of a slavish opportunism. The fact that after the war Schmitt sometimes used the *Großraum* concept in a polemic mode to explain the political influence of the US in the western hemisphere (*see* the examples given by Schmoeckel, *supra*, at 80) does not change the truth that it was originally developed in order to provide a theoretical cloak to the Nazis' expansionistic and aggressive goals.
16. *Cf.* C. Schmitt, *Der Führer schützt das Recht*, Deutsche Juristenzeitung, column 945 (1934).
17. On the course and intrigue of this infamous congress strongly wanted by Schmitt *see* Rüthers, *supra* note 15, at 135 *et seq*. The conclusive speech held by Schmitt is published *in* Deutsche Juristenzeitung, column 1193 (1936). That Schmitt's anti-Semitism was far from being a transient weakness is proved by his post war writings. In his post war diary one can read entries like the following: "*Gerade der assimilierte Jude ist der wahre Feind*"; "*Denn Juden bleiben immer Juden. Während der Kommunist sich bessern und ändern kann*", *cf.* E. Freiherr von Medem (Ed.), Glossarium. Aufzeichnungen der Jahre 1947–1951, at 18, 255 (Berlin, 1991). For an appraisal of the Glossarium *see* R. Mehring, *Zu Carl Schmitts Dämonologie*, 32 Rechtstheorie 258 (1992). Therefore the affirmations by J.W. Bendersky, *Carl Schmitt at Nuremberg*, 72 Telos 91, at 95 (1987): "He never succumbed to racism," and by Schmoeckel, *supra* note 15, at 144: "*Das Rassendenken hat Schmitt grundsätzlich nicht rezipiert*" are totally untenable.
18. The circumstances of Schmitt's imprisonment and release are exhaustively depicted in an apologetical mode by Benderski, *id*.

of any international law doctrine to changed political circumstances.[19] Indeed, if Schmitt managed to escape relatively unscathed from the danger of the trial, that was due not only to his proverbial dialectics, but also to the intrinsic ambiguity of his thesis.

As a matter of fact, we must be aware that, apart from the odious use which the Nazis made of it, the *Großraum* theory, in Schmitt's version but also in a lesser degree in the versions of less refined *völkisch* authors, had the ambition to appeal to non-German peoples too as a model for the re-organization of Europe, based more on persuasion and cooperation than on force.[20] In this perspective one must take Carty's provocation seriously, not to maintain that Schmitt's international writings were "quite simply good," far from that, but to understand how and to which extent the *Großraum* theory could have really represented a plausible alternative project for a European and world order, different from that which emerged from World War II.

3. SCHMITT'S *GROßRAUM* THEORY

The best approach to understand Schmitt's thoughts on international law is the reading of the volume published in 1941 with the revealing title *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, a collection of essays from 1923 to 1939. In the sequence of different writings, some more theoretical and others more practical, along two decades, this collection offers a more direct, less mystifying picture of their author than *Der Nomos der Erde*, published after the war but probably written by 1945,[21] in which the literary style betrays Schmitt's ambition to present a grand painting of mankind's history in the light of some universal *Urbegriffe* and in which passages coming straight from Nazi war propa-

19. Schmitt himself provided a mystifying version of this episode of his life, cast as a piece of literature, *see* C. Schmitt, Ex captivitate salus (Köln, 1950).
20. For the propaganda aspects of Nazi "*Neue Ordnung Europas*" during the war *see* L. Gruchmann, Nationalsozialistische Grossraumordnung 71 *et seq.* (Stuttgart, 1962); H.W. Neulen, Europa und das Dritte Reich (Munich, 1987). Writing almost at the end of the war G. Küchenhoff, *Grossraumgedanke und völkische Idee im Recht*, 12 ZaöRV 34 (1944), stated that the fundamental feature of the *Führerbegriff* was *Liebe der Geführten*, but he conceded that such love would not be possible in international relations (*id.*, at 51). Rather, according to Küchenhoff the Nazi goal was to establish a "*Führungsraum*" based on justice and respect and not a *Herrschaftsraum*," but he admitted that sometimes coercion might be necessary to discipline forces, "which blindly, selfish and dull-witted withstand the common good of the people" (*id.*, at 64).
21. C. Schmitt, *Der Nomos der Erde* (Berlin, 1950). According to Quaritsch, *supra* note 14, at 121 the book was already finished by 1945.

ganda are skillfully smuggled into philosophical reflections, dubious etymologies, erudition and epics.[22]

