

Interlinking the Domestic with the International: Carl Schmitt on Democracy and International Relations

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Abstract

Carl Schmitt's *Der Nomos der Erde* allows us to rethink his interlinked proposals for the organization of the Weimar Republic, namely his theory of 'democratic dictatorship' and the 'concept of the political'. Connecting the domestic homogeneity of an empowered people with the pluralism of the Westphalian state system, Schmitt seeks to humanize war; he objects to the renaissance of the 'just war' tradition, which is premised on a discriminating concept of war. Schmitt's objections are valid today, yet their Eurocentric foundations are also partially outdated. We are thus to argue with Schmitt against Schmitt to reflect on possibilities for the humanization of war.

Key words

Carl Schmitt; concept of the political; discriminating concept of war; *Hegung des Krieges* (concept of bracketed war); just war; nomos concept

I. INTRODUCTION

In refocusing his theories on international issues, Carl Schmitt 'seeks a new field of activity in which he would like to avoid his complete marginalization, hoping eventually to regain his momentum'.¹ This quote by an anonymous observer aptly summarizes a commonplace contextualization of the German jurist's oeuvre, namely that at least three separate periods in his academic work can be distinguished: a (somewhat untainted) Weimar period containing Schmitt's thoughts on domestic political theory as well as on constitutional legal matters; Schmitt's early and deep entanglement with Nazi Germany, that is, his prominent role as the *Kronjurist* of the Third Reich; and an international period – roughly beginning in 1938 and culminating in Schmitt's 1950 *Der Nomos der Erde* (The nomos of the earth) – where Schmitt is concerned with geopolitics as well as with international law. As the initial quotation suggests, the late turn to the international was (and still is)

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1. Reported by G. Balakrishnan, *The Enemy – An intellectual Portrait of Carl Schmitt* (2000), 227.

often considered as awkward or abrupt, as a mere tactical manoeuvre to overcome academic and political isolation.²

In this article I shall challenge the assumption that Schmitt's international work represents a break in his academic life. Rather, I am to suggest that it is worthwhile understanding *Der Nomos der Erde* not as a break from, but as a continuation and development of, Weimar themes. My primary aim, then, is an exegetic exploration of Schmitt's contemporary renaissance. Reading *Der Nomos der Erde* as a continuing line of thought, I understand Weimar as holding the keys to unlock various idiosyncratic concepts that constitute the later work; and, vice versa, *Der Nomos der Erde* reflects back on Weimar, and thus helps to shed some light on the ambiguities and uncertainties that characterize the centrepieces of Schmitt's Weimar writings, namely his constitutional law treatise and his famous *Der Begriff des Politischen*.

In order to establish the interrelationship between Weimar themes and *Der Nomos der Erde*, it certainly would be interesting to follow individual evolutionary steps or to elucidate transitional publications such as *Leviathan*, the *Discriminating Concept of War*, or Schmitt's greater-space theory. However, to sharpen my argument, I will only explore three prominent concepts in *Der Nomos der Erde* that are far from self-explanatory and are easier to understand by taking Weimar schemes into account: first, I shall focus on the nomos concept and its underlying land–sea binominal in order to shed some light on the impetus of Schmitt's Weimar theory of democracy (section 2). Second, I will illuminate the notion of *Hegung des Krieges* and how it supplements the Weimar concept of the political (section 3).

In an epilogue I shall briefly outline the extent to which Schmitt's Westphalian paradigms and concepts are transferable to our post-Westphalian world order and the extent to which they are helpful to rethink and challenge what Schmitt feared most: the renaissance of the 'just war' tradition (section 4).

2. THE NOMOS CONCEPT AND THE LAND–SEA BINOMINAL: SHEDDING LIGHT ON THE IMPETUS OF THE WEIMAR THEORY OF DEMOCRACY

In the 1950 *Nomos of the Earth* Schmitt devises the nomos concept to reconstruct the international plane in spatial terms, in terms of geopolitical line-drawing. Moreover, the land–sea binominal becomes the prevalent prism through which to analyse law and politics. Both the nomos concept and the land–sea binominal shed light on the true impetus of Schmitt's Weimar theory of democracy.

In his 1928 constitutional law treatise (*Verfassungslehre*), Schmitt had managed to constitute 'democratic dictatorship' not as a *contradictio in se*. The alleged inner relationship between an empowered *Volk* and authoritarianism was intended to relegitimate the Weimar state and to reintroduce order in unordered times. This theory, however, was conceptually flawed and eventually doomed to fail in legitimizing the state apparatus and its encompassing influence on the citizens. Schmitt

2. Schmitt was not only isolated in post-war West Germany, but had already fallen from grace before the war.

sought domestic homogeneity in order to foster allegiance to the state; the substance of this homogeneity was to be erected by a democratic national identity. This substance, nevertheless, turns out to be linked to a mere nihilistic myth (hypostatized by a strong *Reichspräsident* or, later, the Führer). With the *nomos* concept, Schmitt rather explicitly supersedes this inherent nihilism of his Weimar writings. What is more, the land–sea binomial helps us to evaluate the radical democratic tone that is so thoroughly muted by the authoritarian elements of Schmitt’s Weimar theory of democracy.

2.1. Schmitt’s Weimar theory of ‘democratic dictatorship’

To appreciate Schmitt’s Weimar theory of democracy, we first of all need to understand the paradoxical determinations on which this theory is based. On the one hand, Schmitt was deeply suspicious about the maturity of the masses. As a conservative thinker who was raised in the Wilhelmian era and who resented the idea of a liberal *bürgerlicher Rechtsstaat*, Schmitt had first – in his 1922 *Politische Theologie* (Political theology) – been part of the counter-revolutionary camp: an absolute dictator was to reunite a disrupted and antagonized Weimar society, and the disintegrating state was to be revalidated through the decisions of a strong leader who challenges the almost apocalyptic crisis by emanating authority and substance. On the other hand, Schmitt was soon – in his 1926 *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (The intellectual-historical condition of contemporary parliamentarism³) – to abandon his previous denial of the empowerment of the masses. He had determined that the legitimate state could no longer be based on a monarch’s divine right or on tradition, but that it had to accommodate the rise of the people. The legitimacy of the state thus rested on the incorporation of this *Volk*. Substance as national identity, then, was a necessary precondition to reinventing the state’s authority. Yet still, because of their unpredictability, the masses represent an element of instability and disorder that had to be tamed.⁴ It follows that Schmitt’s theory of democracy had to reconcile two contradictory convictions: the masses are both the foundation and the possible destruction of the state. Unlike elitist theorists, who only saw a ‘mob’ driven by primal instincts, Schmitt had to transfer and convert the masses into the *Volk*, into the public.⁵ Schmitt conceptualized this transfer in his *Verfassungslehre*; this piece promotes radical, Rousseauist democratic ideals, only to abandon them in concrete suggestions for a democratic constitutional order.

In *Verfassungslehre*, Schmitt develops the core of his theory of democracy around a deconstruction of the French Revolution. In his typical polemical style, Schmitt sees two antithetical traditions in the Weimar Constitution: the liberal tradition of the *bürgerlicher Rechtsstaat* that imposes limitations to the state’s power, and a truly

3. As to this translation cf. Balakrishnan, *supra* note 1, at 278.

4. He shared this view with nineteenth-century liberals. See B. Fontana, ‘Notes on Carl Schmitt and Marxism’, (2000) 21 *Cardozo Law Review* 1515, at 1518.

5. For a concept of the public and Schmitt’s differing from elitist theories, cf. E. Kennedy, ‘*Hostis not Inimicus*: Toward a Theory of the Public in the Work of Carl Schmitt’, (1997) 10 *Canadian Journal of Law and Jurisprudence* 43, at 46–7.

democratic tradition linked to the theorist of the French Revolution, Emmanuel Sieyès.⁶ Schmitt unequivocally sides with the latter tradition. The French Revolution presents, for Schmitt, the most basic principles of democracy because it mirrors the first moment of the constitution: the founding moment.⁷ In this very moment the French nation used its *pouvoir constituant* to originate a new way of being, a new constitution that has to be distinguished from constitutional laws. In Schmitt's account, the French people discovered that the true democratic sovereign is the indivisible (in Schmitt words: homogeneous) nation. The nation's constituent power (and here Schmitt draws on an absolutist interpretation of Jean Bodin's theory of sovereignty⁸) is free from restraints; it is absolute, 'originary and groundless'.⁹ The constitution arising from the omnipotent decision of the sovereign nation demonstrates that this nation pre-existed the state. Hence this constitution is superior to the state and to the legal institutions – among them constitutional law – attempting to enshrine the way of being willed in the founding moment. The term 'constitution', Schmitt argues, does not represent the (written) foundational law of a new political community, but distils the way of being of an already existing one.¹⁰ From his reading of the French Revolution Schmitt deduces that democracy presupposes an inseparable, unified nation; this homogeneity, for Schmitt, is distorted by a liberal focus on individual rights and privileges. Further, the only viable form of democratic government is the identity of the ruler and the ruled, so that parliamentary representation and its struggle of interest groups are outdated.¹¹

At first glance Schmitt's 'devotion' to democratic ideals seems radical. However, in the light of an examination of Schmitt's concrete ideas about democratic government and statehood, he (not unexpectedly) turns out not to be interested in a permanent revolution, but only in a constitutional order informed by the empowerment of the masses.¹² Holmes once attacked these definite ideas about democracy as 'perverse' and classified them as a 'soccer-stadium democracy'.¹³ Schmitt aims at installing a strong leader, the *Reichspräsident*, who represents and upholds the

6. J. Seitzer and W. E. Scheuerman have independently illustrated that Schmitt presents, at best, a partial and one-sided interpretation of Sieyès. See J. Seitzer, 'Carl Schmitt's Internal Critique of Liberal Constitutionalism: *Verfassungslehre* as a Response to the Weimar State Crisis', (1997) 10 *Canadian Journal of Law and Jurisprudence* 203, at 203 et seq. and W. E. Scheuerman, 'Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt', (1997) 10 *Canadian Journal of Law and Jurisprudence* 141, at 141 et seq.
7. A. Kalyvas rightly points to the various stages of democracy. See A. Kalyvas, 'Schmitt and the Categories of the Political: Carl Schmitt and the Three Moments of Democracy', (2000) 21 *Cardozo Law Review* 1525, at 1525 et seq.
8. Again, Schmitt only presents a limited reading of Jean Bodin, who was far from establishing an absolute and unrestricted prince and rather limited the sovereign prince by natural law. Cf. J. Bodin, *Six Livres de la république* (1576), Book 1, ch. 8.
9. Kalyvas, *supra* note 7, at 1535.
10. See generally Balakrishnan, *supra* note 1, at 91.
11. Cf. M. A. Hamilton, 'Discussion and Discourse: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation', (1994) 69 *New York University Law Review* 477, at 487.
12. For Schmitt, as Kalyvas correctly contends, 'the sovereign [i.e. the *Volk*] is also the one who "creates" the normal situation' (Kalyvas, *supra* note 7, at 1549). Schmitt's seeing the sovereign as the creator of peace is also apparent in his 1938 *Leviathan*, where he approves the fact that Thomas Hobbes's 'sovereign is not the Defensor Pacis of peace that relates back to God; he is the creator of no more than earthly peace, *Creator Pacis*' (author's translation). See C. Schmitt, *Der Leviathan in der Staatslehre Tomas Hobbes* (1938), 50.
13. See S. Holmes, *The Anatomy of Anti-Liberalism* (1993), at 49.

unity of the *Volk* by articulating the *volonté générale*.¹⁴ Being the guardian of the constitution (i.e. the way of being of the German *Volk*), the *Reichspräsident* and his decisions make ‘an invisible being publicly visible’;¹⁵ his decisions radiate the substance that – allegedly – inheres in the *pouvoir constituant*. The leader hypostatizes a nation’s identity through his actions and thus relegitimizes the state. For this task Schmitt conceptualizes caesarism.¹⁶ While the government is openly and vitally elected, the actual influence of the *Volk* is reduced to mere acclamation. There is no discourse, no rational consideration, only irrational masses cheering or booing.

