Leiden Journal of International Law, 19 (2006), pp. 41–67
 Printed in the United Kingdom doi:10.1017/S0922156505003171

Carl Schmitt and the Problem of Legal Order: From Domestic to International

THALIN ZARMANIAN*

Abstract

This article focuses on the evolution of the concept of legal order in Carl Schmitt's thought and in particular on the spatial perspective he developed in his internationalist thought. In order to grasp its relevance, it is necessary to understand it in relation to the theoretical problems and concepts which underlie Schmitt's oeuvre. For this reason the first part of the article focuses on the theoretical problem of the possibility of a legal order in a plural context, trying to assess the distinctiveness of Schmitt's thought in relation to his contemporaries and to the approaches and schools of thought with which he is often associated. The second part then examines the evolution of his constitutionalist output, something which is fundamental to an understanding of his internationalist thought. The third part then focuses on his internationalist thought, and in particular on the theory of the nomos, which represents a synthesis of his whole thought.

Key words

Carl Schmitt; law; legal order; limitation of war; nomos; sovereignty

Probably no political thinker, and certainly no jurist, has given rise to such conflicting views as Carl Schmitt. As Carlo Galli has noted, Schmitt has been called the worst man in the world and the only German of his time with whom it was worthwhile conducting a conversation. He has been called a sceptic and a dogmatist, a romantic and an anti-romantic, a modernist and an anti-modernist, the thinker who did away with the state and the one who most regretted its death. To some, Schmitt is the thinker who saw disorder and conflict as the source of the political. To others, Schmitt is the last person to point to order as its constitutive element. Schmitt defined himself as 'the last bearer of the European juridical civilization'.[1] Schmitt ended up being ignored by jurists; many political scientists and philosophers, in contrast, regard his work as a milestone.

The mere fact of Schmitt's being one of the most controversial figures of the twentieth century, the object of fierce hatred and enthusiastic admiration, speaks for the extremely disconcerting power of his thinking. In his lifelong struggle to define the essence of legal order and, consequently, of political obligation, Schmitt strove constantly towards comprehending the depths of political modernity. Schmitt's striving

* University of Milan, thalin.zarmanian@unimi.it. In memory of Prof. Carlo Maria Santoro.

1. C. Galli, *Genealogia della Politica. C. Schmitt e la Crisi del Pensiero Politico Moderno* (1996), v. This is, to my knowledge, the most complete, comprehensive, and insightful account of Schmitt's thought ever published (and unfortunately available only in Italian). Galli's *Genealogia* not only discusses Schmitt's work with great philological and historical accuracy, but it also sets his intellectual being within the epochal pattern of modernity, highlighting the exceptionality of his being inside and outside modernity at the same time.

led him to denounce its 'dark side' and to acknowledge the lack of foundation of any political order. Schmitt thereby challenged every ideology, among them liberalism, which promises definitive peace and order, both domestically and internationally. Such intellectual bravery contrasts, as in the case of Heidegger, with Schmitt's human meanness. He proved unable to live up to his own theories, and himself transformed his own ideas into ideology when he became an active supporter of Nazism.

Schmitt's reaction to his own ideas, however, is shared by many of his critics, past and present. Some of the scholarly and common literature about Schmitt seems more directed at bypassing 'the challenge of C. Schmitt'[2] than towards facing it.[3] Most scholarship on Schmitt is devoted to the effort of setting him within the stream of political Catholicism, right-wing conservatism, fascist anti-liberalism, political realism, and, most of all, Nazism. Although part of this scholarship has led to deeper historical insight into Schmitt's life and thought, the attempt to reduce Schmitt's work to one ideology or school of thought has led to a biased interpretation of his works. This bias, in turn, has given rise to many simplifications and misinterpretations. The bias is especially apparent in those who have tried to read Schmitt's writings in the light of his support for Nazism. Some have ended up by reading even his previous work in the light of this support, to the extent that they argue that Schmitt's theories of the imperial and Weimar years would necessarily lead to this choice.[4] Schmitt's internationalist texts, written after 1936, when – despite his continuing efforts to appear as the legal ideologue of the regime – he was dismissed by the Nazi establishment because his theories seemed too distant from Nazi orthodoxy, have long been ignored or considered an unworthy expression of Nazi views.

There is no doubt that Schmitt actively supported Nazism between 1933 and 1936.[5] It is also true that some of Schmitt's internationalist texts are replete with disgusting anti-Semitic passages and nationalistic or *völkisch* accents. Even so, reading Schmitt's entire oeuvre from an exclusively ideological perspective is unjustified. It must be remembered that, even in those years, Schmitt continued to be a jurist and an academician, although the quality of his writings declined dramatically and he often turned to actual Nazi propaganda. It is therefore inappropriate to depict Schmitt primarily as an ideologist, a *Kulturkritiker*, or even a political theorist. Of

2. C. Mouffe (ed.), *The Challenge of C. Schmitt* (1999).
3. As was the case in the 1960s and 1970s with Heidegger, most of the recent literature on Schmitt has argued for or against simply reading his works. For a recent debate on this question, see E. Richter, 'The Critic of Liberalism: C. Schmitt: The Defective Guidance for the Critique of Political Liberalism', (2000) *Cardozo Law Review* 1619, and the critique to this approach by C. Galli, 'The Critic of Liberalism: C. Schmitt's Anti-liberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning', (2000) *Cardozo Law Review* 1597. See also C. Mouffe, 'C. Schmitt and the Paradox of Liberal Democracy', in D. Dyzenhaus (ed.), *Law as Politics* (1998), 159.
4. This is for example the thesis of K. Löwith, *Marx, Weber, Schmitt* (1986).
5. For a recent debate about Schmitt's Nazism, see A. Carty, 'Carl Schmitt's Critique of Liberal International Legal Order Between 1933 and 1945', (2001) 14 *Leiden Journal of International Law* 25, and also A. Gattini, 'Sense and Quasisense of Schmitt's *Großraum* Theory in International Law', (2002) 15 *Leiden Journal of International Law* 53. For a more historiographical approach; see also D. Cumin, *C. Schmitt, biographie politique et intellectuelle* (2005).

course, to a certain extent he was all these things, but Schmitt's complexity compels a clear distinction between his 'normative agenda'[6] and his thought, which addresses the whole modern European juridical and political tradition, and deserves a better understanding.

My intent here is to offer an account of the evolution of the concept of legal order in Schmitt's thought. I am particularly interested in the spatial perspective he adopted towards the problem of international legal order in *Der Nomos der Erde*, which represents the final synthesis of his international thought.[7] This perspective reveals the relevance of Schmitt's thinking for contemporary international relations and international law theory which address the question of the nature, possibility, and conditions for an international (legal) order.

In order to grasp the relevance of Schmitt's concept of international legal order, it is necessary, however, to understand it in relation to his intellectual history. Schmitt's production, even though not systematic (his key concepts were disseminated in numerous short texts, none of which is complete in itself and which often make an implicit reference to concepts discussed elsewhere), is in fact, as Burchard[8] also notes, nevertheless progressive. Schmitt's international thought is an attempt to overcome the challenges and limitations of his previous work, and therefore most of the theoretical problems and concepts which underlie his later writings are to be read and understood in reference to his previous work.[9] It is thus extremely important initially to set aside the misinterpretations, cited above, of his earlier works.

In the first part of this article I shall therefore set Schmitt's problem of legal order within the framework of nineteenth- and twentieth-century legal thought, trying to clarify key Schmittian problems and concepts by pointing out their distinctive character in relation to other theories or approaches with which Schmitt is often associated. In the second part I shall sketch the evolution of his thought concerning the domestic realm. In the third part I shall discuss his international thought from the perspective of legal order. In conclusion I shall briefly discuss the relevance of Schmitt's international thought to the theory of international law and international relations today.

---

6. Galli warns against the theses according to which, given the continuity between his Weimar years and Nazi years, Schmitt's support for Nazism was the inevitable result of his theories of the Weimar period, since nothing in his work actually suggests a necessary transition from his anti-liberalism to totalitarianism and Nazism. Galli maintains instead that Schmitt's Nazism was more a consequence of his personal than his intellectual history, and that during his Nazi years (1933–6) Schmitt did not actually produce any original work but rather used his previous output, properly revised and 'decorated', to please the new regime and to gain recognition as a *Kronjurist* within it. Nazism had little influence on Schmitt's theoretical perspective, which also explains why his Nazi orthodoxy was contested even within Nazi circles and within the regime. Galli, *supra* note 1, at 839.
7. C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950), translated and annotated by G. L. Ulmen under the title *The Nomos of the Earth in the International Law of the* Jus Publicum Europaeum (2003).
8. C. Burchard, 'Puzzles and Solutions: Appreciating Carl Schmitt's Work on International Law as Answers to the Dilemmas of His Weimar Political Theory', *IILJ Working Paper* 2004/8.
9. See Galli, *supra* note 3.

1. The tragedy of modernity: the problem of legal order in a plural context

Schmitt's whole corpus, from his first juridical writing, *Gesetz und Urteil*,[10] to his masterwork, *Der Nomos der Erde*, is a quest for a definition of the nature and scope of a legal order. It is, in Schmitt's words, the search for an answer to the problem of the *Rechtsverwirklichung* (actualization of the law).