The *capitis deminutio* imposed on Germany by the Treaty of Versailles was resented by virtually all German international lawyers of the time, but it is peculiar to Schmitt that he completely rejected the League of Nations, which he blamed as being not only a specific product of the system of the Treaty of Versailles, but also as the realization of a universal concept of international relations. Particularly significant is an essay written in 1928 on the League of Nations and Europe.[23] Through concise and polemic brushstrokes Schmitt tried to demolish the idea of the League of Nations as a *universaler Bund*. Its territorial scope was limited by Article 21, which bowed to the Monroe doctrine, and which Schmitt equated with a formal and preventive renunciation to any kind of concern with regard to the American continent. Its material scope was limited as well by the decision of the Allied Powers to keep the issue of German reparations out of the reach of the League. Not only the universality of the League is an imposture, also the concept of any such thing as Europe is dubious. Through a list of pseudo rhetorical queries Schmitt wants to demonstrate that Europe does not exist: is Great Britain part of Europe, notwithstanding its major interests and dominions all around the world; is Spain part of Europe, although its cultural and economic relations to Latin America are much stronger than those to Scandinavia? Is Russia part of Europe, despite the vastness of its territory which reaches the Far East? Are Algeria or Tunisia part of Europe, because of the constitutional links with France? Or is "Europe" just a term of art to describe a French-German understanding for the development of an economic complex between West Germany, North-East France and the Benelux? Undoubtedly some of the questions regarding the configuration of Europe have maintained their pertinency almost to the present day, but what Schmitt consciously omits to refer to,

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22. Schmoeckel, *supra* note 15, at 130, mentions the "almost priestly self description" by Schmitt in the foreword of the *Nomos*. Characteristic for Schmitt's method and style is the following entry in his diary short before the publication of the *Nomos*:

> Man redet sehr weise und sehr viel und redet sich doch nicht fest; man sagt soviel, daß ein dickes Buch entsteht und hat schließlich doch nichts Gefährliches gesagt, sondern nur pseudomythologische Kulissen gemalt. Aber wahrscheinlich ist das die richtige Methode, in einem Lizenzstaat über aktuelle Dinge zu publizieren. Non possum directe scribere de eo qui potest directe proscribere.

von Medem, *supra* note 17, at 280, quoted also by Schmoeckel, *supra*, at 148, who does not seem to deduce all the consequences that such sentences imply. *See also* A. Verdross's review of the *Nomos der Erde*, 4 Österreichische Zeitschrift für öffentliches Recht (neue Folge (new series)) 249 (1952). Verdross observed that the *jus publicum europaeum* was dissolved not because of its "*Entortung*," but because of its "*Entwertung*" through the axiological nihilism, to which Schmitt himself contributed.

23. C. Schmitt, *Der Völkerbund und Europa*, *in* Quaritsch, *supra* note 14, at 88 *et seq*. It was the text of a conference held on 29 October 1927 for the 'Gesellschaft der Freunde und Förderer der Universität Bonn' and originally published *in* Hochland, January 1928, at 345.

is the common heritage of traditions of rules of law and civil liberties which in the course of centuries made up the cultural and political concept of Europe.

Another important stage along the theoretical construction of the *Großraum*, and the role played by the *Reich* in it, is marked by an essay from 1932 about the different forms of modern imperialism in international law.[24] Focusing his attention on US imperialism, due to the degeneration of the Monroe doctrine, Schmitt actually reveals his deconstructive attitude towards international law and poses the basis for a reconstruction of the international law system through the doctrine of imperialism. Every kind of power expansion, be it physical or intellectual, needs a *Legitimitätsprinzip*, although by this term Schmitt does not mean a normative or transcendental principle, but quite ordinarily "a whole inventory of juridical concepts and formulae, linguistic constructions, slogans." A "historically significant imperialism" must have the fundamental characteristic of being able to autonomously determine the content of the conceptual tools it uses, and even more of being able to autonomously determine not only the language that other peoples will use, but even their way of thinking.[25] A typical characteristic of a "true and great Imperialismus" is its "remarkable elasticity and extensibility, and especially the non choice between Law and Politics,"[26] its freedom not to engage on a precise codex of norms and concepts, which could then be used also by others against it.