Schmitt’s initial commitment to democracy is almost diametrically opposed to the concrete projects to shape a constitutional order. For instance, Hamilton maintains, ‘Schmitt’s embrace of dictatorship oversteps the problems he identifies. His democratically elected dictator is just as vulnerable as the parliamentarian to the ideal of self-rule because self-rule delegitimizes representation at any level’.¹⁷ Schmitt’s existentialist pathos and his admiration for the raw power of the *pouvoir constituant* are radically tamed – the omnipotent sovereign only resonates in yes–no decisions. The ideal of unlimited self-rule, the basis of Schmitt’s theory of democracy, is reduced to that of a publicly enthroned leader. In *Verfassungslehre*, the German jurist spreads the legend of an inner relationship between an empowered people and authoritarianism; his Weimar theory of democracy is in effect a theory of ‘democratic dictatorship’.

In Schmitt’s narrative, this is no *contradictio in se* – a truly disturbing assumption which raises the question: why does he oscillate between two extremes, why does he intone authoritarian statements with a radical democratic timbre? It would be too simplistic to answer that Schmitt only tried to manoeuvre between conceiving the masses as the only source of legitimacy and, at the same time, as signalling decline and decay. For this answer could not explain the deep fascination that characterizes Schmitt’s description of the French Revolution. Why, then, would Schmitt be enthralled by a ‘*Volk*, awakened to political consciousness’ and ‘self-determining its political destiny’?¹⁸ Why would he welcome the absolute power residing in a united and indivisible nation?¹⁹

Seitzer²⁰ has suggested that Schmitt brilliantly manipulates constitutional history in order to slip his own authoritarian agenda into the very core of the liberal constitutional tradition and to hollow it out from within. Schmitt’s fascination with an empowered people would thus be but a ‘tactical manoeuvre’.²¹ He would only use ‘history as a tool’²² for rejecting liberal constitutionalism. At first glance,

14. With open approval, Schmitt describes Thomas Hobbes’s rector: ‘The sovereign and representative person is disproportionately more than the accumulated power of all the participating individual wills could bring about’ (author’s translation). Schmitt, *supra* note 12, at 52.

15. See J. Müller, ‘Carl Schmitt – An Occasional Nationalist?’, (1997) 23 *History of European Ideas* 19, at 25.

16. *Ibid.*, at 26.

17. Hamilton, *supra* note 11, at 490.

18. C. Schmitt, *Verfassungslehre* (1993 [1928]), at 50.

19. Cf. *ibid.*, at 51.

20. Seitzer, *supra* note 6.

21. *Ibid.*, at 203.

22. *Ibid.*, at 209.

this is a sound interpretation which accounts for the divergence between the avant-garde tone and conservative, practical constitutional proposals; the tone would be but a means – as I have expounded elsewhere – to effectively ‘transcend a chaotic and unstable social environment and to reinvent a strong and orderly state’.²³ Yet, as we shall see when taking into consideration Schmitt’s post-Weimar writings, there is more to his theory of ‘democratic dictatorship’ than merely a cold-blooded promotion of authoritarian and decisionist ideals; indeed, there is some truth in Schmitt’s fascination with the empowered people and his authoritarian backlash might express anxiety about his very own fascination.

2.2. The inherent nihilism of Schmitt’s democratic substance

Before turning to his international writings, we need to take note of a prominent deficiency in Schmitt’s Weimar theory of democracy: the inherent nihilism of democratic substance. Nihilism vibrates in Schmitt’s indifference as to what unifies the *demos*; this indifference points to the inability of his theories thoroughly to legitimize the state domestically. Schmitt postulates that the identity of the *Volk* is crucial only in order to ensure substantive equality and homogeneity in order to accommodate the democratic empowerment of the masses. However, Schmitt cannot advance absolute criteria that design the substance that he eventually needs to legitimize the state. In an early, yet selective,²⁴ flirtation with Mussolini’s fascism, Schmitt proposes a nationalist identity. In Schmitt’s opinion the images of nationalism create stout bonds; bonds that are, for instance, stronger than Georg Sorel’s communist appeal to the general strike. Schmitt notes that even Lenin was aware of this and, accordingly, mobilized his followers by means of a national ideology. But by favouring Sieyès’s term ‘nation’ over *Volk* (‘a term which merely identifies a somehow ethically or culturally connected group of people that does not necessarily exist in a political sense’²⁵) Schmitt signifies that his quest for democratic legitimacy is relative and lacks objectivity. Eventually Schmitt acknowledged that all nations show distinct concepts of, and individual criteria for, nationality.²⁶

Going even further, Schmitt degrades democratic substance to a fiction, to nothing but the decision of a leader filling a cultural nothingness. Eventually building democracy on a volatile myth, on a spectre, Schmitt’s theories fail to stop the domestic disintegration of the state. Rooted in his cultural perspective on modernity – on the *Zeitgeist* – published in his article ‘Das Zeitalter der Neutralisierungen und Entpolitisierungen’ (The age of neutralizations and depoliticizations), Schmitt advances the idea that the contemporaneous religious faith in technological progress is only the last step in a passage from theology, to metaphysics, to humanitarian morality, and then to economics. Each of these steps was taken by the European nations²⁷ to

23. C. Burchard, ‘Puzzles and Solutions: Appreciating Carl Schmitt’s Work on International Law as Answers to the Dilemmas of his Weimar Political Theory’, (2003) 14 *Finnish Yearbook of International Law* 89, at 105.

24. See generally Balakrishnan, *supra* note 1, at 122.

25. ‘Nur eine *irgendwie* ethnisch oder kulturell zusammengehörige, aber nicht notwendig politisch existierende Verbindung von Menschen’. Schmitt, *supra* note 18, at 79 (emphasis added).

26. See C. Schmitt, ‘Das Zeitalter der Neutralisierungen und Entpolitisierungen’, repr. in C. Schmitt, *Der Begriff des Politischen* (1963) 79, at 84.

27. ‘Europäische Menschheit’. *Ibid.*

find neutral territory where groups could interact safely, but each attempt to outrun the political failed, and the neutral terrain became the new battle ground.

Auf dem neuen, zunächst für neutral gehaltenen Felde entfaltet sich sofort mit neuer Intensität der Gegensatz der Menschen und Interessen, und zwar um so stärker, je fester man das neue Sachgebiet in Besitz nimmt. Immer wandert die europäische Menschheit aus einem Kampfgebiet in neutrales Gebiet, immer wird das neu gewonnene neutrale Gebiet sofort wieder Kampfgebiet und wird es notwendig, neue neutrale Sphären zu suchen. Auch die Naturwissenschaftlichkeit konnte den Frieden nicht herbeiführen. Aus den Religionskriegen wurden die halb noch kulturell, halb bereits ökonomisch determinierten Nationalkriege des 19. Jahrhunderts und schliesslich einfach Wirtschaftskriege.²⁸

As I am going to illustrate in greater detail later, the immutability of conflict surmounts Schmitt's thinking. Therefore he judged believing in technocracy to be dull and dangerous – for what was thought to be the final neutral ground, a sphere of peace and reconciliation²⁹ and the ultimate flight from the political,³⁰ is nothing but spiritually void,³¹ that is, nothing but culturally blind.³² Technocracy does not challenge the political, nor does it provide identity – it merely waits to be used either to aggravate war or improve peace.³³ Schmitt is calling for politics to usurp technocracy and fill it with substance in order to compose new friend–enemy groupings. Nevertheless, since technocracy cannot inherently give any guidance, domestic friendship – homogeneity – cannot be conjured by more than a myth.³⁴

In a preliminary conclusion, Schmitt's caesaristic theory of democracy is characterized by an innately nihilistic attempt to create democratic identity. This identity had to create internal cohesion, which in turn was vital for legitimizing the state apparatus. However, from this point of view, Schmitt's theory of democracy seems flawed, contradictory, and counterproductive. The mythical basis of democracy cannot provide real or true legitimacy. Rather, Schmitt's democratic state is founded on mere hypothetical authority. The democratic myth could not only be exchanged, thus challenging continuity, it could also be exposed, the exposure possibly bringing about a crisis. Therefore Schmitt's theory of democracy not only proves to be

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

29. *Ibid.*, at 90.

30. 'Absolute Entpolitisierung'. *Ibid.*, at 94.

31. *Ibid.*, at 92.

32. *Ibid.*, at 91.

33. *Ibid.*, at 94.

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

incapable of really legitimizing the state; Schmitt founded his state on potential discontinuity and instability.

Thus if Schmitt did not construe a blatantly inconsistent and incoherent system, then interpreting his Weimar theory of democracy as an attempt to overcome the legitimacy crisis of the Weimar state is seemingly wrong. Caesarism rather appears as an end in itself, and the authoritarian fabrication of fictional substance is the true impetus of Schmitt's theory of 'democratic dictatorship'. This is where the *nomos* concept in *Der Nomos der Erde* comes in, substantiating the former and invalidating the latter interpretation.

2.3. The *nomos* concept: superseding the Weimar nihilism

Der Nomos der Erde was published in 1950, but it is commonly believed that it was in fact completed as early as 1945. The leitmotif of *Der Nomos der Erde* can be found in the preface of the 1963 edition of *Der Begriff des Politischen*. With the end of the Westphalian era, Schmitt found himself unable to resort to its 'marvellous concepts',³⁵ Schmitt only saw two ways out: the flight into aphorism or seeking shelter in historic analyses – being a jurist, Schmitt maintained that he has to follow the latter path. *The Nomos of the Earth*, then, is Schmitt's account of the history of international law or rather of the paradigms governing international relations. In his 1939 *Völkerrechtliche Großraumordnung mit Interventionsverbot im Völkerrecht* (The order of large space in international law³⁶), Schmitt had turned to geopolitics, to perceiving international co-ordination as the distribution of space: spheres of influence, global lines of demarcation, the idea of the inseparability of order and its spatial allocation³⁷ formed the framework of Schmitt's approach to international law. This approach is the prism through which he tells his story of international law's history in *Der Nomos der Erde*. For Schmitt, the keyword in rethinking international law is 'nomos'. In a highly idiosyncratic interpretation of its denotation – he maintains that already the Greek philosophers misinterpreted the Greek word *nomoi* as *shedon*, that is, as rule or law³⁸ – Schmitt understands 'nomos' as expressing the primordial partition and allocation of space, that is, as the first seizure of land.³⁹ With the dawning of the global age, international co-ordination was based on certain spatial arrangements. With the end of the common agreement on this arrangement, that is, with the end of this *nomos*, an end Schmitt sees as having taken place in 1890, the world was left in a condition of confusion, order was separated from its spatial allocation, and politics was not provided with the means of attributing different meanings to different regions of the world. Schmitt advances this uncertainty as one of the reasons for the First and Second World Wars. By showing that international interaction historically was – allegedly – founded on an agreed *nomos*, and that the historic concepts under classical international law were based on this very *nomos*,

35. See Schmitt, *Begriff des Politischen*, *supra* note 26, at 17.

36. As to this translation cf. Balakrishnan, *supra* note 1, at 235.

37. 'Ordnung und Ortung'.

38. See C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950), at 37.

39. 'Landnahme'. *Ibid.*, at 36.

Schmitt calls on international lawyers to compose a new *nomos* for a changed world and warns against the employment of obsolete concepts that are bound to the past *nomos*.