This theoretical urgency was inspired by the growing *Politisierung* of German society brought about by Marxist, socialist, anarchist, pluralist, and rightist movements which, at the end of the nineteenth century, not only threatened the constitutional order of the German Reich, but questioned the very legitimacy of the state as such. Schmitt believed that it was the task of legal scientists, and especially constitutionalists, to address these attacks and to investigate whether and how the state and its laws can produce order and provide constitutional and political stability.[11] In his view, the legal scientists of his time had neglected this task. By equating the law with the will of the bearer of the 'supreme power' (*höchste Macht*), identified with the state as a legal person, positivist Labandian[12] *Staatslehre* had deprived both legal science and the state of their scope and meaning. In one of his first writings[13] Schmitt pointed out that if the power of the murderer against his victim is the same as the power of

10. C. Schmitt, *Gesetz und Urteil, Eine Untersuchung zum Problem der Rechtspraxis* (1969 [1912]).
11. Schmitt was inspired by the writings of C. Friedrich von Savigny (1799–1861), the founder of the so-called historical school of jurisprudence, who is considered to be the father of modern continental juristic thought. According to his doctrine, in which legal positivism is said to have its origins, the law is not the 'metaphysical' law 'invented' by rationalists and naturalists but is embedded in social practices and is therefore 'positive'. Society and its fundamental institutions (family, order, church, military) bear an 'inner measure'. The task of jurists is to uncover this inner measure by investigating how rules and customs are applied in order to trace them back to the basic concepts and principles on which all law is based. Legal science is, therefore, not a part of philosophy, but an empirical discipline (similar to the positive social sciences born in Germany at the end of the nineteenth century) devoted to understanding the conditions of civic order through the systematization and analysis of the vast array of historical material collected throughout Germany and, later, Europe. See O. Jouanjian, *Une Histoire de la Pensée Juridique en Allemagne (1800–1918)* (2005); S. Mezzadra, 'Dalla Necessità all'Occasionalità del Positivo: Figure della Giuspubblicistica Tedesca da Savigny a Jellinek', (1997) *Materiali per una Storia della Cultura Giuridica* 1.
12. Paul Laband (1838–1918) completed the systematization of German constitutional doctrine along a positivist approach initiated by his master, Karl Friedrich von Gerber (1823–91). Gerber had answered the question of whether sovereignty belonged to the people or to the monarch raised by the 1848 revolution by ascribing to the state a legal personality. Gerber justified the state's sovereignty as being the product of a new 'positive force' (*positive Macht*), an irresistible power, stemming from the alliance of the bourgeois and the emperor, imposing a new constitutional and legal order which followed the revolutions of 1848. In his *Staatsrecht deutschen Reiches*, published in four volumes between 1876 and 1882, Laband set aside Gerber's historical arguments about the origin of the state and advocated an even more radical positivist (i.e., realist) view of the constitutional framework. Regardless of its origin, sovereignty belonged to him who actually exercises the supreme power. It was an 'irrefutable fact', then, that sovereignty belonged to the *Staatsoberhaupt*, that is, the emperor, the central government, and the high administration, which were the only entities able to exercise power. As a consequence, even though the people were allowed, thanks to the self-limitation of the state, to determine the content of a norm, its force (and therefore its legitimacy) could derive only from the state's sanction. The law was, therefore, not the result of any deliberation of the consultative parliament (the Reichstag) but only those decisions which became statutes through the sanction and approval of the *Staatsoberhaupt*. The Labandian *Staatslehre*, which soon became the official doctrine of the state in Germany, provided, therefore, a theoretical basis to oppose every popular claim to a right to exercise their sovereignty – as Gerber's theories would have allowed – and to withdraw the exercise of their allegiance to the 'constitutional compromise' with the monarch. On the development of the German *Staatslehre*, see Jouanjian, *supra* note 11; Mezzadra, *supra* note 11.
13. C. Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnes* (2004 [1914]).

https://doi.org/10.1017/S0922156505003171 Published online by Cambridge University Press

the state against the murderer,[14] then there is no need for legal science to investigate the lawfulness of the uses of power or to provide a distinction between legal and illegal facts. Any legal question would ultimately be solved through observation of mere facts instead of by argumentation. The state would make no sense and have no value, since the bearer of the supreme power would not need to formalize it into a coherent and public system of law. Instead, the bearer could simply act through force and imposition.

Schmitt believed the theory which identified law with the will of the state as the bearer of supreme power to be flawed and inconsistent. The theory forgets that, without law, the very existence of a power beyond the individual is impossible. In a state of nature the only power is that which each individual wields over others. No one can impose his will indefinitely. One is limited to a certain number of other individuals, for a limited time, and one is always subject to opposition from others. Stable and general power (i.e., political power) exists only out of the state of nature, when a plurality of individuals co-operates to use (or not to use) their force according to a common principle. This is possible to the extent that individuals agree on the legitimacy of the use of such power – that is, on its being *right*.[15] It follows, then, that outside the state of nature the *fact* of power is dependent on a *value*: it is not law which comes from power, but power which comes from the law.

If every individual shared the same notion of rightness and legitimacy, there would be only one supreme power. There would be no need for legal science or the state, because there would be no disagreements about the essence of the law and therefore no need for its enforcement. Schmitt explained the existence of legal science and the state by the fact that, even though the idea of law (*die Rechtsidee*) on which the existence of any political power depends is necessarily one and universal, empirical reality reveals a plurality of conflicting political powers. The main task of legal science, therefore, is to analyse this obscure nexus between the idea of law and a plural empirical reality and to assess the *sense* of the state, which is intermediate between the idea and an orderless political reality.

This task was partly undertaken by the organicist and the liberal theories developed in the pre-war period and in the Weimar years. These theories had tried to overcome the problem of conflict among the various powers claiming legitimacy. Organicist legal thought[16] was fostered by the German rightist and conservative movements (to which Schmitt is sometimes said to belong[17]), which believed that

14. Ibid., at 30.
15. In German the word *Recht* means both 'law' and the adjectives 'right' or 'just'.
16. German organicism was first theorized by Adam Müller (1779–1829), whose thought was revived by the late-nineteenth-century conservative thinkers (such as Friedrich Ratzel and Wilhelm Riehl) who identified the state as the product of the revolutions of 1848 and the establishment of the German Reich in 1871, to which the whole German nation (*Volk*) had willingly adhered in order to regulate the relationship of all its parts. This means that according to these doctrines, the state is not the product of a social contract, but it is the expression of the single will of the nation which, being the product of nature and culture, can be thought of a priori as a unique body.
17. See Carty and also Gattini, both *supra* note 5; Galli, *supra* note 1, at 130, notes that Schmitt was very close to some of the most prominent thinkers of the so-called 'conservative revolution', such as Jünger and Freyer, and that even though he shared their dissatisfaction with liberalism and Marxism, he nevertheless always rejected – even during his Nazi phase – their irrationalist approach. C. Schmitt, *Politische Romantik* (1919).

the German people (*Volk*) formed a unique organism, in the same way that organs form a single body. This was the result of natural laws (race or 'natural' geography) or, in its historicist and romanticist version, the laws of historical development, which also determine the will of the nation, as expressed by the state. According to such a historicist view, the laws of the state were legitimate, not because of the power of the state, but because the state is driven by the laws of necessity.

Liberal theories, which were developed in Germany by the so-called Marburg school,[18] tried to derive an idea of justice from the Kantian concept of liberty and the categorical imperatives of practical reason, which are universal and common to all humanity. From such premises, the members of the school tried to develop a system of 'just laws' which would bind all humanity. According to this perspective, the laws of the state were legitimate only to the extent that they reproduced such laws.

According to Schmitt, both approaches – as different as they were in their objectives, methods, and contents – failed to account for the legitimacy of the state and its law. Their flaw was that they tried to find a univocal formulation of the idea of law, aiming at the perfect order outlined above. Schmitt remarked that this does not happen in empirical reality, which reveals no shared notion of justice or lawfulness. What is more, Schmitt demonstrated that, even if it were possible to develop a common notion of justice or law, there would still be room for conflict and disorder. Drawing on his first book,[19] Schmitt insisted that in order to receive concrete application, any principle needs to take the form of a norm. The principle of justice, 'respect thy neighbour', cannot be applied unless one first defines what it means to respect, who should do so, who one's neighbour is, and, most importantly, who shall decide these questions (*quis iudicabit?*). Even once the terms of the norm are defined, another predicament arises in regard to specific cases. In order to affect a plurality of individuals, norms need to be general, but their enforcement requires a connection of the specific case to these general norms, so that every judicial ruling has to determine whether one particular person was bound by that particular norm, whether the particular act they committed falls within the provision of that norm, and so on.[20] In both cases, the relationship between the abstraction and the concrete case shows a 'momentum of indifference', that is, a lack of co-implication between the abstraction and the concrete case ('zwischen jedem Konkretum und jedem Abstractum liegt eine unüberwindliche Kluft'[21]). This gap cannot be bridged by a principle of nature or rationale of necessity. The chasm definitely precludes, therefore, the possibility of a perfect order and entails a space of indeterminacy which creates room for indefinite plurality.

18. This school tried, under the guidance of Rudolf Stammler and Herman Cohen, to derive a notion of justice and therefore of 'just law'. According to Cohen, justice as an a priori category exists independently from its empirical determinants. The analysis of this school is, therefore, formal and hypothetical and tries to derive the essence of the idea of justice from the concepts of Kantian liberty and the value of the human being.
19. Schmitt, *supra* note 10.
20. In a later book, *Die Diktatur, von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (1964 [1921]), Schmitt offers the example of legitimate self-defence: the norm can indicate only which rights and interests can be defended, and what the limits are, but in no case can the norm regulate a priori a particular, concrete case.
21. '[B]etween any concrete case and any abstraction lies an insuperable divide' (author's translation). Schmitt, *supra* note 13, at 80.

https://doi.org/10.1017/S0922156505003171 Published online by Cambridge University Press

The same conclusions about the impossibility of adjudicating legitimacy were shared by Schmitt's great antagonist, Hans Kelsen (1881–1973). Kelsen also believed that legal science should forego the attempt to formulate a definition of legitimacy and sovereignty. His whole work is devoted to the attempt to 'purify' legal science from all the 'subjectivist' and 'sociological' elements which nineteenth-century legal science utilized in order to justify the existence and the value of the state and to build a theoretical system which would subject laws to irrational disputes with their value and meaning. In Kelsen's view, jurists should not be concerned about the value of laws (and thus with their legitimacy), but only with their validity. This is a purely logical predicate which derives from their being referable to higher-ranking norms according to the so-called *Stufenbau* (construction by grades) up to a single basic norm (*Grundnorm*), which is a 'transcendental presupposition', a universal principle coaxing order. Therefore, to the extent that these norms are produced according to a legal process defined by higher-ranking norms, they should be regarded as valid, applied to concrete cases, and enforced – whatever their content and effect is.