One of the key concepts in Schmitt's theory, and which is at the basis of his concept of *Großraum* and also of *Reich*, is the historical-spacial location of every human intellectual and practical activity, its *Ortung*. So for Schmitt international law came into being as *jus publicum europaeum*, with the purpose to regulate the co-existence of continental ethnic communities organized as states and to keep the conduct of war into the limits of civilization and reciprocal legitimation (*hegen*, in the peculiar Schmittian language).[27] In the 17th and 18th century, which Schmitt considered to be the golden age of international law, essential for the good functioning of the system were the so-called *ocean amity lines*, which traced out the boundaries, within which reigned the civil and free inter-

24. C. Schmitt, *Völkerrechtliche Formen des modernen Imperialismus*, *in* Quaritsch, *supra* note 14, at 162 *et seq.*, and originally published *in* 8 Könisberger Auslandsstudien 117–142 (1933).
25. *Id.*, at 179.
26. *Id.*, at 169. In the original "*Die merkwürdige Elastizität und Dehnbarkeit, diese Offenhaltung vor allen Dingen auch der Alternative Recht oder Politik.*"
27. The concept of *Hegung*, as the act of founding and spatially circumscribing, and at the same time legitimizing and restraining, plays a fundamental role in Schmitt's reconstruction of the *jus publicum europeum*, *see* Schmitt, *supra* note 21, at 44:

> Diese Erkenntnis, dass Recht und Frieden ursprünglich auf *Hegungen im räumlichen Sinne* beruhen, wird uns im weiteren Verlauf unserer Betrachtung noch öfters begegnen und fruchtbar werden. (Emphasis in original.)

course between the European powers and their citizens, and beyond which lay the vast spaces open to conquest and violence. This system, which allowed at the same time for a relative peace in Europe and for competition and expansion outside, was undermined by the British desire for world hegemony, which was eventually responsible for the pan-interventionism and totalitarianism of the war even on European soil. The universalization of international law, an invention of the late 19th century too, was for Schmitt but further evidence of the insidious British, and later the US', method of indirect world domination. The reaction to the British design of destabilization ('*Entortung*') of international law and the solution of the many inter-ethnical conflicts consequently imported into the European continent, can be found only in the construction of a *Großraum*, *i.e.*, a space vast enough to resist the disruptive British action and at the same time cohesive enough to reconstitute the ancient civil community under the stabilizing action of a leading nation, the *Reich*.

The designed ambiguity of the key concepts of *Reich* and *Großraum* is striking. The first is the pivotal element essential for the concretization of the *Großraum*, and its political organization, but it does not coincide either with the one or with the other. Despite its name, the *Reich* is a state, with its own territorial extension and its own juridical system in the traditional sense. In the *Großraum* it does not exercise sovereignty in the classical sense, but a spacial supremacy. As for the second concept, no cue is given as to the spatial delimitation of the *Großraum*, which should form its essence. Its extension can be evaluated only in political terms, in relation to the power of radiation of the *politische Idee* of the leading nation. Nor is anything said about the possible number of *Großräume* on earth.

Schmitt's scheme leaves in the twilight some other essential questions: first and foremost the relations between the states in the *Großraum*. It is noteworthy that Schmitt did not abolish states, on the contrary he plainly used the term state to designate the individual components of the *Großraum*. It is obvious, though, that this is a term of convenience, devoid of a specific meaning. Indeed, recalling Schmitt's constitutional writings on the state, what really qualifies an entity as a state is according to him its exclusive power to distinguish in any time and under any circumstance between friend and foe, and to take the supreme decision.[28] In the *Großraum* such a power can clearly only be given to the *Reich*. Rather by "states" are meant disaggregated governmental authorities, possibly entrusted with a certain degree of autonomy, engaged in a network of

28. C. Schmitt, Der Begriff des Politischen, 2nd Ed., at 32 (Berlin, 1932):

> Solange ein Volk in der Sphäre des Politischen existiert, muß es, wenn auch nur für den extremsten Fall – über dessen Vorliegen es aber selbst entscheidet – die Unterscheidung von Freund und Feind Selber durch eigene Entscheidung und auf eigene Gefahr bestimmen. Darin liegt das Wesen seiner politischen Existenz.

transnational relations or institutions regulated by a new or revived "public law," enlightened by the *politische Idee* of the *Reich*.

Under these conditions, it would be a misconception to speak of relations regulated by "international" law. Such a qualifier would better suit the residual rules which apply to the relations between *Großräume*. Schmitt does not specify which kind of rules they are. The only clear imperative is a negative one, namely that no power external to the *Großraum* may interfere in any aspect related to the inner life of the *Großraum*. For the rest all depends on the question of the magnitude, frequency and nature, friendly or hostile, of the contacts between *Großräume*.