Before referring to the *nomos* concept, Schmitt was incapable of following either of the traditional, bipolar paradigms. He was neither willing to accept positivism – a school that, for Schmitt, fled into the theoretical negation of politics and into pure procedural thinking and hence was conceptually disabled from enshrining substantive determinations – nor prepared to pursue a natural-law approach. Natural law, with its focus on reason and epistemological objectivity and its search for ontological truth, seemed outdated in times of the reign of irrational masses. With *nomos*, Schmitt wanted to leave behind both these two classical solutions, positivism and natural law, and his initial Weimar solution, that is, his seeking refuge in a nihilistic myth. An initial allocation of space, a primordial disposition over the globe, *nomos* provides the raw and concrete guidance he is looking for. For Schmitt, *nomos* refers to a true, factual, historic event⁴⁰ that supersedes any social construct. The ontological⁴¹ dimension of *nomos* establishes a *Grundnorm* that is not hypothetical but real. Drawing on the dichotomy of legitimacy and legality,⁴² Schmitt characterizes *nomos* as a legitimating act that gives sense to legality.⁴³ In comprehending *nomos* as the *pouvoir constituant*, as the *ordo ordinans*, as the *ordnungsbegründender Vorgang*,⁴⁴ as the founding moment of a new order, Schmitt abolishes the very basis of this theory of democracy. It is not an isolated people willing a new order and originating a new constitution by its very *pouvoir constituant*, but a geopolitical *nomos* primordially constituting structure. This structure is the antithesis of nihilistic vagueness and counters any potential instability. Having found real substance and veracity, Schmitt no longer needs a mythical figure that impersonates any fictitious *pouvoir constituant* by radiating hypothetical authenticity.

Accordingly, Schmitt uses his description of *nomos* to contradict the legitimacy entailing a ‘caesaristic cult of the political ruler’.⁴⁵ In other words, Schmitt rather explicitly revokes his myth of the *Reichspräsident*, and thus reconfigures his unsatisfying Weimar approach. The caesaristic hypostatization of the *volonté générale*, which was not able to create more than imaginary homogeneity among a people, is abandoned; *nomos* establishes order and stability. Thus *Der Nomos der Erde* clearly insinuates that Schmitt’s Weimar theory of democracy did not promote caesarism as an end in itself.

Der Nomos der Erde represents the evident continuing of a line of thought. So how are we to reinterpret Schmitt’s theory of ‘democratic dictatorship’ in the light of its later dismissal? Knowing about its integral significance, the *nomos* concept – or rather the land–sea binominal underlying this concept – holds the answer.

40. See Schmitt, *supra* note 38, at 17.

41. *Ibid.*, at 16.

42. Schmitt established this dichotomy in his *Legalität und Legitimität* (Legality and legitimacy) (1932).

43. Schmitt, *supra* note 38, at 42.

44. *Ibid.*, at 50 et seq.

45. *Ibid.*, at 45.

2.4. The land–sea binominal: rethinking Schmitt’s theory of ‘democratic dictatorship’

Within the nomos concept, Schmitt distinguishes between land, sea, and air space. Since air space was a new development, Schmitt’s focus in his looking back in *Der Nomos der Erde* is on the land–sea binominal. He eventually reverts to metaphysics to condense the implications of land and sea. Schmitt channels his anti-universal stance into his view on the latter. For Schmitt, the sea – its lack of limits⁴⁶ and its ignorance of any borders except coastal lines⁴⁷ – expresses universalism.⁴⁸ Commonplace mythical characteristics of the sea – the vast emptiness of the oceans, the lack of guidance, the pervading sense of insecurity, and the sea’s irrepressible forces, its inconceivable but ever-present depth – seem to mirror the very notions Schmitt is attempting to outrun: inhuman voids, profound and uncontested nihilism. Comparing the sea with land, Schmitt conveys, on the one hand, that the sea represents the opposite of order, symbolizes the opposite of protection and safety. On the other hand, he describes the land as radiating these very aspects. For Schmitt, land is open to lines of demarcation, whereas the sea is not; land is open to being classified – by nomos – as a safe haven, whereas the sea is not. While land knows clear borders and can be distributed into territories of states and into spheres of influence,⁴⁹ the sea is ‘free of any kind of spatial supremacy by a state’.⁵⁰ Schmitt presents protective geopolitics and the allocation of space as necessarily tied to land, whereas the sea is described as outside a state’s spatial order.⁵¹

Schmitt’s positive characterization of land and his pejorative description of sea in *Der Nomos der Erde* is highly instructive. He seems to hold dear implications of order and stability while loathing an almost Hobbesian state of insecurity. Transferring this insight back to his Weimar theory of democracy seemingly exposes a coherent picture: Schmitt’s own mental contortions to accept the empowerment of the masses as well as the violent twisting of democracy in his writings make sense if Schmitt sought to reintegrate volatile human masses into a stable order that ensures bodily safety and integrity. The Weimar society, which was in Schmitt’s eyes at the brink of civil war, had to be relegitimated and restrengthened in order to prevent in all cases a shedding of blood between ‘brothers and sisters’. Constructing a national identity would thus be but a function to establish – to recall Schmitt’s romantic description of the land – a safe haven. To that extent, the radical democratic and existentialist pathos of his Weimar theory of ‘democratic dictatorship’ would be no more than an empty cover for his true authoritarian agenda – in fact, Seitzer’s analysis that Schmitt (mis-)used his idiosyncratic interpretation of the French Revolution in order to bring down liberal constitutionalism seems more than warranted.

However, in order to grasp fully the analytical value of the land–sea binominal, we must probe its origin and its implications more carefully. Schmitt himself has

46. See Balakrishnan, *supra* note 1, at 242.

47. See Schmitt, *supra* note 38, at 143.

48. *Ibid.*, at 144.

49. ‘Staatsgebiet und Herrschaftsräume’.

50. ‘Staatliche Raumhoheit’: see Schmitt, *supra* note 38, at 143.

51. *Ibid.*

traced the land–sea binominal back to the 1940 booklet *Land und Meer* (Land and sea), where he had for the first time considered those elements as the driving forces behind world-historical clashes of man.⁵² *Land und Meer* provides important and astonishing insights, as Schmitt approaches the sea with the same anxious fascination that characterizes his Weimar description of an empowered people. Moreover, this piece of writing bears an invaluable exegetic authenticity, since the world historic reflections contained in it are no viciously crafted device to bring down an academic enemy, but originate from stories he had told his daughter. To please his ten-year-old daughter, Schmitt had talked about pirates and whale-hunters and had thus, as he has described it later, been drawn into an element formerly alien to him: the sea.⁵³

Land und Meer prepares for the mythical characterization of the sea in *Der Nomos der Erde*, yet from an entirely different angle: not from a pejorative but from a positive one. The sea is portrayed as the ‘mysterious source of all life’.⁵⁴ ‘Wild’ adventures and seafarers, ‘bold’ whale-hunters and ‘daring’ sailors are the ‘first heroes’ of maritime existence.⁵⁵ Pirates, corsairs, privateers, and buccaneers find themselves mentioned as ‘another, dashing kind among the children of the sea’.⁵⁶ The decline of Holland’s command of the high seas in the late seventeenth century was due, according to Schmitt, to ‘land’ becoming the predominant element.⁵⁷ *Land und Meer* radiates Schmitt’s crude fascination with an element novel to him: he cherishes the moulding powers of the sea, the raw power gained by directly engaging with it; and he holds in contempt the protection brought about by the mechanization of sea travel, for it ended the heroic times of old, ‘the harsh breeding and selection of a certain kind of man’.⁵⁸

However positive Schmitt’s reflections on the sea in *Land und Meer* may be, its introduction articulates an insurmountable reservation:

Der Mensch ist ein Landwesen, ein Landtreter. Er steht und geht und bewegt sich auf der festgegründeten Erde. Das ist sein Standpunkt und sein Boden; dadurch erhält er seinen Blickpunkt; das bestimmt seine Eindrücke und seine Art, die Welt zu sehen.⁵⁹

As Schmitt summarized his position elsewhere, land determines man’s fantasy; man is a son of earth.⁶⁰ Privateers intrigued and enthralled Schmitt, especially since ‘they acted at their private, own risk in the most dangerous sense of the word’⁶¹ – yet he chose to stay ‘down to earth’, to think of man as a *Landtreter* (land-treader).

52. Cf. C. Schmitt, ‘Welt großartigster Spannung’, reprinted in G. Maschke (ed.), *Staat, Großraum, Nomos* (1995), at 514.

53. *Ibid.*, at 513.

54. ‘geheimnisvolle Urgrund allen Lebens’. C. Schmitt, *Land und Meer* (1981), at 9.

55. ‘wilde Abenteurer und Seeschäumer, kühne, die Ozeane durchstreifende Waljäger und wagende Segler sind die ersten Helden einer neuen maritimen Existenz’. *Ibid.*, at 29.

56. ‘eine weitere, verwegene Art von “Kindern der See”’. *Ibid.*, at 40.

57. *Ibid.*, at 52.

58. ‘die harte Zucht und Auswahl eines bestimmten Menschenschlages’. *Ibid.*, at 98.

59. ‘Man is a land creature, a land-stepper. He stands and goes and moves on the solid Earth. That is his position and his fundament; that is how he receives perspective; this is what determines his impressions and his way of seeing the world.’ *Ibid.*, at 7.

60. Cf. C. Schmitt, ‘Das Meer gegen das Land’, reprinted in Maschke, *supra* note 52, at 396.

61. ‘handelten auf privates, eigenes Risiko im allergefährlichsten Sinne des Wortes’. *Ibid.*, at 396.

From his safe haven, that is, from land, Schmitt listened to sea's alluring song of adventure, chance, risk, and peril – yet he did not give in to it.

Reading *Land und Meer* together with *Der Nomos der Erde* thus reveals a highly ambivalent, even paradoxical description of the sea: on the one hand, this element is conquered by dashing seafarers who existentially determine for themselves their own lives, which take place in a *status mixtus* between peace and war; on the other hand, the sea is treacherous and inhumane, since, after all, man 'is and will ever be a son of earth'.⁶² In contrast, land epitomizes – as Schmitt noted – 'concrete truth [that] is by no means utopian'.⁶³ From an evaluative point of view, in the same way one can very easily characterize land ambivalently: on one hand, man is 'down to earth' – sensible and level-headed – on the other, land is highly conservative and probably even unsophisticated.

I would like to suggest that these ambivalences of the land–sea binomial are paradigmatic for Schmitt's exploration of democracy in his Weimar period: Schmitt's Weimar account of an empowered people anticipates the portrayal of privateers in *Land und Meer*. In his 1928 *Verfassungslehre*, a democratically awakened *Volk* makes a 'free decision' about its 'political existence'.⁶⁴ It is the 'strength as well as the weakness of the *Volk*'⁶⁵ that it is unshaped and never fully shapeable.⁶⁶ Public opinion – and Schmitt considered democracy as government by public opinion, although this must not be confused with discourse and deliberation but stands for acclamation – arises and exists in an 'unorganized' manner;⁶⁷ indeed, public opinion is – as Schmitt was to point out in his 1931 *Hüter der Verfassung* (Guardian of the constitution) – a 'fluid which can neither be organized nor defined'.⁶⁸ A close association of democracy with fluidity had already marked Schmitt's coming to terms with the empowerment of the people in the 1923 *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*: in this piece we read about the 'flood of democracy against which there has seemingly been no dam since 1789'.⁶⁹ Schmitt describes democracy as an 'irresistibly approaching and swelling power'⁷⁰ that historically had served many masters and had by no means known any clear goal.⁷¹

One could go on citing passages from Schmitt's Weimar period, yet the point has already been made: his Weimar theory of democracy evidently correlates neatly with his later description of the sea. Both democracy and the sea represent elements alien yet fascinating to Schmitt. The anxious fascination with a politically awakened people anticipates his later curiosity about corsairs and so on in *Land und Meer*. In addition, Schmitt's authoritarian denigration of the fluidity and the aimlessness

62. 'ist und bleibt ein Sohn der Erde'. Schmitt, *supra* note 52, at 514.

63. 'konkrete Wahrheit ist niemals utopisch'. *Ibid.*

64. 'eine freie Entscheidung über Art und Form seiner politischen Existenz'. Schmitt, *supra* note 18, at 78.

65. *Ibid.*, at 83.

66. *Ibid.*, at 242.

67. 'Die öffentliche Meinung entsteht und besteht "unorganisiert"'. *Ibid.*, at 247.

68. 'unorganisierbares, "undefinierbares Fluidum"' (emphasis added). C. Schmitt, *Hüter der Verfassung* (1931), at 83.