Schmitt denounced the theoretical failure of Kelsen's attempt[22] by pointing out the impossibility of legal science ignoring the problem of legitimacy. Kelsen himself, despite his claims of theoretical purity and neutrality, ended up making the same a-priori assumptions he tried to do away with. His system is, in fact, based on the assumption that the *Grundnorm* and all the norms deriving from it are immediately intelligible in the same manner to all humanity. In Kelsen's version of parliamentarism, this turns into the assumption that every element of society is willing to accept the majority's will, whatever its content, which is equal to assuming a perfect order as an ontological given. In addition to this, such an ontologically given order entails for Kelsen a universal normative value. As has recently been argued, such order consists of 'peace', which has a 'normative priority over the realization of particular substantive ethical aims'.[23] According to Schmitt, this apparently neutral proposition hides a bias towards the status quo and the bourgeois state. In Kelsen's view, the concept of peace (i.e., order) is the 'absence of unauthorized use of force'. Schmitt objects,[24] saying that this conception does not take into account the possibility that the 'authorized use of force' – that is, the use of the state's power (*die Macht*) – which derives from a simple numerical majority, can ever be harmful[25] and that therefore opponents of the status quo can ever have the right to resistance.

Schmitt, therefore, criticized Kelsen's theory, not only because it incurs the same theoretical fallacies of organicist and rationalist theories, but also because by

22. For a review of Schmitt's critique of Kelsen see, among others, S. Delacroix, 'Schmitt's Critique of Kelsenian Normativism', (2005) 1 *Ratio Juris* 30; Galli, *supra* note 1, at 283 et seq., 393.
23. L. Vinx, 'Sovereignty and International Legal Order in Hans Kelsen and C. Schmitt – A Reassessment', paper presented at the Fifth Pan-European International Relations Conference at the Hague, September 2004, available at http://www.sgir.org/conference2004/papers/Vinx%20%20Sovereignty%20and%20international%20legal%20order.pdf.
24. C. Schmitt, *Legalität und Legitimität* (1988 [1934]), 38, translated into English by J. Seitzer under the title *Legality and Legitimacy* (2004), at 34.
25. M. Nigro, 'Carl Schmitt tra Diritto e Politica', (1986) *Quaderni fiorentini per la storia della cultura giuridica moderna* 15, notes that this was the case for most of the authoritarian regimes – especially Hitler's – that in those years had risen to power legally across Europe.

presuming order as given, it bypasses the problem of plurality. Schmitt noted that the political or social forces which began in the late nineteenth century to object to the very fundamental structures of the bourgeois system – often making use of 'unauthorized use of force' against the state – called upon the same idea of law on which such legal power is assumed to be founded and, as happened during the Weimar Republic, 'So wirft im kritischen Moment jeder dem anderen Illegalität vor, jeder spielt den Hüter der Legalität und der Verfassung. Das Ergebnis ist ein legalitäts- und verfassungsloser Zustand'.[26] According to Schmitt, such a clash between two or more contrasting concepts of legitimacy either creates a state of violence and disorder, in which the enforcement and exercise of any right becomes impossible, or, if a majority is strong enough to annihilate the minority, it makes use of the state power (*Macht*) to impose its own law. In the former case, law exists only in the jurists' minds and books, while in the latter it appears as a mere theoretical disguise of power.

Schmitt regarded both these results as unacceptable. According to him, legal science cannot simply disregard this call to law and in order to preserve its 'pureness' leave to 'sociology' the answers: 'Wenn sie [formalist jurists] mit der Bregründung, daß die Jurisprudenz etwas Formales sei, nicht zur Sache kommen, so bleiben sie trotz allen Aufwandes in der Antichambre der Jurisprudenz'.[27]

Schmitt's theoretical move was, therefore, to accept the challenge and to assume plurality, conflict, and chaos as ontologically given and to take charge of what Galli[28] calls the 'tragedy of modernity'[29] – the fact that on the one hand, after the collapse of medieval Christian unity, an ultimate and uncontested foundation for legitimacy is no longer possible and that, on the other hand, such legitimacy is unavoidable for any order. What makes Schmitt's thought unique and so interesting, then, is that it is entirely set within the modern tragedy but it looks at it from without.[30] Unlike postmodernists, he never gave up seeking an Archimedean point – the legal order – in which the tension between the idea of law (*die Rechtsidee*) and empirical reality could converge. In order to do this, however, he had to renounce the legacy of modern juridical and political thought. He is therefore no *realist*, as Koskenniemi[31] recently suggested by likening him to (the second) Morgenthau. Far from thinking

26. 'So at the critical moment when all parties accuse each other of illegality, each plays the defender of the constitution. The result is a situation in which there is no legality and no constitutional order.' Schmitt, *supra* note 24, at 38 (author's translation).
27. C. Schmitt, *Politische Theologie: vier Kapitel zur Lehre von der Souveränität* (1985 [1922]), 31. The full quotation reads, 'Unity and purity are easily attained when the basic difficulty is emphatically ignored and when, for formal reasons, everything that contradicts the system is excluded as impure . . . Methodological conjuring, conceptual sharpening, and astute criticizing are only useful as preparatory work. If they [formalist jurists] do not come to the point when arguing that jurisprudence is something formal, they remain, despite all effort, in the antechamber of jurisprudence.' Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. G. Schwab (1985), 21.
28. Galli, *supra* note 1, at v.
29. In his most famous work, *Politische Theologie*, *supra* note 27, and *Das Zeitalter der Neutralisierungen und Entpolitisierungen* (1929), in *Der Begriff des Politischen* (1988 [1932]), Schmitt depicts the modern age as a succession of 'secularized theological justifications' for power, and as a never-ending process of conflict neutralization, in which the sovereign power replaces a contested foundation of order with another.
30. Galli, *supra* note 1, at v, describes the character of Schmitt's thought as a 'modern anti-modernity'.
31. M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), 413.

that 'law is a mere ratification of a concrete order', he always argued that no order can exist if it is not shaped by law in the first place. He is no *idealist*, either, because he confronted every a-priori definition of justice or law. He is no *formalist* because, unlike Kelsen, he refused to recoil from empirical reality and to seek comfort in transcendental pureness. He is no *anti-formalist* either, because far from regarding 'the question of valid law' as 'uninteresting',[32] he considered it central: as has been mentioned above, formalization is to him the means through which the idea of law can be transposed into empirical reality. Schmitt's quest for the possibility of a legal order started, therefore, from none of those 'fixed points' – power, idea, form, and norm – from which modern political thought had moved to construct legal science. Having pointed out the unbridgeable chasm which separates them, he chose to start his quest for the possibility of a legal order from there – that is, from disorder.

2. Between decision and concrete order

In his famous work *Politische Theologie*, Schmitt identified this state of disorder with the provision of Article 48 of the Weimar Constitution,[33] which gave the president special unlimited powers to preserve 'public security and order' ('die öffentliche Sicherheit und *Ordnung*'). This is what Schmitt calls the state of exception.[34] The name conveys the fact that it cannot be foreseen or regulated a priori. Since it is impossible to foresee whether disorder will be caused, how it will be caused, and who will cause it, it is also impossible to formulate provisions about what should be done in that case and who should do it. Schmitt takes the state of exception to be the extreme example of those spaces of indeterminacy which lie between the idea of law and norms and between norms and empirical reality. The state of exception is the case in which the impossibility of determining a priori the *content* of law is most visible. At the same time, the state of exception reveals, according to Schmitt, the *form* through which the law is actualized.

Schmitt identified such form with *die Entscheidung* (the decision): 'Ent-scheidung' (with the same structure as the Latin *de-cidere*, 'to reverse a severance') accounts for the creative and active character of formalization. It is not a logical operation,[35] in which conclusions can be derived directly from premises. Rather, it consists of linking two elements which are conceived as originally separate from and not reducible to one another. The decision consists, therefore, of choosing one of the infinite number of options that lie within the momentum of indifference and at that point excluding all the others. This exclusivity accounts, Schmitt said, for its authoritative character. Deciding means elevating one option over the others. The question of valid law is, therefore, the question of who has an authority to decide (again, 'quis iudicabit?'), that is, of who is sovereign.

32. Ibid., at 495.
33. Schmitt, *Politische Theologie*, *supra* note 27.
34. A full account of this concept in Schmitt's thought as well as in modern and contemporary constitutional theory is in G. Agamben, *Lo Stato di Eccezione* (2003), translated by K. Attell under the title *State of Exception* (2005).
35. See Galli, *supra* note 1, at 335.

Since in the state of exception the content of the decision is indeterminate, this problem cannot be treated as one of consistency between the *form* (the decision, which could be expressed in a statute, bill, or sentence) and its *content*. The sovereign is not he who takes the right (i.e., the just) decision, nor can the problem be reduced to a relationship between two forms: the sovereign is not he who is defined as such by a superior legal norm. The existence of a state of exception presumes that such sovereignty is contested and that, therefore, the previous legal order has collapsed or has been suspended or replaced and therefore its norms can have no value.

Given the theoretical fallacy of the modern legal framework, Schmitt's strategy is to revert to the problem of valid law. The ability of a decision to produce legal order does not depend on its content or form; rather, the rightness of the content and the form of the decision are deduced from their ability to produce a legal order. The famous line with which *Politische Theologie* starts, 'The *sovereign* is he who decides on the state of exception',[36] should, therefore, be read as 'He who decides in the state of exception is the sovereign'. In this formulation, the concept of decision conveys the specific legal quality of the order it produces.