It is not by chance that Schmitt left this aspect undetermined in 1939–1940. As long as Nazi Germany had hoped for the US' neutrality in the impending conflict, Schmitt had no difficulty to canvass an international law based on the overarching principle of a friendly co-existence of the *Großräume* of the world. On the contrary, as soon as it became clear that the conflict had reached world dimension, Schmitt could as easily trim his theory, predicting the ineluctable clash of the *Großräume* for the *Sein oder Nichtsein*,[29] and seeing the historical mission of the *Reich* in the struggle to save the future of international law, namely the possibility of the co-existence of plural independent entities, against the menace of a planetary imperialism, be it capitalist or bolshevist.[30]

By this last remark we touch on one aspect of Schmitt's writings in international law, which is most vehemently denied by his defendants, namely his patent opportunism, or, to put it mildly, his exceptional sense of timing.[31] As early as 1938 Herz pointed out the precise and provable link between the various international law theories advanced by German international lawyers susceptible to the Nazis and the various steps in Hitler's foreign policy.[32] In the first phase, which goes from the twenties to the first years after the *Machtergreifung*, the accent was instrumentally put on the doctrine of the fundamental rights of the states, which at that time was part of the mainstream anyway, in order to facilitate the politics of unilateral revision of the Treaty of Versailles and to regain free hand

29. Once again it is not by chance that Schmitt developed a theory of irreconcilable contraposition of land and sea, in which the sea-powers are accused of prompting a total warfare seeking the destruction of the enemy as contrary to the continental tradition of limited war, in 1941–1942, short before and after the German declaration of war against the US, *cf.* C. Schmitt, *Das Meer gegen das Land*, Das Reich, No. 10, 17 (1941); C. Schmitt, Land und Meer – Eine weltgeschichtliche Betrachtung (Leipzig, 1942).
30. *Cf.* C. Schmitt, *Die letzte globale Linie*, *in* E. Zechlin (Ed.), Völker und Meere 342 (Leipzig, 1944).
31. In considering Hitler as a model for Schmitt, and comparing Hitler's absolute and fanatic radicality with Schmitt's outlook, Carty plays down Schmitt's enterprise as a "mixture of extreme naiveté and irresponsibility", Carty, *Carl Schmitt's Critique*, *supra* note 10, at 71, but he knowingly abuses himself when he reduces Schmitt's main purpose of re-establishing Germany "as a regional power, with rights equal to other regional powers", *id.*, at 69.
32. *Cf.* E. Bristler (pseudonym for J. Herz), Die Völkerrechtslehre des Nationalsozialismus (Zürich, 1938). *See also* Gruchmann, *supra* note 20, at 138; Schmoeckel, *supra* note 15, at 112.

in matters of rearmament.[33] In the second phase, which reaches from 1936 to 1939, the politics of unification of the German minorities under the *Reich* went alongside those international law (pseudo-)doctrines pleading for the people as the true subject of international law and race as the distinctive element for a regeneration of international law.[34] In the third phase, that of the war, the scansion and escalation of the facts, from the invasion of the neighbouring countries, to the attack on the USSR and to the declaration of war against the US, was accompanied by a parallel escalation of ghastly doctrinal paraphernalia, from *Großreich* to *Großraumordnung* to *Lebensraum* to the *Kampf für das Sein oder Nichtsein der Völker*.

Yet, a word must be spent in favor of Schmitt. Although the version of an increasingly isolated and ostracized Schmitt in the war years may be more the product of a later clever self-propaganda than corresponds to historical reality,[35] it is true that Schmitt's theory of *Großraum* accommodates with most of Nazi fancies, and gets away with it, without having to take a clear position on the superiority of the German race. Significantly the stress lies on the "political" nature of the idea, whatever it may be,[36] which makes a particular people the leading one, and not on its inherent biological merits. It is this political aspect, as we shall see, which today still might confer a dubious appeal to Schmitt's theory on *Großraum*.

4. Practical Realization of the *Großraum*

It could be considered pitiless and pleonastic to test the plausibility of Schmitt's theories by their practical realization, but some words are due,