69. 'die Flut der Demokratie, gegen die es seit 1789 keinen Damm zu geben scheint'. C. Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (1926), 31.

70. 'unwiderstehlich kommende und sich ausbreitende Macht'. *Ibid.*, at 32.

71. *Ibid.*

of empowered masses anticipates the deprecation of the nihilism of the sea in *Der Nomos der Erde*. His reaction – to tame the people’s *pouvoir constituant* with the *pouvoir neutre* of a strong leader – epitomizes Schmitt as a *Landtreter*, who sought to channel the flood of democracy into structure.

From this we can learn that Schmitt’s existentialist pathos and his promotion of radical democratic ideals is more than the brilliant manipulation of constitutional history, than just a tactical manoeuvre and a way to reinvent a strong state. There is truth to his existentialist fascination with a bold *Volk* that wills its own political destiny. Yet Schmitt was not prepared to venture forth into this new realm of empowerment. He stayed ‘down to earth’ and tried to fabricate fictitious substance and directions which were about to drown in the fluid alignment of democracy. In order to compensate for the democratic lack of direction, Schmitt conceptualized his theory of ‘democratic dictatorship’ as a way of disempowering the empowered people – or rather of supplementing empowerment with a neutral counter-force. As we read in *Hüter der Verfassung*, a neutral counter-force was to uphold the very existence of statehood:

Trotzdem gehören solche neutralen Gegenkräfte zum heutigen Staat und wäre dieser Staat ohne sie überhaupt undenkbar, weil es in Wahrheit keinen Staat geben kann, der nur ein pluralistischer Parteienstaat wäre. Ausser den rein parteimässigen Kräften muss es immer auch andere, unparteiische und überparteiische Kräfte geben, wenn die staatliche Einheit sich nicht in ein pluralistisches Nebeneinander sozialer Machtkomplexe auflösen soll.⁷²

This passage gives rise to two questions: why was there a need for a counter-force? Moreover, why was Schmitt so preoccupied with preserving the state? With regard to the first question, we may again draw on the land–sea binomial as a valid exegetic tool. The fluidity of empowerment points to its lack of intrinsic limits. This is mirrored in the way of life of the corsairs, who – according to Schmitt in *Land und Meer* – often exceeded their vested rights in order to murder, burn, and plunder.⁷³ Transferring this back to Weimar, Schmitt was alarmed that the fluidity of empowerment might increase the risk of civil war. To that extent Schmitt operated with an eminently (post)modern understanding of empowerment: as Pieterse has illustrated, empowerment radiates an ‘aura of power’, but ‘it does not necessarily problematize power’ and it ‘does not necessarily imply consciousness’.⁷⁴ For Schmitt, empowerment does not connote any form of self-control or self-imposed limitations. Empowerment merely stands for a nation’s absolute control over its political destiny, not for an improved capacity of self-expression, let alone individual self-assertion. In other words he did accept that democratically empowered masses provided the only viable legitimacy for the modern state, but he did not *emancipate* the people. It

72. ‘However, such neutral counter-forces belong to today’s state and this state would at any rate be inconceivable without them, because there can be no true state which would only be a pluralistic state of political parties. Apart from the mere powers wielded by political parties, there must always be other, impartial powers transcending those of the political parties, if the unity of the state is not to dissolve into a pluralistic set of social power complexes existing side by side’ (author’s translation). Schmitt, *supra* note 68, at 100 et seq.

73. Schmitt, *supra* note 54, at 44.

74. J. N. Pieterse, ‘Emancipation, Modern and Postmodern’, in J. N. Pieterse (ed.), *Emancipation, Modern and Postmodern* (1992), 111 et seq.

comes as no surprise, then, that Schmitt – as a son of earth, as a *Landtreter* – attempted to dam the violent tides of democracy, that is, a *pouvoir neutre* was to channel the empowered masses into a united and homogeneous *Volk*.

This does not, however, answer the second question – why Schmitt was preoccupied with preserving the state. I will respond to this question in the following section.

3. THE CONCEPT OF *HEGUNG DES KRIEGES*: CLARIFYING THE DEFICIENCIES OF THE WEIMAR CONCEPT OF THE POLITICAL

Not only the *nomos* concept and the land–sea binominal shed light on the impetus of his Weimar theory of ‘democratic dictatorship’; *Der Nomos der Erde* similarly clarifies ambiguities inherent in one of Schmitt’s most controversial pieces, his 1928 *Der Begriff des Politischen* (Concept of the political). In his international period, Schmitt introduced the concept of *Hegung des Krieges* to expand on almost cryptic Weimar thoughts. As I will illustrate now by reinterpreting *Der Begriff des Politischen* in the light of Schmitt’s expansions in *Der Nomos der Erde*, Schmitt deemed the Westphalian state system to be capable of humanizing war and conflict.

In *Der Begriff des Politischen*, Schmitt separates morality, aesthetics, economics, and politics.⁷⁵ Being the most prominent theme, the nature of politics – or in Schmitt’s terminology, the political – materializes in a friend–enemy dichotomy. Distinguishing the political from other considerations and ultimately reducing politics to the demarcation of friend and enemy bears several implications – the most troublesome being that state warfare is only to be guided by politics, while moral or ethical reflections are conceptually foreclosed from guiding conflict behaviour. To that extent, although surprising at first glance, I will, by taking into account *Der Nomos der Erde*, argue that Schmitt sought to establish – in his opinion – circumstances as stable as possible: first, by creating national homogeneity by reference to the external enemy and, second, by de-escalating mortal conflict as much as Schmitt deemed it feasible.

3.1. The deficiencies of the concept of the political

In order to interpret *Der Begriff des Politischen* correctly, one has to appreciate Schmitt as a political ‘realist’ who did not spend much time considering utopias, ideal worlds, or romantic idylls; his objectives found their boundaries in ‘concrete situations’,⁷⁶ or rather in his perspectives on these concrete situations. Political philosophy, for Schmitt, was not reflecting *on* ideal politics, but was a reflection *of* actual human affairs. This reflection was heavily influenced by his experiences during the breakdown of the *Kaiserreich*, the revolutions, and counter-revolutions pre-dating the establishment of the Weimar Republic, and the social disruption of the Weimar society by antagonized political parties ready to overturn the Weimar constitution. His grim and almost apocalyptic convictions can only be understood against this

75. See Schmitt, *Begriff des Politischen*, *supra* note 26, at 27.

76. ‘konkrete Existentialität’. *Ibid.*, at 65.

background, in the context of a *Reichspräsident* ruling by decree to ensure minimal stability, and of Schmitt's living in a society at the brink of civil war. Schmitt was convinced that, since man was a dangerous and dynamic being,⁷⁷ there is no, or at least no imminent, possibility of creating the just society,⁷⁸ the *civitas dei* on earth.

Pointing to his most fundamental empirical determination, Schmitt thought that the validity of theories and their conceptualizations depended on their acknowledging the immutability of enmity and mortal conflict. As he asserted in the foreword to the 1963 edition of *Der Begriff des Politischen*, nothing less than reality necessitates a theory's descriptive part acknowledging the ontological dimension of human enmity.⁷⁹ In his terminology, enmity is not directed against the economic rival or the opponent in a debate,⁸⁰ but describes the potential of mortal clash. War and conflict, then, became the basis and focal point as well as the object and subject for Schmitt's reflections on human interactions and their reflections in politics. In *Der Begriff des Politischen* Schmitt refrains from advancing a definition of politics and rather introduces his famous friend–enemy distinction that serves as a phenomenological criterion to capture an 'aggregate condition':⁸¹ the political. The friend–enemy dichotomy enshrines the antagonism that surmounts human relations and embraces enmity as its concrete source and foundation. 'Friend and enemy signify the outer limits of an association or dissociation'.⁸² Once the extreme pole of dissociation is reached, that is, once the enemy has been marked, an intense existential fight (as a matter of life and death) cannot be prevented – politics is a 'realm of danger, not safety'.⁸³ Note, however, that fighting itself is neither virtuous nor a social ideal for Schmitt.⁸⁴

It is crucial to appreciate that the insecurity created by the ever-present potentiality of lethal conflict is not the Hobbesian state of nature, that is, not the war of all against all. Rather, the antagonisms that Schmitt has in mind exist between groups of people. According to Schmitt, only those communities that are structurally capable of deciding on an enemy and waging war against him, are political units⁸⁵ properly so called. These units can appear in the form either of a state, which Schmitt merely comprehends as a specific status within the historic narrative of human co-ordination,⁸⁶ of a party, of a union, or of a church. The (so-called) *Kulturkampf* in Bismarck's Prussia between the Catholic Church and the state, the First World War between various nations, the October Revolution and the fight between Lenin's Communist Party and the Russian aristocracy, the clash of

77. See *ibid.*, at 61.

78. See W. Rasch, 'Conflict as a Vocation', (2000) 17 *Theory, Culture and Society* 1, at 11.

79. See Schmitt, *Begriff des Politischen*, *supra* note 26, at 15.

80. *Ibid.*, at 28.

81. See Kennedy, *supra* note 5, at 43.

82. See Schmitt, *Begriff des Politischen*, *supra* note 26, at 27.

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

84. See Schmitt, *Begriff des Politischen*, *supra* note 26, at 33. Kennedy correctly asserts that other conservative contemporaries of Schmitt such as Ernst Jünger and Erich Kaufmann did in fact idealize struggle as virtue. See Kennedy, *supra* note 5, at 44 and n. 34.

85. The following sections of the article will take up Schmitt's definition of a political unit. When I refer to 'political unit' or 'political community', and so on, I mean them in the Schmittian sense.

86. See Schmitt, *Begriff des Politischen*, *supra* note 26, at 20.

far-left and far-right parties in the Weimar Republic, all this experience is mirrored in Schmitt's thinking that hostility between *groups* is immutable. However, Schmitt is far from conceptualizing an all-encompassing, ever-present state of war. The political only appears as the exception,⁸⁷ as the existence of an enemy is not the rule. In 'the stable state the political in this sense is latent, unseen, mere potential'.⁸⁸ But this must not obfuscate the fact that the immutability of conflict determines Schmitt's thinking, a thinking that, I would argue, saw the political lurking everywhere.

Bearing in mind that Schmitt was not prepared to challenge theoretically his empirical convictions, his normative project has to be explored where he refines the political, where he frames and conceptualizes conflict. Schmitt's Weimar prescriptive focal point is the state:⁸⁹ he seeks the advantages of this specific political unit and is projecting the ideal state that is capable of guaranteeing 'peace, safety, and order'⁹⁰ within its territory. *Der Begriff des Politischen* only implies that the allocation of an enemy as an internal affair and the international plane are mutually intertwined. In Schmitt's opinion a community that discards the friend–enemy criterion cannot be called a state; rather, a people rejecting the political is doomed to perish⁹¹ and a state only exists if its *demos* is united⁹² by a common enemy.⁹³ This enemy, then, generates domestic solidarity within the state; it conjures the internal cohesion which is primordial for a state to radiate legitimacy and authority. From this point of view, external⁹⁴ enmity is integral to upholding a functioning state, that is, a concept that inhibits the political from appearing as civil war. To use Schmitt's words, the 'political world is a pluriverse, not a universe. To that extent, every state theory is pluralistic'.⁹⁵ It follows that the state assumes national homogeneity through international heterogeneity. Schmitt rests his state theory on two distinct levels: to ensure the absence of the political domestically, that is, to prevent civil war, the political has to be possible on the inter-state realm.⁹⁶ Some thirty years after the initial publication of *Der Begriff des Politischen*, Schmitt described these two interrelated levels as the Westphalian world order.⁹⁷

87. See Kennedy, *supra* note 5, at 42.

88. See Fontana, *supra* note 4, at 1519.

89. Schmitt equates pre-state conditions with a condition of insecurity. Cf. Schmitt, *supra* note 12, at 69.

90. See Schmitt, *Begriff des Politischen*, *supra* note 26, at 10.

91. *Ibid.*, at 54.