The sovereign is not he who simply prevails, thereby putting an end to the state of exception through mere force; valid law is, therefore, not whatever decision is taken to annihilate opposing political powers. In *Die Diktatur*,[37] Schmitt had distinguished between dictatorship and arbitrary despotism, that is, tyranny. While both entail the forceful imposition of a decision on the state of exception, the former aims at the establishment of a legal order and therefore 'at transposing a normative idea in concrete reality, that is, at becoming unnecessary'.[38] The latter, arbitrary despotism, can, according to Schmitt, never produce a legal order, because it does not prevent defiant minorities from bringing back the state of exception.

Schmitt refers to medieval and modern doctrine, which distinguished the *tyrannus absque titulo* from the *tyrannus ab exercitio*. The former takes power illegally, but his decisions can nevertheless be legitimate, should he act to restore a legal order. The latter is a sovereign who has taken power legally but acts in a way contrary to the interests of those whom he governs. While resistance against the latter was always considered legitimate, the former should be obeyed if he acts according to the law. The law is, therefore, pre-existent and superior to the sovereign, who reveals his quality by actualizing it: 'The sovereign cannot be superior to the law as he cannot be superior to grammar'.[39]

Legal order is, therefore, according to Schmitt, a particular shape given to empirical reality through a sovereign decision. Schmitt specified the meaning and scope of the concepts of sovereign decision and legal order in his subsequent works. At this stage, his attention, which formerly had been centred on constitutional and domestic law, turned to international law and international political issues.

36. Schmitt, *Politische Theologie*, 1, *Political Theology*, 1, both *supra* note 1.
37. Schmitt, *supra* note 20.
38. Ibid., at 9 (author's translation).
39. Schmitt, *supra* note 13.

https://doi.org/10.1017/S0922156505003171 Published online by Cambridge University Press

In *Der Begriff des Politischen*,[40] Schmitt pointed out that the state of exception consists of the critical case, that is, the real, concrete chance of physical conflict among groups. The critical case is, therefore, by definition a state of war, international or civil. A legal order can be said to be in danger when the existence and independence of a political unit is menaced by a plurality of men and women[41] (an external group or one within the unit itself) who are ready to risk their lives in order to defend or affirm a principle against an opposing force. The willingness to risk life, and the authority to ask an individual to take such a risk, reveal the political character of a conflict.

As the essence of other concepts is defined through an opposition (e.g., morality is defined by the opposition of good and evil, aesthetics by beauty and ugliness), the political is defined by Schmitt according to the opposition of friend and enemy.

Because of its focus on enmity and conflict Schmitt's thought has often been regarded as militarist and war-oriented.[42] In *Der Begriff des Politischen*, however, Schmitt defended himself pre-emptively by stating that his definition of the essence of politics does not mean that war is an ideal or the goal of politics. He wrote instead that the goal of politics is rather to avoid war. What he meant is only that the ever-present possibility of war is the leading presupposition which determines in a characteristic way human action and thinking and thereby creates a specifically political behaviour.[43] A world in which the possibility of war no longer existed would be a world in which a perfect order would be realized, because the momentum of indeterminacy which every norm and principle entails would have been eliminated. This would be a world without the political, but, Schmitt notes, also a world in which only one culture, one civilization, one economics, one morality, one law, one type of art, and one form of entertainment would exist. But as long as the world remains a pluriverse, each of these realms is capable of giving rise to political distinctions. Without giving him credit, Schmitt in his writing made an assertion originally made by Hans Morgenthau in his graduation dissertation.[44] According to this assertion, the friend–enemy opposition has no substance of its own. It is, rather, defined by its intensity. The political can in fact derive its energy from any realm (religious, economic, social, cultural, moral) but its particularity is to drive the distinction within these realms to the extreme degree of separation. Not every possible grouping, not every element of distinction or

40. Schmitt, *Der Begriff des Politischen*, *supra* note 29, translated by G. Schwab under the title *The Concept of the Political* (1996).

41. Schmitt distinguishes between the private enemy (*inimicus*) and the public one (*hostis*), and defines the latter as a member of a 'group' which 'fights' another similar group. Only the enmity which relates to an entire group is therefore relevant to the definition of the enemy. Schmitt, *Der Begriff des Politischen*, *supra* note 29, at 29.

42. For an overview of Schmitt's criticism and for a comprehensive account of his theory of conflict and enmity, see Galli, *supra* note 1, at 739. Galli points out that the many misunderstandings about Schmitt's theory derive, as Schmitt himself recognizes in his many comments about the original text of *Der Begriff des Politischen*, from his excess of synthesis, so that the text can be understood properly only within a comprehensive view of Schmitt's work. For a comparison between Schmitt's notion of enmity and Derrida's notion of difference, see J. P. McCormick, 'Poststructuralism Meets Schmitt. Schmittian Positions on Law and Politics? CLS and Derrida', (2000) 21 *Cardozo Law Review* 1693.

43. Schmitt, *Der Begriff des Politischen*, *supra* note 29, at 33 (*Concept of the Political*, *supra* note 40, at 33). Elsewhere in the text, Schmitt notes that from the concept of the political follows international pluralism.

44. See Koskenniemi, *supra* note 31, at 436.

separation between individuals, has a political character, nor is the grouping along the lines of the friend–enemy distinction the only one. According to Schmitt, the enemy is not morally bad, religiously heretical, or aesthetically ugly simply by virtue of being the enemy. This means that even though single individuals belong to the same cross-cutting groupings of the enemy, in the critical case the one which is political – that is, the one for which the individual is ready to risk his life – prevails over the others. Therefore Schmitt's focus on intensity as the defining feature of the political does not mean that he is a nihilist. To him, conflict is not an irrational drive or a normative necessity. It is, rather, the result of a deliberate choice (a decision) about the binding substance of a people's political existence:

> Der Krieg, die Todesbereitschaft kämpfender Menschen, die physische Tötung von andern Menschen, die auf der Seite des Feindes stehen, alles das hat keinen normativen, sondern nur einen existenziellen Sinn, und zwar in der Realität einer Situation des wirklichen Kampfes gegen ein wirklichen Feind, nicht in irgendwelchen Idealen, Programmen oder Normativitäten. Es gibt keine rationalen Zweck, keine noch so richtige Norm, kein noch so vorbildliches Programm, ein so schönes soziales Ideal, keine Legitimität oder Legalität, die es rechtfertigen könnte, daß Menschen sich gegenseitig dafür töten.[45]

Later,[46] Schmitt lamented that interpreters of his definition of 'friend' and 'enemy' had paid too much attention to the pole of enmity and not enough to the pole of amity. The definition of 'amity' is, in fact, a key point in understanding Schmitt's definition of the political and of its implications for legal order. In an extreme conflict, the political necessarily entails an extreme grade of association as well. Since conflict is assumed to be possible within every field of human endeavour – morals, religion, economics – and can lead to physical struggle, saying that the sovereign is the one who decides about the distinction between friend and enemy means, first of all, that it is he who can make sure that all the other conflicts do not give rise to the critical case. Whoever is able to make a decision about the political capable of inducing individuals on one hand to give up the use of violence against each other and on the other hand to risk their life to defend it is the sovereign. By contrast, if the sovereign is incapable of preventing conflicts within the group from reaching the critical case, the group ceases to be a political unit, and either chaos ensues or new political units arise. A political unit is, therefore, a group which has already overcome the critical case within itself and has therefore already established a concrete order within itself.

This is the point where the political and the juridical converge. In order to neutralize internal political conflicts, obtaining that they give up armed conflict, the sovereign's decision must guarantee all parties. This guarantee function is the

45. Schmitt, *Der Begriff des Politischen*, *supra* note 29, at 49. 'War, the readiness of combatants to die, the physical killing of human beings who belong on the side of the enemy – all this has no normative meaning, but an existential meaning only, particularly in a real combat situation with a real enemy. There exists no rational purpose, no norm, no matter how true, no program no matter how exemplary, no social idea, no matter how beautiful, no legitimacy nor legality which could justify men killing each other for this reason. If such physical destruction of human life is not motivated by an existential threat to one's own way of life, then it cannot be justified. Just as little can war be justified by ethical and juristic norms.' *Supra* note 40, at 48.

46. C. Schmitt, *Theorie des Partisanen* (1963).

https://doi.org/10.1017/S0922156505003171 Published online by Cambridge University Press

essence of legal order as a concrete order – 'concrete' meaning depending on a pre-existent, given, empirical context – and the measure of the risks and responsibilities that the sovereign must take in order to be legitimate. Schmitt clarified this view in a later work, *Über die drei Arten des rechtswissenschaftliches Denken*,[47] and definitely in *Der Nomos der Erde*,[48] in which he refined his decisionism, and put the concrete order, instead of the decision per se, at the centre of his legal thought. By taking a decision that can avoid a conflict within the group without creating another one capable of bringing its members to the critical case, the sovereign respects the asset of power and interest which is necessarily pre-existent in the political unit, but gives it a legal form. That is, the sovereign renders conflicts capable of mediation and non-violent adjudication. The particular shape of a legal order, in which the lawfulness of the sovereign's decision lies, consists, therefore, in its respecting (or establishing) such a concrete order. A norm, a decision, or a behaviour is legitimate to the extent that it is in accordance with the pre-existing concrete social order or to the extent that it brings a pre-existent asset of power and interest to a concrete order through a creative action which is able to neutralize conflicts as they arise.

The Schmittian decision differs, therefore, from mere power in that, instead of avoiding and negating occasions of conflict, as does the exercise of arbitrary power, and instead of perpetuating it, as does a nihilistic vision of power, it sees conflict as a constitutive, unavoidable, and creative aspect of human existence, and tries to contain it. According to Schmitt, legal order, even if it is durable, is never definitely stable: the sovereign decision, in fact, in that it elevates one of the possible options, does not exclude the possibility that a different one might be taken and that, therefore, a new state of exception arises that requires a new decision and a new legal order. This is, according to Schmitt, the path of the modern European state, which was able to neutralize every conflicting force within its borders through a series of depoliticizations.

While *Der Begriff des Politischen* clarifies the ordering character of the sovereign decision, it still leaves some questions about Schmitt's theory of legal order open.[49] On one hand, by assuming enmity as given, the theory did not account for amity, and therefore for order. Schmitt avoided the question of what drives individuals to form a group, that is, a political unit, in the first place. Nor did he explain why these conflicting groups need a sovereign to neutralize their conflicts and thus to form a larger political unit.