33. At any rate this attitude was shared by most German international lawyers, beyond their personal adherence to the Nazi movement, *see* V. Bruns, Deutschland Gleichberechtigung (Berlin, 1934).
34. Notably among the many publications, *cf.* N. Gürke, Volk und Völkerrecht (Tübingen, 1935).
35. The ostracism of which Schmitt was purportedly the victim from 1936 on, especially from the SS and specifically because of his nationalistic clerical political and philosophical origin, is emphasized by Schmitt's followers, J.W. Bendersky, Carl Schmitt – Theorist for the Reich, at 234 *et seq.* (Princeton, 1983); Quaritsch, *supra* note 14, at 13 *et seq.*; A. Könen, Der Fall Carl Schmitt, at 631 (1995). As Rüthers, *supra* note 15, at 157 sharply observed, the thesis of an "inner Emigration" was originally propagated by Schmitt himself. *See also* B. Rüthers & R. Hoehn, *Carl Schmitt und andere – Geschichten und Legenden aus der NS-Zeit*, 53 NJW 2866 (2000).
36. I do not agree with Carty, *Carl Schmitt's Critique*, *supra* note 10, at 42, that Schmitt's concept of the Political Idea unconditionally reflected the Nazi racial ideology; it rather seems to me that Schmitt's main thrust was to establish a totalitarian system through the assertion of the Führer principle and the reordering of societies along ethnical divides. It is telling that Schmitt's *Grossraum* does not coincide with the more orthodox Nazi views on *Lebensraum*, represented by R. Höhn, *Grossraumordnung und völkisches Rechtsdenken*, 1 Reich – Volksordnung – Lebensraum 256 (1941); and W. Best, *Völkische Grossraumordnung*, 10 Deutsches Recht 1006 (1940); *cf.* Schmoeckel, *supra* note 15, at 139 *et seq.* and 188 *et seq.*

especially if one wants to apply the same verification categories of Schmitt's and therefore to approach the matter by the same *konkretes Ordnungsdenken* so characteristic of his philosophy.

Whereas the *Anschluß* of Austria and the annexation of the *Sudetenland* in 1938 had been justified by Nazi propaganda as the accomplishment of the legitimate aspirations of German people to rejoin the *Reich*, the first practical realization of the idea of *Großraum* happened on 16 March 1939, date of the *Führer* Decree, by which Czechoslovakia was definitively liquidated through the establishment of the Protectorate on Bohemia and Moravia. Article 1(1) declared that the said territories from then on belonged to the territory of the *Großdeutschen Reiches* and were under its protection.The formula of the Protectorate was intrinsically ambiguous, because the relation between the *Reich* and the Protectorate shaped by the Decree was of internal and not international nature.[37]

The next step was the establishment of the *Generalgouvernement* in Poland, after its defeat in autumn 1939. While in the case of the political organization of Bohemia-Moravia one could still see the grant of a sort of albeit precarious autonomy for a dependent community, in the case of Poland the German Government let totally in abeyance any legal qualification of its power over the territory. According to the dominant doctrine Poland had ceased to exist as a state because of *debellatio*, but the territory had not been annexed by Germany, with the exception of the regions which had been incorporated in the *Gaue* of Slesia, East Prussia and Pomerania. Therefore the German Government did not exercise *Gebietshoheit* over the territory of the *Generalgouvernement*, but only a *Raumshoheit*, *i.e.*, factual power, although intrinsically different from that of an occupier.[38]

In plain language that meant that Polish people were deprived of any minimal legal guarantee and left entirely to the arbitrariness of the German Government. The reasons given by German internationalists in wartime were contradictory: some stressed the exceptionality and temporariness of the situation, by pointing at the fact of the strategic importance of the territory for the war operations against the Soviet Union,[39] others saw in the bondage of the Polish people the most coherent realization of the *Großraum* with its *völkisch* underpins. In fact, as early as spring 1942 the

37. The point was already made clear by the contemporary German doctrine, *cf.* F. Klein, *Die staats- und völkerrechtliche Stellung des Protektorats Böhmen und Mähren*, 31 Archiv des öffentlichen Rechts 262 (1940). Although Art. 3 of the Decree vaguely spoke of "sovereign rights" to be exercised by officials of the Protectorate, all government members had to be nominated and could at any time be removed by the *Reichsprotektor* (Art. 5(3)), the German Government could enact statutes for the Protectorate whenever it judged suitable and could assume directly the administration of some sectors (Art. 11).
38. For an irony on history, a very similar thesis was brought forward by German authors after the war in order to explain the peculiar power of Poland over the former Eastern German territories, *cf.* A. Verdross, B. Simma & R. Geiger, The Oder-Neiße Frage (Bonn, 1972).
39. *Cf.* F. Klein, *Zur Stellung des Generalgouvernements in der Verfassung des Grossdeutschen Reichs*, 32 Archiv des öffentlichen Rechts 227 (1941).

main features of the so called *Generalplan Ost*, the plan for the German colonization of Eastern Europe tinkered at by influential governmental circles, were made known.[40] The plan foresaw the deportation of 80–85% of the Polish population to Siberia and the forced germanization of the rest.