92. The German word *Einheit* translates as both 'unit' and 'unity'.

93. In *Legalität und Legitimität*, Schmitt clarifies 'the concept of the political' appearing in the opening sentence of *Der Begriff des Politischen* ('The concept of the state presupposes the concept of the political'): 'In times of stable jurisprudence and of consolidated property relationships, a jurisprudential state will prevail . . . Incidentally, one could hardly describe such a community as a "state", because a political unit would have been replaced by a legal community that is, at least in fiction, apolitical' (author's translation). Schmitt, *supra* note 42, at 10 et seq.

94. Schmitt saw the possibility of finding an internal enemy, too. However, the civilizing thrust of his state focus could only work on the inter-state plane, so that his primary concern was the external 'other'.

95. 'Die politische Welt ist ein Pluriversum, kein Universum. Insofern ist jede Staatstheorie pluralistisch'. See Schmitt, *Begriff des Politischen*, *supra* note 26, at 54.

96. This approach is illustrated by Schmitt's interpretation of the 1928 Kellogg–Briand Pact. Since international enemies ensure internal unity and homogeneity, and thus are crucial for the stability of the state, Schmitt was not prepared to acknowledge a ban on international war – after all, doing so would have made impossible the very statist approach that he was still following in his Weimar work. *Ibid.*, at 51.

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

Der Begriff des Politischen gives several, albeit minor, hints that Schmitt considered the Westphalian state system capable of mitigating a scenario characterized by immutable enmity. Schmitt's grand opening of *Der Begriff des Politischen*, 'The concept of the state presupposes the concept of the political', eventually equates a distinct role of the state with a solely politicized understanding of conflict. For Schmitt, only the state ensures that antagonism remains in the public sphere so that war is not continued in non-political, for instance social or economic, realms. The state thus guarantees that an enemy is '*hostis*, not *inimicus*',⁹⁸ since 'one does not have to hate the political enemy in a personal way'.⁹⁹ The constraining power of the state might also drive Schmitt's warning that once the state loses its unchallenged authority to wage war against a declared enemy, the political will reappear as civil war.¹⁰⁰ While the state system offers a framework to regulate the political, civil war does not know any inherent limits and the political can lash out untrammelled by any constraints. To a certain extent this analysis disentangles the first-glance paradox that Schmitt dreads civil war while cherishing inter-state war. Although the state cannot transcend, let alone challenge, the existence of a mortal conflict, it can provide for de-escalation. Accordingly, Schmitt's rejection of communism¹⁰¹ is eventually rooted in its inherent lack of any protective limitations. Rather, by employing the idea of the class struggle, communism reintroduces the political into the domestic realm and thus destroys the civilizing function of the state. By way of a preliminary conclusion, Schmitt saw transferring war from the domestic to the international plane as an instrument for taming the political, for it reduced the chance of civil war.

This turns a spotlight on the international political, that is, on inter-state warfare: how, if at all, did Schmitt refine and conceptualize international conflict? As a reminder, Schmitt was convinced that enmity is immutable; further, the political is distinct from other considerations, that is, warfare must not be charged with, for example, moral, ethical, or economic language. This brings about the central question: why is the political a distinct criterion? Because Schmitt propagated inherently unlimited international warfare?

Howse believes so. In his opinion, the normative agenda behind *Der Begriff des Politischen* is overtly bellicose,¹⁰² because it removes '*any* moral constraint from the conduct of war'.¹⁰³ Drawing on a reading of *Der Begriff des Politischen* and *Politische Theologie*, Howse seeks to demonstrate that Schmitt's 'last word is the unconstrained rule of the strong over the weak as the one authentic form of order implied in the universality of man's animal striving'.¹⁰⁴ The de-moralization of war and peace nicely fits this paradigm – moralistic limitations to waging war would impede high men from dominating the weak, while a concept of politicized, that is unlimited, conflict

98. See Schmitt, *Begriff des Politischen*, *supra* note 26, at 29.

99. 'Den Feind im politischen Sinne braucht man nicht persönlich zu hassen'. *Ibid.*

100. See Kennedy, *supra* note 5, at 44.

101. Cf. Holmes, *supra* note 13, at 41–3.

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

103. *Ibid.* (emphasis in original).

104. *Ibid.*, at 80.

entails all the instruments for the *Herrschaft* ('rule') of the strong. The polemical tone of *Der Begriff des Politischen* supports Howse's interpretation: historic incidents, such as Cromwell's (verbal) attacks on papal Spain, where national antagonisms had spiralled to an extreme, and where an intense friend–enemy contrast had surfaced, are cast in a positive light.¹⁰⁵ Indeed, according to Schmitt, these moments mark 'the culmination of high politics'¹⁰⁶ – Schmitt even seems to hold dear extreme conditions of international antagonism.¹⁰⁷

However, Howse's view cannot be reconciled with other passages, where Schmitt warns that wars that are to promote humanity or other supposedly ethical goals necessarily imply the eradication of the enemy. According to Schmitt, resorting to moral justifications for waging wars is but an ideological instrument that eventually degrades the enemy and places him *hors la loi* or *hors l'humanité*.¹⁰⁸ He hence introduces, however briefly, the idea that conflicts that go beyond the sphere of mere politics will become exceptionally inhumane, intensive, and brutal.¹⁰⁹ Rather cryptically, Schmitt suggests that moral considerations only aggravate wars, that they lead to the utmost inhumane conflicts. In this respect Schmitt's appreciation of the state system might well be read as mitigating the political – only the state can ensure that wars remain in a strictly public sphere and do not drift into a private sphere. In *Der Begriff des Politischen*, this suggestion, that is, that the (re)introduction of morality into conflicts would lead to atrocious consequences, remains superficial; after all, moral considerations are rather thought to limit warfare, instead of aggravating its effects.

Interpreting the distinctness of the political as eventually limiting warfare knows yet another obstacle which is not addressed in *Der Begriff des Politischen*: assuming that the state is capable of mitigating the political and assuming that internal allegiance to the state is assured by transferring the political from the domestic to the international plane (i.e., that a condition of domestic order rests on international anarchy), what prevents international conflicts from total escalation? This question becomes all the more important, since Schmitt entertains, even seems to welcome, an unconstrained intensification of international antagonism. Hence his state system – as devised in *Der Begriff des Politischen* – might de-escalate internally, but it does not provide safeguards against the total escalation of international war. A systemic framework that constrains the outbreak of unchecked civil war while allowing ever increasing and aggravated inter-state conflicts does not refine the political – rather, Howse's evaluation seems eventually correct: the state system and the sole focus on political considerations in times of war would lead to unlimited conflicts; Schmitt's

105. See Schmitt, *Begriff des Politischen*, *supra* note 26, at 67.

106. 'Höhepunkte der grossen Politik'. *Ibid.*

107. 'Die Höhepunkte der grossen Politik sind zugleich die Augenblicke, in denen der Feind in konkreter Deutlichkeit als Feind erblickt wird' (at the same time, those moments where the enemy is actually and in concrete perspicuity recognized as the enemy represent the culmination of high politics – author's translation). *Ibid.*, at 67.

108. *Ibid.*, at 55.

109. *Ibid.*, at 37.

summary of the *cogito ergo sum* of the state: *protego ergo obligo*,¹¹⁰ would be meaningless.

3.2. The concept of *Hegung des Krieges*

In *Der Nomos der Erde*, Schmitt responds to the unanswered problems of *Der Begriff des Politischen*: he gives details why cleansing conflict from non-political considerations mitigates the brutality of war, and he describes how his state system de-escalates the political on the inter-state plane. At the heart of his explanations lies the concept of *Hegung des Krieges*, which finds itself translated into English as ‘bracketed war’, but which I refrain from translating because of the various German connotations.¹¹¹

In order to appreciate the significance and the implications of *Hegung des Krieges*, one has to sum up Schmitt’s historic account of the evolution of war in *Der Nomos der Erde*, namely the differences between the pre-Westphalian and the Westphalian approach to war and conflict. In Schmitt’s terminology, pre-Westphalian was discriminating in nature, since it rested on the just war tradition which differentiated between just and unjust war. According to Schmitt, the just war tradition contributed to the devastating consequences of the Thirty Years War in the seventeenth century. In these times war was, depending on its qualification as just or unjust, either a divine-like enforcement of God’s own will and law or rebellion against it.¹¹² Schmitt dreads several implications of this dichotomous structure. First, the just war tradition provided the means to elevate one’s cause over the enemy’s, the means to depict one’s mission as just and the enemy’s as unjust, and the concepts to see oneself as the champion of justice and the enemy as the heinous villain. This created brutal and inhumane wars, since the enemy was degraded and demonized. Second, because wars became punitive in nature – wars of eradication, or wars of subjugation – the termination of war was infinitely complicated. This was reinforced by the fact that the results of a war could always be challenged on the ground that they were wrong, brought about by an unjust war. Third, the central question of ‘*quis iudicabit*’ could not be answered by an appeal to justice. Most certainly having Vattel in mind, Schmitt feared that the claim of waging a just war could very well prevail on both sides of the conflict – Vattel warns that a war in which ‘each party, asserting that they have justice on their own side, will arrogate to themselves all the rights of war, and maintain that their enemy has none, that his hostilities are so many acts of robbery . . . [Such a] quarrel will become more bloody, more calamitous in its effects, and also more difficult to terminate’.¹¹³

110 Ibid., at 51.

111. To give a brief overview of possible connotations: first, the German verb *hegen* can be translated as ‘to foster’ or ‘to nourish’. From this perspective, ‘*Hegung* of war’ implies that the *jus publicum europaeum* embraced war as such, i.e. that it reduced war, to use the common definition of war in political science, to organized violence between contending political communities. Hence, mundane war could not rise to god-like activity. Second, the German verbs *einhegen* and *umhegen* have a territorial implication (this territorial implication of ‘*Hegung* of war’ is enunciated in Schmitt, *supra* note 38, at 22): *umhegen* translates into ‘to enclose’.

112. See Schmitt, *supra* note 38, at 94.

113. See E. de Vattel, *Le droit des gens* (1758), Book 3 of *War*, § 188, http://www.constitution.org/vattel/vattel_03.htm (visited 23 Aug. 2005).

After the Peace of Westphalia, the just war tradition (with its medieval crusades and feuds) was abolished. At the core of the new spatial arrangement of Europe was the state and its territorial borders. According to Schmitt, the Westphalian state was conceptualized to overcome civil war, especially the religious civil wars during the Thirty Years War.¹¹⁴ The concept of war was transformed into war between equals, that is, sovereigns that were seen as equals; wars that were previously discriminating in nature were now non-discriminating. The *jus publicum europaeum* provided for a non-discriminating model of war that followed the concept of *Hegung des Krieges*. This concept helped to overcome the devastating Thirty Years War:¹¹⁵ in Schmitt's narrative, *Hegung des Krieges* is founded¹¹⁶ on the principle that the enemy – the sovereign state – was accepted as an equal and thus as a *justus hostis*.¹¹⁷ Because the enemy was situated on the same ethical, moral, and legal level, European inter-state war was able to show tolerance towards the enemy. Under Westphalian paradigms, since wars had become a viable means of dispute settlement and since they had overcome the punitive character of wars under the just war tradition, no European war in the *jus publicum europaeum* was a war of eradication, and no European state was dissolved or subjugated notwithstanding sweeping defeat on the battlefield. Contrarily, the just war tradition had entailed the means to elevate one's cause and one's belligerence over the enemy, and the ability to portray one's enemy as evil or ugly had led – before the Westphalian era – to a 'century that was filled, to the extent of desperation and revulsion, with religious and theological battles, with disputes and bloody wars'.¹¹⁸ In Schmitt's description, it was the just war canon of ideologically charged war rhetoric that had spiralled to the brutality and inhumanity in the Thirty Years War. Schmitt thus considered that using morality in the context of enmity was dangerous.

This partially clarifies his intentions in *Der Begriff des Politischen*: Schmitt had already had in mind the devastating consequences of making the enemy a foe, of degrading him *hors la loi* or *hors l'humanité*. Schmitt had not appreciated morality as the readily available panacea to cruelty in war; on the contrary, Schmitt had conceived non-political considerations as the true source of unlimited, inhumane warfare. In other words he had not disengaged conflict from moral or aesthetic considerations in order to free war from any constraints; on the contrary, Schmitt had wanted to preclude the intensification of antagonism by excluding non-political motivations.