On the other hand, by describing the political as a progressive process of conflict neutralization, he did not explain the persistence of enmity. The political realm, despite the drive to unity deriving from a common Idea of Law to which each political power appeals, nevertheless remains a pluriverse.

47. C. Schmitt, *Über die drei Arten des rechtswissenschaftliches Denkens* (1993 [1934]).
48. Schmitt, *Nomos der Erde*, *supra* note 7.
49. Galli, *supra* note 1, at 725, notes that Schmitt defined *Der Begriff des Politischen* as his 'cookbook', meaning that this brief writing was not to be read as a full theory of the political but rather as the formulation of a theoretical challenge.

The coexistence of universe and pluriverse poses a theoretical challenge, which forced Schmitt to go beyond *Der Begriff des Politischen*[50] and to investigate the possibility of conceiving a legal order despite the persistence of enmity, and therefore despite the lack of a common sovereign to neutralize conflicts among units. The problem of legal order therefore leads necessarily to the problem of international legal order.

Schmitt therefore shifted his attention to the international realm after 1936 partly because he had been marginalized by the Nazi regime[51] and had to divert his attention to 'safer' subjects, but also because, as the state of exception in his previous output, the international realm offered Schmitt the archetype for a trans-epochal and general theory of legal order.

Inspired by the great success of geopolitical studies in those years, Schmitt initially tried to elaborate an international theory based on the concept of *Großraum*. In his first internationalist work Schmitt still viewed the solution to this theoretical puzzle as lying in hierarchy and authority. His theory of the *Großraum* is the first attempt to reconcile universe and pluriverse by suggesting that the state form should be overcome by grand territorial units, in which minor political units which cannot defend themselves should give up autonomous war (but maintain their political distinctiveness[52]) and live under the hegemony of a leading political unit.[53] Because of the Nazi influence, in these writings the legal dimension of Schmitt's thought is often overshadowed by ideological considerations, and thus they do not represent a real advance in Schmitt's thought. It is in this phase, however, that Schmitt discovered the element that allowed him to bring his previous reflections on the legal and the political to a comprehensive and trans-epochal theory[54] expressed in his masterwork, *Der Nomos der Erde*. This element is space.

3. *Der Nomos der Erde*

Der Nomos der Erde is an obituary of modernity. It is the last tribute to the great monument of modern European legal science, the Westphalian system, which managed to create a concrete order in a pluralistic and anarchical system by putting an end to the destructive wars of religion and thus prevented chaos from taking over Europe for the following three hundred years. At the same time, the book is a condemnation of European self-deception[55] which had led, according to Schmitt, to the destruction of the modern Eurocentric order, and had put the world at risk of

50. This tension between universe and pluriverse is already noticeable in *Der Begriff des Politischen*, *supra* note 29, at 54 (*Concept of the Political*, *supra* note 40, at 63), but is not explicitly discussed.
51. Despite Schmitt's attempts to Nazify his thought, his pluralism and his accent on the fact that conflict within society could be 'restrained' but not completely overcome, always caused suspicion within the SS and other sectors of the regime, and eventually led to his dismissal as *Kronjurist* and professor in 1936.
52. This element caused the disapproval of Schmitt's international theories by the Nazi regime. Galli, *supra* note 1, at 864.
53. Most of Schmitt's writings about his *Großraum* theory are in his *Staat, Großraum, Nomos* (1995).
54. Galli, *supra* note 1, at 877, agrees that with *Der Nomos der Erde* Schmitt tries to overcome the horizon of modernity and tries to formulate a trans-epochal theory of the political.
55. The theme of self-deception and oblivion in Schmitt's nomos theory is discussed from a philosophical point of view by M. Cacciari, *Geo-filosofia dell'Europa* (1994).

https://doi.org/10.1017/S0922156505003171 Published online by Cambridge University Press

atomic self-destruction. It is undeniable that *Der Nomos der Erde* is a book written by a vanquished man (there is no mention of the Nazi occupation of much of Europe, let alone the horrors of the Holocaust, in the entire book). It is, nonetheless, true that winners and conquerors are rarely aware of what they have replaced and of what has caused its defeat.[56]

The enormous value of this book is, therefore, not the accuracy of Schmitt's historical account, which has often – though not always correctly – been contested. Nor is it the polemic character of the book. The real value lies, rather, in Schmitt's understanding of international politics and law as the core problem of the political, and in his account of the particular features of modernity and of its theoretical framework that made the creation of the modern Eurocentric international order possible.

As mentioned above, the spatial element offered Schmitt the key to a comprehensive and systematic theory of the political and the juridical. In *Der Nomos der Erde*, Schmitt offers a theory of legal order as a 'structuring combination' of *Ordnung* (order) and *Ortung* (localization).[57]

Ortung refers to the fact that any concrete order (*Ordnung*) – that is, the exercise of sovereignty – must rest on a specific, concrete space. The connection between *Ordnung* and *Ortung* is, according to Schmitt, essential to political existence in three ways. First, order can be created through the neutralization of conflicts among contrasting groups only to the extent that such groups or individuals are finite. Infinity cannot be ordered: either it leads to unity, and therefore there is no need for an order, or it excludes the possibility of discriminating between friend and enemy. If humanity as a whole is conceived not as a perfect order, but as indefinite plurality, then, as seen above, there is no point at which one decision can structure all possible conflicts.

Without a limit, there is no choice between one side or the other, that is, between friend and enemy. In this way not only is amity precluded, but enmity results in a return to the state of nature, in which conflict is among individuals.

In order to exist, any political unit, defined through a friend–enemy opposition, must therefore de-fine[58] itself, must exclude those who cannot be included in the political unit in order to ensure the safety of its members. This is possible only through a *Landnahme*, that is, the original, radical act of appropriation of land, through which a group takes possession of a defined space and makes it the field for its concrete order by giving it a location (*Ortung*) through the position of limits. Schmitt observes that the defence of a defined space is possible only on land, as

56. The book is suffused throughout with this last theme, especially the chapters about the great jurists of the past (among whom were Francisco de Vitoria, Baltasar de Ayala, and Alberico Gentile), where Schmitt shows how even in the Middle Ages and in early modernity, within the span of one generation jurists could be totally oblivious and unaware of the concrete and theoretical meaning of earlier writings. Schmitt warns against the improper use of their thought, which is a danger whenever their writings are interpreted without considering the context in which they were produced. This caveat should be held in the utmost consideration in a time like ours, when international lawyers invoke a return to the medieval doctrine of the 'just war' with learned citations, but at the same time do not care to enquire into the reasons why it was abandoned.

57. The best description of the meaning of *Ordnung* and *Ortung* is still that by one of the first commentators on *Der Nomos der Erde*, H. Schmidt, 'Der *Nomos* begriff bei Carl Schmitt', (1963) *Der Staat* 81.

58. Note that *limit* and *de-finition* come from the two Latin words meaning 'frontier' (*limes*) or 'border' (*finis*).

https://doi.org/10.1017/S0922156505003171 Published online by Cambridge University Press

opposed to the sea, where no appropriation and possession are possible and where, therefore, friends, enemies, and neutrals coexist in the same space.

The *Landnahme* allows the establishment of a concrete order not only through the exclusion of enemies but also through the organization of the land in a way that protects group members from each other as well as from the enemies of the group as a whole. The second way in which *Ordnung* and *Ortung* are connected, therefore, refers to the fact that a sovereign is capable of neutralizing internal conflict to the extent that he can divide, partition, enclose, and distribute the land and regulate the various statuses of the sub-spaces in a way that is respected by all members of the space. Again, only land offers the possibility of separating the space of war from the space of peace, the space of neutrality from the space of belligerence, the space of the sacred from the space of the profane, the space of production from the space of consumption, and so on. The sea does not allow such partitions and delimitations, so that merchants, pirates, smugglers, felons, and bellicose parties compete for the same space. At sea, the weak must therefore give in to the will of the strong.

Third, the *Landnahme* is constitutive of the polity not only to the extent that it excludes the enemy from a particular space, but also to the extent that it simultaneously ensures amity. The *Landnahme* differentiates a particular space from another. One's willingness to risk one's life in order to defend it – which is the condition for the political unit to exist – must be justified by the fact that life within such a space is essentially different from life in another space (or in the same space governed by enemies). This means that it is the principle, and the sense, governing the organization of land and of life within a particular space (its *Ordnung*) that binds each individual or group to that particular space. This happens to the extent that such an *Ordnung* guarantees their *Lebensmöglichkeit* (a word meaning both 'opportunity of life' and 'way of life'). The sea, again, does not allow a partition according to a principle or a sense. It does not allow the binding of a particular *Lebensmöglichkeit* to a particular space. Everywhere on the sea the conditions of political life are the same. Nobody, therefore, is interested in the defence of the sea as a common good, but only in the defence of his own interests. Therefore no political power – as an aggregation of individual entities – can exist. No order and no neutralization are therefore possible on the sea, in which the mightiest command the weak as in the state of nature.