If one thinks that in the same turn of time Schmitt was perfecting his *Großraum* theory,[41] then the question naturally arises: how did Schmitt explain the German aggression against Poland and, as Carty puts it, "its subsequent terrorization"? The answer which Carty gives is inconceivable with regard to somebody, whose international law writings are held to be "quite simply good." The answer is as simple as that: "Schmitt passes this over."[42] As deceiving as this missing answer is Schmitt's silence on another fundamental and very practical query: if the delimitation between hostile *Großräume* is lastly determined by force, one may wonder which criterion of delimitation should operate in the case of two cognate and tightly allied *Großräume* as the German and Italian ones were. The two regimes, while they obsessively propagated the idea of a European diarchy based on a "totalitarian friendship," with a continental *Großraum* under German leadership and a Mediterranean one under Italian domain, studiously avoided to clear up their competitive ambitions over the Balkans and the Danube region. The German insistence to push Italian attention towards the African shores of the Mediterranean as a result rendered the fascists uncertain about their own identity. The manifesto, most probably written by Mussolini himself, which in July 1938 officially started the anti-Semitic campaign of the Italian Government, was interspersed with assertions, which would be of interest to a psychoanalyst, such as the followings: "it is necessary to make a strict distinction between the Mediterranean peoples of Europe on one side, and the Orientals and Africans on the other side […], the purely European physical and *psychological* characteristics of the Italians may not be altered under any circumstance."[43]

The disastrous way in which the war was conducted disposed of the Italian *Großraum* whims, and probably helped to dissipate any German ambiguity on the point: the German *Großraum* naturally extended to all Italian territory which in any period of history had belonged to the Holy Roman Empire of the German Nation. A curious testimony of the way in

40. On the *Generalplan Ost* envisaged by the *Reichssichereitshauptamt* and the German occupation regime in Poland *see* M. Rössler, Generalplan Ost (Berlin, 1993); B. Wasser, Himmlers Raumplanung im Osten. Der Generalplan Ost in Polen 1940–1944 (Basel, 1993); and the classical, still valuable works by M. Broszat, Nationalsozialistische Polenpolitik 1939–1945 (Stuttgart, 1961); C. Madajczyk, Die deutsche Besatzungspolitik in Polen 1939–1945 (Wiesbaden, 1967).
41. Schmitt's Völkerrechtliche Großraumordnung underwent four each expanded editions between 1939 and 1942.
42. *Cf.* Carty, *Carl Schmitt's Critique*, *supra* note 10, at 43.
43. Author's translation (emphasis added). The manifesto was published *in* the Giornale d'Italia, the official fascist press organ on 14 July 1938.

which the *Großraum* theory was actually received by Hitler and his entourage is given by Goebbels, who in his diary on 23 September 1943 reported his speech with the *Führer* on a "very serious and important question," namely that of the southern boundary of the *Reich*. According to Hitler the *Reich* should have confined the Veneto, and the Veneto itself should have been included in it as an autonomous region. The acceptance by the exclusively Italian population of the Veneto of such a solution could have been greatly facilitated by the thought that the *Reich* would have provided after the victory for that touristic movement, "to which Venice would attach the utmost importance."[44] Of course, one can not make Schmitt responsible for such a petty and vulgar perception of his theories. As we all know, by 1943 he had eventually given up any ambition he had left of becoming Hitler's main international adviser.

5. Of What Use Is Schmitt's International Law?

Quite rightly Carty depicts Schmitt as the "shadow side of the post war international law of peace, human rights and democracy."[45] Indeed, the world order established after World War II defeated Schmitt twice. The most obvious defeat clearly came from the universalist ethos with which all the new institutions were imbued,[46] and which reflected the universality of international law and the international community.[47] This is true, even if the ideological clash between the two blocks made the universalization of the economic system, envisaged at Bretton Woods, simply impossible[48] and almost brought the UN's political system to collapse. Still, the UN managed to survive, and was quickly spotted as the most suitable place to carry out the least common denominator agenda between the two superpowers, namely decolonization, through which the European model of state was exported to Africa and Asia.[49] The second, and more profound defeat was the fact that the new world order was designed to make allowance