In Schmitt's terminology the Westphalian *Hegung des Krieges* is a symbol of the international political, of international war fought for no non-political reasons. But how was this concept to prevent the total intensification of the inter-state war? To give a short answer, with *Hegung des Krieges* Schmitt describes a self-reproducing system that establishes internal loyalty by reference to an external threat, which in turn is prevented from rising to total enmity in order to forestall the disintegration

114. Schmitt, *supra* note 38, at 129.

115. See Schmitt, *Begriff des Politischen*, *supra* note 26, at 11.

116. See Schmitt, *supra* note 38, at 159.

117. *Ibid.*, at 25.

118. Schmitt, *supra* note 12, at 64.

of internal obedience. To clarify this concept: Schmitt saw the Hobbesian state at the core of the *jus publicum europaeum*. Internal loyalty was ensured by providing neutral grounds, and civil war was precluded because the sovereign promised order and protection but demanded obedience in exchange. The first ‘trick’ was to externalize enmity – by projecting an international enemy, the sovereign was able to argue convincingly that his service, the provision of safety, was still needed. Keeping an international enemy proved crucial in reminding the citizens that the political would always be immutable, that upholding a community could not be based on renouncing war, and that the internal peace of the state must not be confused with (utopian) total pacification. The enemy was used to strengthen internal bonds. However, this system would have failed once enmity deteriorated into absolute antagonism – as Schmitt had already noted in *Völkerrechtliche Grossraumordnung*, ‘the system as a whole is only tolerable as long as war is not total’.¹¹⁹ Total war, the ultimate intensification of the political, negates the sovereign’s ability to fulfil his task and provide domestic order. *Hegung des Krieges* thus points to two levels: first, embracing war and the enemy as a necessary circumstance for legitimizing the state, and, second, the mitigation of enmity as an equally essential precondition. Both levels share the same starting point as they are eventually rooted in the state’s role in establishing internal stability. In Schmitt’s thinking, the negation of international war leads to the breakdown of loyalty to the state so that the immutable political will re-enter the domestic plane to destroy internal peace. The aggravation of international war into total war similarly leads to the breakdown of loyalty, because the state proves itself unable to provide any shelter. In Schmitt’s words, ‘Once protection ceases to exist, the state also ceases to exist and every duty to obey is void’.¹²⁰

At least in theory, *Hegung des Krieges* is an answer to the dilemma left unresolved in Schmitt’s earlier work, of how to preclude the absolute intensification of externalized war.¹²¹ Setting any objections aside – and I will come back to them later – in *Der Nomos der Erde* Schmitt devises the concept of *Hegung des Krieges* to counter the inevitable total intensification (through demeaning the enemy morally) of war while, conversely, equating total war with the morally charged conflicts under the just war tradition. With this, Schmitt spells out what he already had in mind in *Der Begriff des Politischen*, that embracing war as pure political violence, without any private implications for citizens, rationalizes and humanizes the immutability of human enmity. By establishing internal loyalty by reference to an external enemy (not foe) the state is constantly relegitimated; a system of sovereign equality of states in turn prevents the political from rising to total enmity by preventing moral superiority from being arrogated, in order to forestall the disintegration of internal obedience to the state. In Schmitt’s historical narrative, *Hegung des Krieges* upheld minimal internal stability and order.¹²² Manifestly, on one hand, Schmitt’s deep

119. See C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot im Völkerrecht* (1941), at 70.

120. ‘Hört der Schutz auf, so hört auch der Staat selber auf und jede Gehorsampfpflicht entfällt’. See Schmitt, *supra* note 12, at 113.

121. Cf. Schmitt, *supra* note 38, at 159.

122. *Ibid.*, at 113.

appreciation of *Hegung des Krieges* underscores the fact that he did not seek unlimited warfare in Europe. On the other hand, Schmitt's most basic factual conviction, the immutability of enmity, precluded him from contemplating total pacification. Schmitt was left with the option of reflecting on means to introduce constraints into the chaos of war – he theorized the concept of *Hegung des Krieges* in the *jus publicum europaeum* as such a method. In what is certainly a key passage in *Der Nomos der Erde*, Schmitt concludes as follows:

Das Wesen des europäischen Völkerrechts war die Hegung des Krieges. Das Wesen solcher Kriege war ein geordnetes, in einem gehegten Raum vor Zeugen sich abspielendes Messen der Kräfte. Solche Kriege sind das Gegenteil von Unordnung. In ihnen liegt die höchste Form der Ordnung, deren menschliche Kraft fähig ist. Sie sind der einzige Schutz gegen den Zirkel sich steigernder Repressalien, d.h. vor den nihilistischen Hass- und Racheaktionen, deren sinnloses Ziel in der gegenseitigen Vernichtung liegt.¹²³

Thus, reinterpreting *Der Begriff des Politischen* in the light of the clarifications of *Der Nomos der Erde*, I have to refute Howse's assumption that Schmitt cherished and welcomed unlimited international warfare. Schmitt, somewhat obstructed by his factual convictions, sought to tame and to refine the immutability of human enmity by making war a pure form of political violence. The Westphalian state stood at the core of this refinement, for Schmitt deemed it alone to be capable of humanizing war and conflict.

4. EPILOGUE: THE CONTEMPORARY RENAISSANCE OF THE JUST WAR TRADITION – TRANSFERRING SCHMITTIAN CONCEPTS TO OUR POST-WESTPHALIAN WORLD ORDER

The exegetic exploration of Schmitt's Weimar and post-Weimar writings has produced an interconnected series of concepts, which were to defend the Westphalian state system against the renaissance of the pre-Westphalian just war tradition. The preservation of the state stood at the core of Schmitt's Weimar theory of 'the political' and of 'democratic dictatorship'. The state, being legitimized by a concrete spatial order, was to humanize war and conflict, as we can learn from *Der Nomos der Erde*. According to my interpretation, removing moral considerations from war and conflict was intended to limit excessive behaviour, to foreclose an enemy being ethically degraded or morally demonized.

Today we are experiencing what Schmitt dreaded most: a strikingly strong influx of just war thoughts. As Gorry observes, 'just war is an idea whose time has come (again)'.¹²⁴ Humanitarian interventions (such as in Kosovo), the so-called war on terror (such as Operation Enduring Freedom in Afghanistan), and of course regime change (such as the US-led 'disposal' of Saddam Hussein) – all of these 'new' war titles

123. 'The essence of European public international law was the bracketing of war. The essence of such wars was the orderly trial of strength in a bracketed space in front of witnesses. Such wars are the opposite of disorder. In them lies the supreme degree of order that man can bring about. They are the only protection against a circle of violence and escalating reprisals, that is, acts driven by nihilistic hatred and vengeance, acts that senselessly aim at mutual destruction.' *Ibid.*, at 158 et seq.

124. J. Gorry, "'Just War' or Just War? The Future(s) of a Tradition', (2000) 20 *Politics* 177, at 183.

are embedded in a just war framework. It is this renaissance of the just war tradition that makes Schmitt's insights pertinent today. To what extent, then, is it worthwhile to revive Schmittian concepts in our post-Westphalian legal order? In the final section I will outline – rather drafting a research agenda than conducting an in-depth analysis – the extent to which his Westphalian concepts fit the needs of our post-Westphalian times. Whereas Schmitt's objections to the possible perils of morally charged warfare are, to a certain extent, confirmed by the latest developments, his concept of non-discriminating bracketed war (*Hegung des Krieges*) is historically incorrect and theoretically outdated. This leaves us with the option of thinking with Schmitt against Schmitt in order to fend off a reintroduction of just cause into the determination of international war.

4.1. The transferability of Schmitt's objections to a just war framework

Schmitt's objections to the treacherous consequences of a just war framework flow from his condemnation of pre-Westphalian *bellum justum* and from his appreciation of the Westphalian *jus publicum europaeum*. According to Schmitt, just war fosters – to use an expression he coined in the 1960s – a 'tyranny of values'¹²⁵ that not only rests on a hierarchy between value and non-value but additionally advocates degradation, discrimination, and annihilation of the enemy.¹²⁶ Just war semantics is premised on – as Koselleck¹²⁷ calls it – 'asymmetrical counter-concepts' because the other is addressed but is neither recognized nor accepted as a *justus hostis*. What is more, the just war tradition temporalizes the asymmetry, that is, it does not accept the non-value but strives for its ultimate obliteration; accordingly, it is almost inconceivable (and for that matter, hardly likely to sell to agitated masses) to end the just war without a total eradication or subjugation of the unjust counterpart. Further, the classification of value and non-value is highly subjective, so that – to be reminded of Vattel's statement – both sides of the conflict are reciprocally empowered to arrogate to themselves all the rights of war.¹²⁸ There are two additional implications of an asymmetrical tyranny of values. One is the polarization of debate, which catches any commentator – for example on the justice of a cause – in a 'normative bind',¹²⁹ since only two options are available, for or against. The final implication of just war asymmetry is its total impetus, which Schmitt finds realized in the collapse of neutrality; Schmitt's critical comment is that a *bellum justum* framework turns inter-state war into a condition of 'international civil war',¹³⁰ which negates impartiality and pulls all parties into the conflict.¹³¹

125. Cf. C. Schmitt, 'Tyrannei der Wert', in K. Doehring (ed.), *Säkularisation und Utopie, Festschrift für Ernst Forsthoff* (1967), at 37 et seq.

126. *Ibid.*, at 46.

127. Cf. R. Koselleck, *Vergangene Zukunft* (1989), at 211 et seq.

128. Cf. *supra* note 113 and accompanying text.

129. Cf. I. M. Porras, 'On Terrorism: Reflections on Violence and the Outlaw', (1994) *Utah Law Review* 119, at 124.

130. C. Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (1988), at 47.

131. As to Schmitt's concept of neutrality cf. C. Schmitt, 'Über das Verhältnis der Begriffe Krieg und Feind', repr. in G. Maschke (ed.), *Frieden oder Pazifismus?* (2005), at 598 et seq.

All of these interrelated attributes, which Schmitt assigned to the just war tradition – discrimination, temporalization, reciprocal subjectivity, polarization, and totalization – aptly characterize the ‘crusading spirit’ and ‘*mission civilisatrice*’ underlying contemporary war rhetoric and its international legal legitimization:¹³² ‘new’ war titles such as humanitarian intervention, war against terror, and regime change draw heavily on – to make use of Schmitt’s polemics – a ‘tyranny of values’ such as humanity or liberal democracy. Although a detailed discussion seems warranted, I will leave it at a few examples.

Most evident in today’s international (legal and political) debate on the legitimacy of armed conflict is the arrogation of moral superiority combined with the degradation of the enemy. Evangelical eagerness resonates in Elshtain’s observation ‘that the 11 September attacks by al Qaeda terrorists against innocent civilians in New York and Washington to frighten the Great Satan were murderous and evil’,¹³³ and drives the counsellors and consolers of President Bush of the United States, who evoke the clash between go(o)d and evil. As Wills has described it,

It helps . . . to be assured that God is on your side . . . it makes one oppose with an easy conscience those who are not with us, therefore not on God’s side. They are not mistaken, miscalculating, misguided or even just malevolent. They are evil. And all our opponents can be conflated under the heading of this same evil, since the devil is an equal opportunity employer of his agents.¹³⁴

Like the pirates of old, despotic leaders or terrorists and their respective supporters become *hostis generis humanis*, they become *hors la loi*, even *hors l’humanité*,¹³⁵ as the treatment of suspected terrorists at Guantánamo Bay and other internment facilities suggests. Because of President Bush’s belief in his universal righteousness,¹³⁶ he ‘will accept no outcome but victory’¹³⁷ in the battle for secularization and democratization in the Middle East. Even though the military operations in Iraq were officially declared closed more than a year ago, there is no end of fighting, let alone a settled state of peace in sight. As the ongoing fights imply, Iraq proves the paradigm where ‘Each side assumes the other is not just imbecilic but also immoral’.¹³⁸ Especially in the early stage of the war on terror, a nuanced debate could not take place, since criticism implied that one was supporting the terrorists, as the modern witch-hunt against internal critics in the United States has demonstrated. As does the

132. M. Koskenniemi, ‘“The Lady Doth Protest too Much” – Kosovo, and the Turn to Ethics in International Law’, (2002) 65 *Modern Law Review* 159, at 162 and 172.