The word that most conveys this threefold relationship of *Ordnung* and *Ortung* is, according to Schmitt, the Greek word *nomos*. Schmitt notes that in the sophistic age, *nomos* was already used as a synonym of *thesmos*, or *psephisma*, or *rhema*, which define a positive enactment of a law or a sentence, while originally it was the *nomen actionis* of the verb *nemein*, which meant taking, dividing, and pasturing:

> Um den entscheidenden Zusammenhang von *Ortung* und *Ordnung* nicht zu verlieren, ist es deshalb richtiger, *Nomos*, nicht mit Gesetz oder 'Regelung' oder 'Norm' oder mit irgendwelchen ähnlichen Ausdrücken zu verdeutschen . . . *Nomos* dagegen kommt von *nemein*, einem Wort, das sowohl 'Teilen' wie auch 'Weiden' bedeutet. Der *Nomos* ist demnach die unmittelbar Gestalt, in der die politische und soziale *Ordnung* eines Volkes raumhaft wird, die erste Messung und Teilung der Weide, d.h. die *Landnahme* und die sowohl in ihr liegende wie aus ihr folgende konkrete *Ordnung*: mit den Worten Kants: Die austeilende Gesetz des Mein und Dein am Boden.'; oder, mit dem anderen,

https://doi.org/10.1017/S0922156505003171 Published online by Cambridge University Press

> gut bezeichnenden Englischen Wort, der radical title. *Nomos* ist das den Grund und Boden der Erde in einer bestimmten *Ordnung* einteilende und verortende *Mass* und die daß, *Ordnung* und Gestalt bilden hier eine raumhaft konkrete Einheit.[59]

The concept of nomos as a 'structuring combination' between *Ordnung* and *Ortung* is an enormous advance in Schmitt's theory of the juridical and the political in that it allows him to overcome the fundamental limitations of his earlier works. Whereas, as mentioned above, Schmitt had so far taken it for granted that conflict among a plurality of groups and a shared idea of law exist, and that they are separated by an original gap that can be filled only by the political (a sovereign creative decision about the distinction between friend and enemy), leaving open the question of what determines, and how, the emergence of the political, in the theory of nomos, Schmitt extricates a single element – space – that accounts for the existence and for the co-implication of empirical reality, law, and the political.[60]

The orderless and chaotic character of empirical reality is explained by the fact that land on the Earth is limited, and that therefore no individual or group can avoid competing with others for its possession and exploitation. On the other hand, as Hobbes observed, such competition, of all against all, hinders the possibility of any *Lebensmöglichkeit*, which is precisely the objective of the fight. No individual or group is able to keep all others out of a definite space, or to prevent them from harming it, or to establish its own *Lebensmöglichkeit* if it has relentlessly to defend its own space from external threats.

Their possibility of life ultimately depends on the fact that others recognize their property over that space as legitimate and thus abstain from acts of dispossession towards it. The concept of nomos reveals that the idea of law and of a *Pflicht zum Staat*, the drive towards its actualization, derive from a material constraint to establish a common principle of distribution, organization, and exploitation of land. To the extent that, as seen above, a perfect order in which land could be organized and partitioned according to one universal law is not possible (due to the plurality of *Lebensmöglichkeiten*, every *Landnahme* is a bi-directional legal act simultaneously defining a new order for insiders and their common relationship towards outsiders:

> Eine *Landnahme* begründet Recht nach doppelter Richtung, nach Innen und nach Aussen. Nach Innen, das heisst innerhalb der landnehmenden Gruppe, wird mit der ersten Teilung und Einteilung des Bodens die erste *Ordnung* aller Besitz- und Eigentumsverhältnisse geschaffen. Ob durch diese erste Landteilung nur öffentliches oder nur privates, ob Kollektiv- oder Individualeigentum oder beides entsteht, ob katastermässige Vermessungen vorgenommen und Grundbücher angelegt werden oder nicht, das alles ist eine spätere Frage und betrifft Unterscheidungen die den

59. Schmitt, *Der Nomos der Erde*, *supra* note 7, at 39. 'Not to lose the decisive connection between order and [localization] one should not translate Nomos as law, regulation, norm or any similar expression. Nomos comes from *nemein* – a word that means both 'to divide' and 'to pasture'. Thus Nomos is the immediate form in which the political and social order of a people becomes spatially visible – the initial measure and division of pastureland that is, the land appropriation as well as the concrete order contained in it and following from it. In Kant's words, it is the 'distributive law of mine and thine' or, to use an English term that expresses it so well, it is the 'radical title'. Nomos is the measure by which the land in a particular order is divided and situated; it is also the form of political, social, and religious order determined by this process. Here measure, order and form constitute a spatially concrete unity.' Schmitt, *Nomos of the Earth*, *supra* note 7, 70.

60. For an overview of this critique, see Galli, *supra* note 1, at 739.

https://doi.org/10.1017/S0922156505003171 Published online by Cambridge University Press

> Akt der gemeinsamen *Landnahme* schon voraussetzen und erst aus ihm abgleitet werden . . . Insofern schafft jede *Landnahme* nach Innen stets eine Art *Obereigentum* der Gemeinschaft ganzen, auch wenn die spätere Verteilung nicht beim reinen Gemeinschaftseigentum bleibt und völlig 'freies Privateigentum' des einzelnen Menschen anerkennt. Nach Aussen steht die landnehmende Gruppe andern landnehmenden oder land besitzenden Gruppen und Machten gegenüber. Hier stellt die *Landnahme* . . . einen völkerrechtlichen Titel dar.[61]

As one of the first writers to comment on *Der Nomos der Erde* observed,[62] because of the inherently collective character of possession of land every individual is interested not only in the defence of his own interests – that is, his own *Lebensmöglichkeit* – but also necessarily in the defence of the common space as the carrier of the common principle of distribution, organization, and exploitation of the land on which his own *Lebensmöglichkeit* depends. This means that every member of a concrete order is, in Schmitt's words, concerned with any conflict capable of altering or destroying it, no matter whether the conflict is against a common enemy or among other members of the common space who wish to alter its internal organization. This accounts for the existence of amity, that is for the willingness of the individual to give up his life to fight a common enemy (*hostis*), even though it may not be his personal enemy (*inimicus*), that is, even though it does not threaten his personal interests.

Such concern for a common space is the source for the political as a distinctive public sphere which is irreducible to the individual, and therefore private, level. This same concern, to the extent that it allows the creation of an organized space of amity, is also, however, the source of its destruction.

As seen above, any *Landnahme* grounds law in two directions: on one hand it establishes the field of a concrete order, but on the other it defines a relationship between the political unit and its enemies. Any given piece of land – from individual property to continents – can be viewed therefore both as a unit in itself and as a part of a wider space – from the common land of a political unit to the whole world. In this sense there is no ontological difference between internal and external, and between domestic and international politics: the existence of a concrete domestic order – and therefore of amity and sovereignty – depends ultimately on its relationship with outsiders exactly in the same way as possession of land for an individual depends on its recognition by others. The creation of amity within a defined space only increases the possibility of defence against enemies, but does not allow an indefinite defence

61. Schmitt, *Der Nomos der Erde*, *supra* note 7, at 16. 'A land appropriation grounds law in two directions: internally and externally. Internally, i.e., within the land-appropriating group, the first order of all ownership and property relations is created by the initial division and distribution of the land. Whether public or private, collective or individual, or both, ownership derives from this initial land division; whether or not cadastral surveys are undertaken and land registers are established are later questions, and they concern distinctions presupposed by and derived from the common act of land appropriation . . . But even when the initial land-division establishes purely individualistic private ownership or common clan ownership, this form of property remains dependent on the common land appropriation and derives legally from the common primeval act. To this extent, every land appropriation internally creates a kind of supreme ownership of the community as a whole, even if the subsequent distribution of property does not remain purely communal and recognizes completely "free" private ownership of the individual. Externally, the land-appropriating group is confronted with other land-appropriating or land-owning groups and powers. In this case land appropriation represents a legal title in international law'. Schmitt, *Nomos of the Earth*, *supra* note 7, at 45.

62. Schmidt, *supra* note 57.

https://doi.org/10.1017/S0922156505003171 Published online by Cambridge University Press

against all possible outsiders: in order to continue, a political unit therefore needs the recognition of its 'radical title' from at least some of its enemies.

This implies that any member of a space is concerned not only with conflicts that take place within its borders, but also by all conflicts capable of redefining the ownership and the character of the outer spaces on which such borders depend. This means that, theoretically, the smallest bit of land is dependent on the nomos of the whole Earth, and that, therefore, every individual is concerned with any conflict capable of altering the nomos of any part of the planet. This concern for the common space is, therefore, both the origin of the political and a source of unlimited conflict, to the extent that, if left uncontrolled, it allows a re-creation of the Hobbesian war of all against all and makes the very partition and organization of land senseless and amity impossible. The persistence of the political relies therefore not only on the possibility of distinguishing between friend and enemy, but on a further element capable of limiting conflict.

In *Der Nomos der Erde* Schmitt defined this containing (*aufhalten*[63]) force as a *kat'echon*,[64] which, according to Pauline doctrine, is the (political) power, in the Middle Ages identified with the emperor and the Pope, that keeps the Antichrist and chaos from taking over.

Schmitt refers back to what he had said about the state of exception, noting that establishing a concrete order is never the same as eradicating conflict, since the action of the *kat'echon* can never remove the Antichrist from the world. To the extent that a conflict cannot be neutralized, it can nevertheless be contained.

The notion of containment becomes now central to the problem of order in Schmitt's thought, in that it allows him to extricate the element that accounts for the possibility of order despite the persistence of enmity, that is, for order in a plural context, domestic or international.

As in *Politische Theologie* – in which the sovereign decision is described as revealing who has the authority to decide – in *Der Nomos der Erde* Schmitt describes the *kat'echon* as he who takes a decision about *who is concerned* with which particular space, thus achieving a spatial limitation of war. This, according to Schmitt, is the essence of international law, in that it allows a distinction between domestic and international. This means distinguishing between subjects who can decide, either through deliberation or through military intervention (*jus ad bellum*), conflicts within a given space and those who are simply *influenced*, and therefore not *concerned*, by a conflict.[65] This distinction is similar to the distinction between interest and standing in a process of law.