44. Author's translation. *Cf.* J. Goebbels, Tagebücher aus den Jahren 1942–1943, at 441 (Zurich: L.P. Lochner, 1948).
45. Carty, *Carl Schmitt's Critique*, *supra* note 10, at 27.
46. On this point *see* Simpson, *supra* note 6, who speaks of "Charter liberalism" in opposition to "liberal antipluralism."
47. Also the title of the leading German textbook of international law, A. Verdross & B. Simma, Universelles Völkerrecht (Berlin, 1976); G. Abi-Saab, *International Law and the International Community: the Long Road to Universality*, *in* R. Macdonald (Ed.), Essays in Honour of Wang Tieya 31 (London, 1994).
48. What was established with the International Monetary Fund, the World bank and the General Agreement on Tariffs and Trade ('GATT') was rather, to use the expression of Picone, the "inner universalization of the capitalistic system," *see* P. Picone, *Diritto internazionale dell'economia e costituzione economica dell'ordinamento internazionale*, XVI Comunicazioni e Studi 137 (1980).
49. On this issue *see* B. Badie, L'Etat importé, l'occidentalisation de l'ordre politique (Paris, 1992); O.C. Okafor, *After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa*, 41 Harv. Int'l L. J. 503 (2000).

for the regionalism, removing so to speak, the clutches of Schmittian *Großraum*. So for instance Chapter VIII of the UN Charter foresaw a role of regional organizations for the maintenance of peace and security, Art. XXIV of the GATT allowed for regional custom unions and free trade areas. Its firm embedment in the liberal tradition and its originally functional character also prevented the EEC from being or becoming a sort of *Großraum*, although historically it was born of the need of post war European democratic politicians to offer to their peoples an appealing substitute to the Nazi *Großraum*, and although it held many of the features of a *Großraum*.[50] Not surprisingly, but probably not very rejoicing for Schmitt, the only realization of anything coming near to his *Großraum* theory was the Pact of Warsaw and the Breznev doctrine, as applied in the 1968 Czechoslovakian crisis.

Today also, in a time where liberal thinking is decaying[51] and the universalist afflatus is giving place to globalistic fumes, the Schmittian *Großraum* does not manage to convey any useful tool for practicable alternatives. It is true that the actual trends towards greater regionalization in all sensitive fields of international life,[52] economic,[53] cultural,[54] political,[55] military,[56] could lead to antagonistic relations, especially when accompanied by anti-liberal bents, but until now the conditions for the creation of a *Großraum* in the Schmittian sense are lacking, because the different regions, having more often a functional than a precise spacial character, variously overlap and at any rate miss the overarching "political idea," which is the essential glue of the *Großraum*. There are even some scholars, fully in tune with liberal international legal theory, who would greet a more advanced regionalization of the world system, viewing it not as a sign of disruption but quite on the contrary as evidence of a more developed

50. *Cf.* P. Gerbet, La construction de l'Europe, 2nd Edn., at 44 (Paris, 1994); M. Dumoulin, Plans des temps de guerre pour l'Europe d'après-guerre 1940–1947 (Brussels, 1993).
51. For a pleading of the recovery of the normative dimension of liberal international political theory *see* C. Reus-Smit, *The Strange Death of Liberal International Theory*, 12 EJIL 573 (2001).
52. For a synthetic overview *see* C. Schreuer, *Regionalism v. Universalism*, 6 EJIL 477 (1995).
53. The phenomenon of economic regionalism has reached such proportions that it could no longer be excluded as a possible alternative system to the World Trade Organization, *see* H.G. Preusse, *Regional Integration in the Nineties*, 28 JWT 147 (1994); J.H. Jackson, *Perspectives on Regionalism in Trade Relations*, 27 L. & Pol'y Int'l Bus. 873 (1996); H.A. Grigera Naón, *Sovereignty and Regionalism*, *in id.*, at 1073. *Contra* S. Hobe, *Völkerrecht im Zeitalter der Globalisierung*, 37 Archiv des Völkerrechts 253 (1999), according to whom the proliferation of regional groups would characterize a transitional era pointing at a better and in time full integration in the world economic system. This theory views the phenomenon of trade regionalism as "building blocks" instead of "stumbling blocks," for a recent view on this *see* S. Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 Harv. Int'l L. J. 419 (2001).
54. Of course, the more macroscopic debate is the one on the so called "human rights relativity." On this issue *see* among others A.A. An-Na'im, *Human Rights in the Muslim World*, 3 Harvard Human Rights Journal 13 (1990); Y. Ghai, *Human Rights and Governance, The Asia Debate*, 15 Australian Yearbook of International Law 1 (1994); T.M. Franck, *Is Personal Freedom a Western Value?*, 91 AJIL 593 (1997).

stadium of its constitutionalization. As much as the domestic constitutional systems historically experience two different pulls, the one towards a greater centralization of competences, in order to better fasten the system, and the other towards a greater decentralization, in order to better respect local specificities, so international law would now find itself in a phase of mature constitutionalization, envisaging new forms of cooperation on a regional scale to carry out the common values, but adapting them to more regionally shaped *Ordungsvorstellungen*.[57]