133. Cf. E. W. Lefever, ‘Duty Bound’ (review of J. Elshtain, *Just War against Terror. The Burden of American Power in a Violent World* (2003)), *Washington Post*, 6 April 2003, To4.

134. Cf. G. Wills, ‘With God On His Side’, *NYT Magazine*, 30 March 2003, 29.

135. The result is that there is no chance of nuanced solutions. Schmitt’s piracy metaphor is particularly apt, the tradition being that rather than just punishing individual pirates, the entire pirate ship would be sunk in battle. ‘If the ship is captured, everyone will be hanged: captured together, hanged together, with the exception of those in chains.’ Reported by Balakrishnan, *supra* note 1, at 240. See further M. Koskenniemi, *The Gentle Civilizer of Nations* (2001), 434 and 462, who calls attention to the fact that by denominating an action ‘humanitarian’ the enemy forces are located outside the purview of humanity.

136. As to the subject matter cf. further J.-C. Monod, ‘La Déstabilisation humanitaire du droit international et le retour de la guerre juste’, 2004 *Les Etudes Philosophiques*, at 39 et seq., esp. at 40.

137. Cf. ‘President Bush Addresses the Nation’, 19 March 2003, <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html> (last visited 23 Aug. 2005).

138. D. Kristof, ‘Let’s Stay Focused on Postwar Goals’, *International Herald Tribune*, 29 March 2003, at 6.

observation by Achmed Chalabi, then leader of the Iraqi National Congress, which opposed Saddam Hussein's regime, that due to its rejection of the Iraq war, the UN became a de facto ally of Saddam Hussein.¹³⁹

Schmitt's alarm that value-charged war would spiral into *bellum internecium* or *bellum subjugatorium* seems substantiated by the current renaissance of a just war framework. Values like humanity or liberal democracy increasingly trump the UN Charter's far-reaching outlawry of international armed conflict¹⁴⁰ and provide for 'new', non-Charter titles *ad bellum*. *In bello* (and maybe even *post bello*), a 'tyranny of humanity or liberal democracy' is capable of justifying discriminating acts committed by the humane or democratic Self against the inhumane or non-democratic Other.

4.2. The non-transferability of Schmitt's concept of *Hegung des Krieges*

Schmitt conceived the concept of *Hegung des Krieges* as an instrument to humanize *actiones in bello*, for it was to counter a tyranny of asymmetrical values by hyper-politicizing, that is, by de-moralizing, war and conflict. However, this Westphalian concept of the *jus publicum europaeum* must not be entertained today, for it rests on false historic assumptions and is theoretically outdated.

Schmitt's history of the Westphalian world order is hopelessly romantic at best and evidently incorrect at worst. Witness his description in *Land und Meer*:

Für den Landkrieg haben die Staaten des europäischen Festlands seit dem 16. Jahrhundert bestimmte Formen herausgebildet, denen der Gedanke zu Grunde liegt, dass der Krieg eine Beziehung von Staat zu Staat ist. Auf beiden Seiten steht die staatlich organisierte, militärische Macht, und die Armeen tragen in offener Feldschlacht den Kampf untereinander aus. Als Feinde stehen sich nur die kämpfenden Heere gegenüber, während die nichtkämpfende Zivilbevölkerung ausserhalb der Feindseligkeiten bleibt.¹⁴¹

It is a tremendous misrepresentation of the European historic experience to portray Westphalian land war as a 'duel' between sovereign 'gentlemen'.¹⁴² Schmitt fails to notice that, historically, armed conflict had always been charged with ideological motives or at least with ideological rhetoric – the best example being the 1870–1 Franco-German war, where the enemy had become the *Erz- und Erbfeind*, that is, the inherited arch-enemy. To this extent it is a romantic idealization to assume that the concept of *Hegung des Krieges* actually succeeded in 'making a warring people do without discriminating against and defaming their enemies'.¹⁴³ Therefore the

139. Cf. 'Schiiten boykottieren Garners Konferenz', *Der Spiegel*, 15 April 2003, <http://www.spiegel.de> (last visited 23 Aug. 2005).

140. The shift in international law to ethics or morality in order to justify and legitimize the use of force becomes more transparent in situations exhibiting the incredibly high threshold that is set by the UN Charter's prohibition on the use of force.

141. 'For the war on land, the states of the European continent have constituted specific forms since the sixteenth century, forms that are based on the idea that war is a relationship between state and state. On both sides stands a state's organized military power, and the armies meet on the open battlefield. As enemies, only the fighting armies clash, while the non-fighting civil population stays out of hostilities.' Schmitt, *supra* note 54, at 89.

142. 'Duell zwischen satisfaktionsfähigen Kavalieren'. C. Schmitt, *Theorie des Partisanen* (1975), 49 et seq.

143. 'Menschen dahin zu bringen, dass sie auf eine Diskriminierung und Defamierung ihrer Feinde verzichten'. *Ibid.*, at 90.

alleged de-barbarization of war and conflict, as Schmitt ascribes to the Westphalian world order, is empirically unsustainable.

What is more, there are also theoretical reasons for speaking out against a possible transfer of the concept of non-discriminating, bracketed war to our post-Westphalian times. First, the Westphalian *domestic organization* of the state cannot be easily transferred. Schmitt himself has recognized in his late Weimar writings that, on one hand, the *jus publicum europaeum* had separated state and society and that, on the other hand, this separation was outdated as a result of democratic empowerment:

Die gewaltige Wendung lässt sich als Teil einer dialektischen Entwicklung konstruieren, die in drei Stadien verläuft: vom *absoluten* Staat des 17. und 18. Jahrhunderts über den *neutralen* Staat des liberalen 19. Jahrhunderts zum *totalen* Staaten der Identität von Staat und Gesellschaft.¹⁴⁴

Although one might want to challenge the total identity of state with society, their convergence cannot be reasonably disclaimed with regard to Western nations. The clear-cut distinction between state and society is lost, and motivates international aggressors to direct their attacks against (traditionally speaking) non-state targets – as tragically manifested by the 11 September attacks. Yet the humanizing function of the state, as Schmitt devised it, is only conceivable as long as the state is powerful enough to uphold a state-free society, that is, as long as the state is capable of preventing the total intensification of inter-state war by denominating a *justus hostis* and by walling off society against the conflict. The state accordingly loses these capabilities when state and society merge. This holds especially true for Schmitt's Weimar reconfiguration of the total state, which was to be constituted by a homogeneous *Volk* – to this extent I should only like to refer to the alleged predecessor of Schmitt's theory of 'democratic dictatorship', that is, to Rousseau, who has emphasized the important role of the private individual in mitigating war and conflict:

War is not a relation between men, but between powers, in which the private individuals are enemies only by accident, less as citizens than as soldiers. The foreigner who robs, pillages, and detains subjects without declaring war on the prince is not an enemy but a brigand; and even in the midst of war a just prince seizes everything in an enemy country that belongs to the public, but respects the person and goods of private individuals . . . One can kill the state without killing one single one of its members.¹⁴⁵

Not only does *Hegung des Krieges* rest on an outdated model of a powerful state separated from society, but this concept is also only theoretically sound where Schmitt's apocalyptic factual hypotheses stand and the provision of protection legitimizes the state. However, in the Western world, existing in a 'depoliticized' context,

144. 'The tremendous change can be construed as part of a dialectical development, which proceeds in three stages: from the absolute state of the seventeenth and eighteenth century to the neutral state of the liberal nineteenth century to the total state of an identity between state and society.' Schmitt, *supra* note 68, at 79.

145. J.-J. Rousseau, 'Fragments on War', reprinted in S. Hoffmann and D. P. Fidler (eds.), *Rousseau on International Relations* (1991), at 52.

establishing loyalty to the state depends on various other activities, such as policies oriented towards equality or social justice.¹⁴⁶

Second, in addition to the lack of comparability between Schmitt's Westphalian and the contemporary post-Westphalian understanding of the *intra*-national organization of the state, today's *inter*-national world order has moved away drastically from the Eurocentric *jus publicum europaeum*. Schmitt himself has recognized and accentuated the outdated 'Eurocentricity'¹⁴⁷ of the Westphalian *nomos*, which ended with the Great War¹⁴⁸ and which discriminated against non-Christian nations in its early phase and against non-civilized nations in its late phase.¹⁴⁹ These inferior nations were colonies or protectorates of the European states and provided free outer-European space. In fact, the whole concept of *Hegung des Krieges* rests on a very real colonial system. *Hegung des Krieges* was, according to *Der Nomos der Erde*, not only concentrated within Europe, but was also limited to Europe. Schmitt argues that lines drawn up in friendship defined geopolitical spheres and that non-discriminating war only took place within Europe – outside Europe, violence was unrestrained.¹⁵⁰ By apportioning the world in geopolitical zones, European sovereigns provided that extra-European conflicts, however bloody they were, did not reflect back on intra-European matters – states could be at war abroad, while living in a state of peace at home.¹⁵¹ Paradigmatically, Schmitt maintains that the collapse of these geopolitical areas – *Hegung des Krieges* and territory of unrestrained violence – marked the end of the Westphalian *nomos*. As an example, he refers to the inclusion of colonies in the territory of their European 'mother' states.¹⁵² Historically, the political was allocated a sphere of total intensification and a region of only limited violence. In Schmitt's account, the limitation of the *Hegung des Krieges* zone signified 'an enormous relief for inner European difficulties'.¹⁵³

Yet if the mitigation of antagonism, the prohibition of total war, rested on a pressure relief valve,¹⁵⁴ that is, a geopolitical arena of unrestrained war, *Hegung des Krieges* is not readily applied today. Obviously, the evolution of international relations, ongoing economic and social globalization, and the technological development of weaponry – in addition to the moral implications – forestall the demarcation of a region where states can clash freely. Conversely, the conceptualization of contemporary problems of international law and international relations through a Schmittian prism is, at best, a treacherous mission – Schmitt's solutions

146. Unsurprisingly, after the Second World War Schmitt became a grim critic of the welfare state, since it eroded the very basis of *Hegung des Krieges*. The welfare state rests, in a Schmittian analysis, the legitimacy of the state on activities that obfuscate the existence of the political.

147. For example cf. Schmitt, 'Die Einheit der Welt', reprinted in Maschke, *supra* note 52, at 500.

148. Cf. Schmitt, 'Der neue *Der Nomos der Erde*', *ibid.*, at 519.

149. Cf. Schmitt, *supra* note 54, at 73.

150. Cf. Schmitt, *supra* note 38, at 62.

151. Cf. Schmitt's summary on the distinction between intra-European and extra-European wars. See Schmitt, *supra* note 38, at 155.

152. *Ibid.*, at 207.

153. *Ibid.*, at 62.

154. *Ibid.*, at 66.

are rooted in an outdated understanding of the state and in an obsolete monopolar Eurocentrism. It is highly significant that Schmitt only related *Hegung des Krieges* to classical international law and refrained from – and in my opinion, was incapable of – reinventing a similar concept in his *Grossraum* model. Once the international system incorporates the whole globe without there being free space, the concept of *Hegung des Krieges* collapses.

With the concept of *Hegung des Krieges* not being transferable to our post-Westphalian world order, does this necessarily mean the reintroduction of just cause and its conflict-escalating consequences into the determination of international war? Are there, in other words, possible means of mitigating the political today – means that are not based on a Eurocentric system of all-powerful states separated from society? Responding to these questions with regard to Schmitt's insights, we are to think with Schmitt against Schmitt. I should like to outline two possible answers, one institutional and the other idealistic.