---

63. This word both in the German and the Latin form (auf-halten) (cum-tenere) means both to 'keep in', that is, to restrain something or someone from exiting and 'to restrain', that is, to limit a force.
64. Schmitt, *Nomos der Erde*, *supra* note 7, at 28. Schmitt used the notion of *kat'echon* in an earlier writing, *Beschleuniger wider Willen*, now in *Staat, Grossraum, Nomos*, *supra* note 53, at 436. On the *kat'echon* see also A. Colombo, 'Challenging the State, C. Schmitt and "Realist Institutionalism"', paper presented at the Fifth Pan-European International Relations Conference, The Hague, September 2004, and available at http://www.sgir.org/archive/index.htm
65. Schmitt, *Nomos der Erde*, at 160, *Nomos of the Earth*, at 188 (in this translation, 'the concerned' is translated as 'participant'; this expression, however, does not convey the meaning of 'having something at stake', which is fundamental to the Schmittian category of '*the concerned*', both *supra* note 7.

https://doi.org/10.1017/S0922156505003171 Published online by Cambridge University Press

Also in this case, provided that, theoretically, every individual is concerned with the whole nomos of the Earth, there is no a-priori rational principle according to which a member of a particular space should be denied a right to affirm his interest in a particular space.

Again, the legitimacy of such a decision rests on its ordering force, that is, on its role as guarantor. Order can exist only to the extent that the overall structure of the nomos (as a combination of *Ordnung* and *Ortung*) is capable of guaranteeing the *Landnahme* of all its members, that is, the possession of land in itself and the sense of it.

Again, as regards the authority to decide within a domestic framework, the right to intervene in the international system cannot belong to all those who simply have the power and capability to intervene in a given space. As in the domestic realm, a tyrannical power cannot give rise to order because it cannot restrain the state of exception and its destructive force; an international order in which space is organized through mere power is always open to disorder.

In such a context, the selection of those concerned by a particular space or conflict has no sense and no effect. Since mere power entails no legitimacy, it cannot induce those who are interested in the conflict to refrain from fighting. Therefore an order based only on power – as the tyrannical order in the domestic realm – is either a perfect order, in which only one polity exists, or it is unstable and open to challenge. As noted above, plurality, if left uncontrolled, lets the state of nature back in. The organization of space, and therefore the selection of those concerned, must, therefore, rely on a juridical element capable of generating order.

As mentioned above, in his early internationalist writings[66] Schmitt tried to apply the logic of sovereignty to the international realm, depicting the hegemonic state as the guarantor of order within a *Großraum* in which political units would coexist, keeping their own sovereignty. In such a framework only the hegemonic power would have a right to make war, both within the *Großraum* (to protect its members from each other) and outside it (to protect the *Großraum* from alien powers). This solution, influenced by the Nazi doctrine, was, however, open to the problem of despotism, even though Schmitt explicitly designed his theory of the *Großraum* as a concrete order and, therefore, as a legal construct guaranteeing plurality.

In *Der Nomos der Erde*, however, Schmitt pointed out that the containing force, the *kat'echon*, does not need to be a single instance: the medieval concept of empire and imperial *potestas*, for example, recognized the nature of *kat'echon* in a plurality of princes or kings. Order, however, stemmed from the fact that despite a plurality of political instances, the action of a *kat'echon* is universal, that is, it is able to *contain* plurality in a unity creating order through the establishment of an equilibrium between universe and pluriverse, between unity and plurality. This equilibrium is not to be identified with a mere balance of power: according to Schmitt, such an equilibrium has a collective, self-aware, and dynamic character.

66. These are available in the collections Schmitt, *Staat, Großraum, Nomos*, *supra* note 53, and C. Schmitt, *Frieden oder Pazifismus?* (2005).

Lacking a sovereign who has the authority to mediate between conflicting parties within a space, order derives from a collective sovereign decision about the organization of a common space. Such a decision entails a commitment from every member to defend the common space from any attempt – internal or external – to alter its nomos, regardless of whether its own space or sense is involved in the conflict. Such a commitment is based not on a contract – like alliances – but on the fact that every unit *recognizes the existence of its enemies within the common space as essential to its own existence*. On the other hand, every member is subject to the threat of the others should it attempt to impose its own hegemony. Those who are concerned with a space are, therefore, those who, on the one hand, are credibly committed to its equilibrium and, on the other, those who are (or can be) threatened by the others.

As mentioned above, this is possible to the extent that every member of the common space shares the awareness that such space carries a particular ordering principle, which is different and preferred to the one brought by external powers or by the possible hegemony of one of its members. Every member of a common space protects therefore the existence of its own enemies to the extent that they co-operate in keeping alien powers from intervening in it and in keeping each member from menacing its internal balance.

The nomos, that is, the relationship between particular space and common space, accounts for the dynamic character of the equilibrium. In fact, all members of a common space commit to its protection only to the extent that it guarantees their own *Lebensmöglichkeit*. This implies, on the one hand, that every member seeks his own interest in the common space, and, on the other, that each has a distinct concept of the common interest. Members commit to the defence of the common space to the extent that it is in their power to decide whether it is in danger and whether it is in their interest to intervene.

Given the persistence of such plurality, contrary to what happens in the domestic realm, in a common space war cannot be avoided. Equilibrium is not, therefore, the mere status quo, but a process of adjustment in which, depending on the case, each member can be the challenger or the defender and in which the rise of a new member, or the fall of an old one, can determine the need to adjust the internal organization of land in order to keep the balance of reciprocal threats. This dynamic character of the equilibrium allows a limitation of war. This refers not only to the subjects who have the right of intervention, but also to the way in which the war is conducted. Schmitt notes that in a context in which the existence of one's enemy is essential to one's survival, and in which all other members are committed to defending order within the common space, members refrain from waging wars of annihilation in order to maintain the internal balance. They also avoid causing disorder in the domestic realm of others in order to guarantee their own internal balance and to avoid a reaction from all the other members of the common space interested in safeguarding it.

As noted above, this common, self-aware, and dynamic equilibrium is possible only on land, because only on land are enemies, threats, and interests stable. Only on land is it possible to limit war, while maritime war, Schmitt notes, is necessarily a war

of destruction and annihilation, and, contrary to terrestrial warfare, is necessarily directed to both military and civilian targets.

Such an equilibrium was made possible for the first time, according to Schmitt, in the epoch of the *jus publicum europaeum* described in *Der Nomos der Erde*. This legal order followed the wars of religion in Europe and the establishment of the Westphalian system, and lasted, according to Schmitt, until 1919, when it was finally replaced with a non-system and a non-order. Schmitt points out that the emergence of the system was determined by a spatial revolution within European civilization at the beginning of the modern era.

Pre-global (i.e., ancient and medieval) empires had, according to Schmitt, no global spatial awareness. Although they did not ignore other civilizations or spaces, they did not have a notion of 'exterior': this means that the single members of the common space had no perception of the fact that their existence depended on the willingness of the others to defend the common space from a common enemy. Christendom saw the Islamic world as an enemy, but, because of the lack of a direct border between them, it could long ignore the problem of plurality. When a clash between the two empires took place, the fact that every member of Christian territory was willing to defend it against the enemy was simply taken for granted. Islamic powers, therefore, were never perceived as a potential source of alteration of the European nomos, but only as an absolute enemy to be destroyed. In the same way, medieval doctrine did not distinguish between civil and international or external wars: since the survival of the members of the common space did not depend on the existence of enemies, there was no interest in limiting wars. Medieval wars had, therefore, the same character as civil conflicts or private fights between personal enemies (*inimici*). They were, according to medieval terminology, feuds: the medieval doctrine of the just war considered it as a means through which individuals or groups could react to an offence and re-establish order through the enforcement of their rights. This concept relies on the assumption that the enemy is a lawbreaker and a felon, and therefore has no right to resist. The justice of a war was therefore dependent on the adjudication of a superior authority, which in early medieval times was the Pope or the emperor and later the king. Medieval order rested therefore on a universal law and authority, since the kings also derived their authority by acting like judges and governors of a single universal Christian empire. This system, although it was never completely effective, created an order similar to the domestic one, in which conflicts are adjudicated through sovereign decisions mediating among all parties in conflict.

This legal order collapsed when the oceans became accessible to navigation and new, free spaces outside Europe were discovered. The destructive potential of such new spaces was not immediately evident to medieval sovereigns and scholars, who initially considered them equal to and homogeneous with European space. Soon, however, it became clear that these spaces, which were also resources, were able to compromise the *sense* of European territory. Powers which had access to spaces outside Europe could, in fact, make use of new and immense resources in order to conquer all Europe and impose their particularity on the universe of Christendom. The pre-global Christian empire experienced, then, a state of exception: single units

of the political system tried to impose a new order on the whole. The collapse of medieval unity left the forces of plurality uncontrolled and gave way to the epoch of the wars of religion. In his *Land und See*[67] Schmitt points out that this epoch presented no spatial awareness: powers waged wars in Europe in order to have a right over lands outside Europe, and they conducted wars on lands outside Europe in order to win the wars of religion in Europe. At the same time, the great maritime powers of the age waged war on the sea, often through pirates, to control land outside Europe, and terrestrial powers tried to gain supremacy over the oceans by waging war on land.

This state of exception of war, of all against all, was brought to an end by a sovereign decision: the winning powers of the Thirty Years War established, in the treaties of Westphalia (1648) and Utrecht (1713), a new nomos through the selection of subjects concerned with various spaces.

The cornerstone of the new nomos was the state as an institution claiming a monopoly on violence and law within a territory with closed borders. Through the establishment of the state, a clear distinction was drawn between internal and external war. Whereas the former was suppressed through a sovereign decision, the latter was reserved to state subjects. On the one hand, European sovereigns protected their citizens from external violence; on the other hand, they protected external powers from violence brought by their citizens. Recognition of statehood was, then, not only a source of rights (the right to wage war), but also a source of duties – and the certification of a trust. In order to have recognized a right over their land and a right to intervene in the organization of the common space, states had to give an assurance about their commitment to safeguarding it. The balance of power – resulting from a division of Europe among states in such a way that no great power could impose its hegemony over the others – could be effective to the extent that every member could rely on others to intervene in case one of them violated the rules of international law.

Because of the guaranteeing role that every state had for the whole system, war also could be limited. While the medieval doctrine of the just war conceived of war as a means to affirm a right and to punish its infringer, modern doctrine transformed war from a feud to a duel. This has the same structure as a trial, in which parties and third parties are recognized a priori a right to defence or intervention. The lack of a judge is compensated for by the presence of witnesses who have a right to react when one of the duelling parties violates the rules.