Therefore, what do Schmittian concepts actually contribute to the present discussion in international law?[58] Quite little, beyond some dubious source of inspiration for a grievance on the sense of dispossession, insecurity and alienation which many individuals feel because of the actual seemingly relentless push to an even more global economy, and on the fact that the indispensable sense of social cohesion and civic culture cannot rest solely on the ideology of market imperialism and the shibboleths of procedural democracy, but must be nourished by a strong political concept. But by saying that, we are just at the beginning of the task to shape a new political theory, or strategy, not at its conclusion. Or rather should one come to the conclusion, that in our mass society parliamentarianism, "the conflict between traditional legality and the desire for democratic legitimacy [cannot but] favor the bypassing of parliamentarianism in favor of authoritarian and even totalitarian style presidential government, if the legitimacy of political society is not to disintegrate entirely," as Carty sympathetically reports Schmitt's political thought?[59]

Paradoxically, Schmitt's international law writings regain a sense in an unexpected contest, namely in the neoliberal international theory. What we are being told about a new world of liberal states contains all the

55. A disquieting example of a political regionalization which could move towards exclusion and self-referentialism is given by the EU Protocol on Asylum for Nationals of Member States of the European Union appended to the 1997 Amsterdam Treaty, in which the EU member states are presumed *de iure*, except in exceptional circumstances, to be "safe countries of origin" for the sake of the 1951 UN Geneva Convention relating to the status of refugees, and thereby releasing them from any UN control, on this point *see* A. Clapham, *Globalisation and the Rule of Law*, 1999(61) The Review of the International Commission of Jurists 17, at 29.
56. On the debate of security regionalism *see* J. Delbrück, *Regionale Abmachungen: Friedenswahrung und Rechtsdurchsetzung – Zum Problem der Allokation internationaler Rechtsdurchsetzungsmacht*, *in* K. Ginther (Ed.), Völkerrecht zwischen normativem Anspruch und politischer Relität 163 (1994).
57. *Cf.* J.A. Frowein, *Die Konstitutionalisierung des Völkerrechts*, *in* K. Dicke (Ed.), Berichte der deutschen Gesellschaft für Völkerrecht 427 (Heidelberg, 1999). *See also* the Symposium held at the Heidelberg Max-Planck-Institut on the occasion of Frowein's 65th birthday, *Grenzüberschreitende Konstitutionalisierungsprozesse*, 59 ZaöRV 901 (1999).
58. Another matter is Schmitt's possible influence on the debate on the development of Europe. Some of those who hold him in high esteem try to actualize his thesis in the framework of that current of thought known as the "conservative revolution," which aims at the re-establishment of a "Christian Europe," on this subject *see* Carty, *Carl Schmitt's Critique*, *supra* note 10, at 74.
59. Carty, *id.*, at 56.

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elements of the *Großraum*, with the only difference that the "*politische Idee*" of the leading nation is disguised under a purported purely explanatory description of "that is the way the world is." That this is not at all the case has been repeatedly and convincingly demonstrated by many commentators: the dual "liberal international relations-liberal international law" agenda[60] is very much "normatively tinged,"[61] albeit on shaky grounds, because of its lack to articulate any philosophical reasoning;[62] the liberal millenarianism which pervades it is pretty much ideological indeed, despite its pretence of not being ideological at all.[63] So, as Koskenniemi pointedly said, what we are witnessing, is a doctrine "truly committed to smoothing the paths of the hegemon" and working for the establishment of a "neo-liberal *Großraum*."[64] Whether this repositioning is really able to give a new sense to Schmitt's theories and to justify a regain of interest, or whether it only bestows on them a flavor of provocation and paradox, *i.e.*, a quasisense, is open to question.

60. *Cf.* A.-M. Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AJIL 205 (1993); A.-M. Slaughter, A.S. Tulumello & S. Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AJIL 367 (1998); A.-M. Slaughter, *International Law and International Relations*, 285 Recueil des cours 9 (2000).
61. The expression is used by Koskenniemi, *supra* note 9, at 33.
62. *Cf.* Reus-Smit, *supra* note 51, at 586.
63. *Cf.* S. Marks, *supra* note 9, at 467. *See also* S. Marks, *Big Brother is Bleeping Us – With the Message that Ideology Doesn't Matter*, 12 EJIL 109 (2001).
64. Koskenniemi, *supra* note 9, at 34.