This was, according to Schmitt, the great strategy of modern law: giving up the problem of the just causes of war, that is, the problem of the content of international law, allowed jurists and states to regulate the war according to its form. What made a war just was, therefore, not the cause for which it was fought, which could not be adjudicated by anyone, but the rules according to which it was conducted. In order to maintain the equilibrium of the common space, the enemy was never to be

67. C. Schmitt, *Land und See, Eine weltgeschichtliche Betrachtung* (1981 [1942]), translated by S. Draghici under the title *Land and Sea* (1997).

annihilated. In order to guarantee the sovereignty of the enemy, the civil population was never involved in the war, and neutrality was respected.

Modern international legal order also relied on the second decision taken by the Westphalian powers: the distinction between state and non-state land (i.e., between European and extra-European lands). The whole system of the balance of power in Europe could have made sense only if the extra-European territories of the single powers were treated as separate from the European metropole. Global powers were concerned by European wars in a way very different from their concern in extra-European wars. Whereas the former put the very *Lebensmöglichkeit* of a state at stake, the latter were fought in order to achieve a further interest. For this reason European powers limited war on European soil and could engage in terrible wars of annihilation in extra-European spaces to the extent that their survival as a political unit was not put at risk.

For the same reason, a third sovereign decision established the nomos of the *jus publicum europaeum*: the separation between land and sea, and therefore between land war and maritime war. Again, the whole structure of the European nomos could be safeguarded only if terrestrial powers gave up using terrestrial wars to win control of the sea, and if maritime powers did not use their control of the sea to alter the European balance.

The complex structure of the nomos resulted, then, in the selection of global spaces and of the subjects concerned with each. A legal order could be ensured to the extent that each subject waging war in a particular space (European land, extra-European land, or the sea) was concerned with that same space. Only in this way was it possible to ensure that each subject had an interest in safeguarding that same space and that, therefore, the destructive force of the political was restrained.

According to Schmitt, the international order emerging from the First and Second World Wars destroyed the institutions of the *jus publicum europaeum* and hindered the limitation of war, thus creating what he calls a nihilistic spatial chaos.[68] This was because the three limitations ('spatializations') mentioned above were replaced between 1884 and 1919 by a universalist system of 'international law'. This system was the product of the loss of spatial awareness, according to him typical of the oceanic powers, and gave rise to a system in which every subject can wage war everywhere on the planet to the extent that it is authorized by a majority, regardless of the consequences for its own space. In such a system, every part of the world became subject to the threat of alien powers which were not in turn credibly and stably threatened by a set of powers capable of putting their existence at risk. No member of the system can be sure of its own sovereignty, because it is not stably guaranteed and protected by others. International obligations are based not on a common threat and assurance, but on the instrument of contract, which is not effective to the extent that its validity and execution are subject to the mere will and power of the parties, or even of third parties. Without a system guaranteeing sovereignty, the domestic realm is also open to disorder, since the sovereign cannot

68. Schmitt, *Der Nomos der Erde*, *supra* note 7.

guarantee internal political units safety from their common enemy. Not only does disorder return (because every actor who has enough power can pursue its own interest regardless of the possibility of retaliation by other members), but wars turn into wars of annihilation, since the existence of one's own enemy is no longer essential to one's own existence, and therefore each member can afford to destroy it. After the rise of air warfare, which was deemed to be subject to the rules of maritime, and not terrestrial, warfare, the land became more and more similar to the sea, and the possibility of a nomos faded with the bombing of civilian populations during the Second World War.

In his internationalist writings Schmitt attacked this new system as he had attacked domestic parliamentary government.[69] A merely normative system, in which the determination of who should act in what space and in which case, depends on the contingent will of *non-concerned* third parties is open either to chaos or to arbitrary despotism resulting in wars of annihilation.

The equilibrium between universe and pluriverse is endangered because whoever has enough resources to impose his will on the others can attempt to establish a universe on the basis of his own *Lebensmöglichkeit*. In his *Die Einheit der Welt*, discussing the confrontation between the two perspective 'universal empires' of the Cold War, Schmitt wrote that pluralism is, however, stronger than universalism, as history is stronger than a philosophy of history.[70] Schmitt recalled what he had written more than fifty years before in *Die Diktatur*, that not only does an arbitrary despotism fail to give rise to any real legal order, but also that even legal orders are always open to the state of exception. The attempt to eradicate war, as with any attempt to eradicate the forces of plurality, is never successful. The forces of history and geography soon come back in and, if left uncontrolled, bring chaos and destruction with them.[71]

For this reason, progressive research in both international law and international relations should be inspired by a culture of modernism (i.e., by the culture of pluralism and spatial awareness), rather than by a culture of formalism, as Koskenniemi recently suggested.[72]

4. Conclusion: international studies in search of a new nomos

In the conclusion to *Der Nomos der Erde*, Schmitt denounced the international law emerging from the First and Second World Wars. He said that the law lacked clear legal definitions and a clear distinction between what is lawful and what is not,[73] in the same way that Koskenniemi does today.[74] He called attention to the absurdity

69. Ibid., at 450; see also 'Beschleuniger wider Willen oder: Problematik der westlichen Hemisphäre', and 'Die Letzte globale Linie', now in Schmitt, *Staat, Großraum, Nomos*, *supra* note 53, and Schmitt, *supra* note 46.
70. C. Schmitt, *Die Einheit der Welt* (1952), now in *Staat, Großraum, Nomos*, *supra* note 53, at 496.
71. C. M. Santoro, *Occidente, identità dell'Europa* (1998).
72. Koskenniemi, *supra* note 31, at 496.
73. Schmitt, Foreword (1963) to *Der Begriff des Politischen*, *supra* note 29.
74. Koskenniemi, *supra* note 31, at 496.

of allowing any precedent, from any part of the world, to be applied as law to extremely different spatial contexts. He criticized the fact that the norms created by international institutions, first the League of Nations and then the United Nations, could be considered valid or not for any time and any place, depending on the opinion of great powers. Without ever mentioning the Holocaust, Schmitt did, however, point out the change in contemporary warfare, which does not allow a clear distinction between belligerents, civilians, and neutrals and between maritime and terrestrial warfare, thus producing not only disorder and destruction, but the erosion of the very function and possibility of sovereignty and therefore the progressive re-emergence of a state of nature.

In his internationalist writings Schmitt pointed out the paradox of a system in which the worst wars of annihilation are conducted in name of humanity, in which in order to put an end to wars disorder is brought all over the planet, and in which the increasing number of treaties and international organizations makes it increasingly difficult to distinguish between legality and arbitrary despotism.

Instead of requiring that decision makers 'take a momentary distance from their preferences and enter a terrain where these preferences should be justified', as Koskenniemi suggests as a solution to such disorder, Schmitt focused on the possibility of constructing legal orders, moving from the assumption that there are no rational or natural criteria for evaluating justifications. This brought him to the analysis of the institutions of the Westphalian system,[75] in particular of the modern state as the bearer of European order and the modern limited war which made order possible.

Their ordering capacity did not lie in the negation of interests and power politics, but in the fact that they are means of depoliticization and neutralization, or limitation of war, and were therefore able to establish a normal situation on the basis of interests and conflict. They are 'restraining' devices that instead of being created against sovereigns, as often international norms are conceived in contemporary international organizations, were created by sovereigns themselves in order to play the role, mentioned above, of guarantor during the 'glorious' epoch of the *jus publicum europaeum*.

Because of Schmitt's emphasis on the particular strength and ordering capacity of modern juridical institutions deriving from a system of mutual and collective credible threat, rather than as a realist *tout court*, he is therefore best defined, with reference to contemporary international relations scholarship, as a '*realist institutionalist*'.[76] In his view, no order is possible without a notion of law, but a legal order cannot be established unless all powers have enough force to require that their interests are guaranteed by the sovereign. To the extent that such minor powers are denied that

75. This focus on the institutional and cultural elements of the political is a common feature of twentieth-century European internationalist thinkers. Martin Wight and the so-called English School of International Relations, and, in a somewhat different way, Raymond Aron shared Schmitt's perspective on the institutional and historical constituents of international politics and international law. A. Colombo, 'L'Europa e la Società Internazionale: Gli Aspetti culturali e istituzionali della convivenza internazionale in Raymond Aron, Martin Wight e C. Schmitt', (1999) 2 *Quaderni di scienza politica* 251.

76. The definition is provided by Colombo, *supra* note 64. Schmitt's institutionalism is highlighted also by A. Amendola, *C. Schmitt tra decisione e ordinamento concreto* (1999).

possibility, the resulting order, even if it may look like a legal order, is a despotic one, where 'peace' is not equal to 'order' but to the silence of the cemeteries. On the other hand, to the extent that sovereigns are denied the right and ability to give their citizens security through a legitimate use of force in the international arena, the only alternative to this 'peace' is chaos.[77] The potentially destructive force of the political needs to be restrained in order to forestall chaos.

The disciplines of international law and international relations today face the same challenges which inspired Schmitt's work. Those challenges are the possibility of an equilibrium between universe and pluriverse, between perfect order and chaos. They are in search of a new nomos. Schmitt's work makes it clear that it is not possible to find it without filling the gap between the two disciplines.

Schmitt's work can be an inspiration to the disciplines of international relations to the extent that it is an attempt to distinguish qualitatively legal order from mere balance of power and that it points out the spatial perspective of such order. This is useful in the attempt to provide a theory explaining the role of spatial factors in shaping the strategic and power balance among states and the role of common spatial commitment in ensuring sovereignty. On the other hand, Schmitt's work is a valid critique of contemporary international law, to the extent that it points out the need to recognize the effects of law as constitutive of their validity and the need to apply it not only to single members of the system but to wider spaces and therefore to develop a new legal distinction between interest and standing in international law.

77. See C. Schmitt, 'Frieden oder Pazifismus?', now in his *Frieden oder Pazifismus?*, *supra* note 66.