4.3. With Schmitt against Schmitt: institutionalizing the mitigation of the political

Schmitt institutionalized a system of powerful and sovereign European states as the means to establish an inner-European zone of *Hegung des Krieges*. The *jus publicum europaeum* was to transcend the conflict-escalating consequences of the pre-Westphalian *bellum justum* tradition, which had been governed by a tyranny of asymmetrical values and which had justified *in bello* discrimination against the unjust enemy. In his polemical use of history, Schmitt marshalled this historic account against the radical changes after the Great War, against the far-reaching outlawry of the sovereign's *jus ad bellum* and its legalization¹⁵⁵ by the League of Nations. In his critique, Schmitt equates the pre-Westphalian *bellum justum* and the post-Westphalian *bellum legale*.¹⁵⁶ Since the UN Charter continues a far-reaching ban on the international recourse to force, and since this regime on the use of force has been labelled a 'neo-just war doctrine',¹⁵⁷ Schmitt's international writings raise an interesting and important question: to what extent are *bellum justum* and *bellum legale* generic concepts? Or, rather, is *bellum legale*, in contrast to *bellum justum*, capable of mitigating the total intensification of international warfare?

To a certain extent I think that Schmitt was right and that there are parallels between *bellum justum* and *bellum legale*, yet I similarly think that Schmitt glanced over differences in degree that warrant reclassification as differences in kind.

With regard to the comparability of *bellum justum* and *bellum legale*, legality serves as a demarcation line in the Charter system – between law-breaking and law-abiding member states and between legal and illegal wars. The configuration of the Charter

155. Schmitt followed the prevailing interpretation of classical international law, namely that recourse to force was but a political decision outside the realm of law, i.e. it was extralegal, with international law only prescribing *in bello* equality. In a second line of reasoning, which one might call a Vattelien tradition, war might have fallen within the purview of law, but, since every state was its own judge and the system lacked a superior deciding body, *jus in bello* (and *jus post bello*) were not to differentiate between the parties.

156. As to the term *bellum legale* cf. J. L. Kunz, 'Bellum Justum and Bellum Legale', (1951) 45 AJIL 528, at 528.

157. I. L. Claude, 'Just Wars: Doctrines and Institutions', (1980) 95 *Political Science Quarterly* 83, at 92.

is similar to the hierarchical dualism of values such as humanity, liberal democracy, or justice. For by not complying with its obligations under the Charter, the law-breaker becomes *hors du régime*. Legal war is the realization and manifestation of the UN system (*bellum legale* replaces *bellum justum*), whereas illegal conduct (including illegal war) is rebellion against it.¹⁵⁸ To give one example, only by considering that modern international law elevates certain parties to an international conflict over other parties is it possible to comprehend that intentionally to attack UN personnel involved in humanitarian assistance and peacekeeping missions is deemed a ‘war crime’ under the Rome Statute of the International Criminal Court.¹⁵⁹ The traditional equality of the warring parties is obviously renounced once a party is legally immunized from attacks and once the attacker is degraded to being a war criminal. In this way, the UN Charter regime on the use of force is – as Japanese literature seemingly has already concluded – premised on a concept of discriminating war,¹⁶⁰ for it differentiates between dissimilar parties. Further, the totalization ascribed to a just war framework is mirrored in the United Nation’s capacity¹⁶¹ to override neutrality. For instance, in its response to the Iraqi invasion of Kuwait, the Security Council required all states to prevent the sale or supply to Iraq of all commodities and products with the exception of strictly medical supplies and foodstuffs for humanitarian purposes.¹⁶² In contrast, under classical international law, as enshrined in common Article 7 of the 1907 Hague Conventions V¹⁶³ and XIII¹⁶⁴ and as cherished by Schmitt as representing a system of *Hegung des Kriegeres*, a ‘neutral Power [was] not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet’.¹⁶⁵ It comes as no surprise, then, that early commentators thought that neutrality was incompatible with the UN Charter.¹⁶⁶

However, and here come the differences between *bellum justum* and *bellum legale*, the UN system allows for far more nuanced determinations of legal cause to wage *bellum legale* than does the determination of just, humane, or liberal democratic cause

158. For example, the UN Security Council vindicated the invasion of Haiti in 1994 on the grounds that the new government – established by a coup d’état – was a condemnable ‘illegal de facto regime’ that was in breach of its relevant duties to the UN (see UN Doc. S/RES/940 (1994)). The annexation of Kuwait by Iraq in 1990 was condemned as having ‘no legal validity’ (see UN Doc. S/RES/662 [1990]). The subsequent war against Iraq was based on its ‘flagrant contempt’ of the UN system and its failure to comply with its obligation to obey the Security Council’s demand to withdraw from Kuwait (see UN Doc. S/RES/678 [1990]). Explaining the similar concept of the League of Nations, Fischer Williams, *Chapters on Current International Law* (1929), 72, contends: ‘We have thus an automatic test of, at any rate, one kind of “unjust” war – war to which a State Member of the League resorts in violation of the League Covenant, or which is resorted to by a non-member of the League under similar conditions, is an “unjust” war.’ (Reported by J. von Elbe, ‘The Evolution of the Concept of the Just War in International Law’, (1939) *AJIL* 665, at 687 et seq. in n. 170).

159. Rome Statute, Art. 8(2)(b)(iii).

160. Kunz, *supra* note 156, at 532, uses this very term to describe the approach taken by the League of Nations.

161. Nothing more and nothing less.

162. UN Doc. S/Res/661 (1990).

163. On Rights and Duties of Neutral Powers and Persons in Case of War on Land.

164. On Rights and Duties of Neutral Powers in Naval War.

165. Emphasis added.

166. For an instructive overview of the literature consistent with this view see G. C. Petrochilos, ‘The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality’, (1998) 31 *Vanderbilt Journal of Transnational Law* 575, at 581, n. 26.

to wage *bellum justum*. As an example, the UN Charter did not dispose of neutrality as a political institution, because the authorization of the use of force (i.e., the right to act) is to be distinguished from its prescription (i.e., the obligation to act).¹⁶⁷ Only in the latter case, that is, when the Security Council takes affirmative action, does the UN system bar the possibility of adopting a completely neutral position.

The UN Charter replaced moral with procedural reasoning intrinsic to formal legality¹⁶⁸ and spiritual logic with secular procedures. The idea behind this was to refute a conception of divine war, a concept that did not withstand the pre-Westphalian religious wars in Europe. Legal procedures are capable of restraining the potential demonization of the enemy. Although international law does not hold unambiguous answers to questions of war and peace, it still provides a common language in order to foster discussion and discourse. Seeing the UN or the UN Security Council¹⁶⁹ as *fora* for international discourse makes it possible to strengthen transparency, to bridge dichotomies, and to increase the likelihood of more nuanced, less absolute, outcomes.

The risk of a just war framework flows from its promoting idiosyncratic subjectivity in the determination of a valuable cause for waging war; the tyranny of asymmetrical values such as justice, humanity, or liberal democracy flows from their merely relying on moral legitimacy, as the Self can find in solipsistic isolation. In contrast, the UN brings together the political pluriverse; as an institution, the UN guarantees sociological legitimacy. This is highly important today: even after the 2003 Iraq invasion, that is, after a war waged under the rhetoric of non-Charter war titles, both ‘the US and Great Britain rushed to seek Security Council authorization for their joint occupation of Iraq’.¹⁷⁰

With Schmitt, one has emphatically to deny a return to pre-Westphalian *bellum justum*. In a way with Schmitt, one has to remind oneself over and over again that the true problem is the possibility of the total escalation and intensification, that is, the barbarization and de-humanization, of mortal conflict. Against Schmitt, his concept of *Hegung des Krieges* is not transferable to our post-Westphalian times, nor did he appreciate the differences in degree between *bellum justum* and *bellum legale*. Schmitt conceived his concept of non-discriminating war between equals as a way to solve the aforementioned true problem and thus ‘founded’ the inner-European zone of bracketed war. With this concept offering no real solution, the UN may be reconfigured as being capable of mitigating the unwanted consequences of a discriminating concept of war: because of the procedural obstacles, the discrimination entailed by legalized war cannot spiral to extremes, especially to the demonization of the enemy. With Schmitt against Schmitt, we may thus rethink the UN as not so much positively striving for absolute depoliticization or absolute peace, but rather as negatively moderating the total intensification of human enmity. This would

167. Cf. Petrochilos, *supra* note 166, at 583.

168. Cf. Kunz, *supra* note 156, at 532.

169. However questionable this institution might be from a democratic viewpoint that considers the world community as the *demos*.

170. M. Albright, ‘Think Again: The United Nations’, (2003) September/October *Foreign Policy*. http://www.foreignpolicy.com/story/cms.php?story_id=34&print=1 (last visited 23 Aug. 2005).

warrant it in reclassifying the differences in degree between pre-Westphalian *bellum justum* and post-Westphalian *bellum legale* as differences in kind.

4.4. With Schmitt against Schmitt: emancipating the people to even out asymmetries

Beside the previous institutional way of thinking with Schmitt against Schmitt, I shall now finally suggest an idealistic answer to the question of how to fend off a tyranny of values (such as humanity and liberal democracy) in the determination of international war. To a certain extent we are to appreciate that Schmitt sought to ‘emancipate’ the just enemy, that is, to welcome him as an equal. The political, that is, the friend–enemy distinction, is formally based on two *symmetric* counter-concepts.¹⁷¹ While value-oriented rhetoric asymmetrically denominates the non-valuable as inferior, the friend–enemy dichotomy dissolves hierarchies and thus forestalls discrimination against the Other. In fact, the enemy is not so much an Other but rather a Brother: the friend–enemy distinction points, as Schmitt wrote in a private letter, to the primordial tension between Cain and Abel.¹⁷² We find an exegetically ideal idealization of the relationship between friend and enemy in *Land und Meer*, in Schmitt’s account of the relationship between whale-hunter and whale:

Das war ein lebensgefährlicher Kampf zweier Lebewesen, die sich beide, ohne Fisch im zoologischen Sinne des Wortes zu sein, im Element des Meeres bewegten . . . Herman Melville . . . beschreibt in seinem *Moby Dick*, wie hier eine, man kann sagen persönliche Beziehung und eine innige, feind-freundschaftliche Bindung zwischen dem Jäger und seinem Wild eintritt.¹⁷³

Therefore Mégret’s analysis that to ‘speak of war against the background of the 11 September attacks is to engage, analytically speaking, in an eminently Schmittian exercise of enemy designation’¹⁷⁴ is, to speak frankly, wrong; the contrary holds true for values such as humanity and liberal democracy, as they were conjured after 11 September to unite the political community within, encouraged discrimination against the non-valuable Other, while a Schmittian exercise of enemy designation is to prevent the arrogation of superiority by the Self. At least in theory, Schmitt’s concept of the political is a remarkable achievement, because friend and enemy are not asymmetrically, but rather symmetrically, opposed. Likewise, friend and enemy are more than mere epistemological categories which are to be filled with asymmetric ideology and motives; rather, as the self-reproducing system of *Hegung des Krieges* illustrates, symmetry prevails, for even when a concrete war operates with asymmetric rhetoric, this war is to be prevented from total escalation and intensification.

171. Cf. Koselleck, *supra* note 127, at 258.

172. Reported by C. R. Köster, *Außenpolitik und Politikbegriff bei Carl Schmitt* (1998), at 70.

173. ‘This was a life-endangering battle between two creatures, both of which moved about in the element of the sea, with neither of them being a fish in the zoological sense . . . Herman Melville . . . expresses in his *Moby Dick* how a personal relationship and an intimate, hostile–friendly bond comes about between the hunter and his game.’ Schmitt, *supra* note 54, at 33.

174. F. Mégret, ‘“War”? Legal Semantics and the Move to Violence’, (2002) 13 EJIL 361, at 366.

In his Weimar period, and here I return to the first section of this article, Schmitt believed that a strong leader was to compose fictional friend–enemy groupings: internal homogeneity and external enmity were nothing more than a nihilistic myth, hypostatized by the caesaristic cult of the political leader. According to my interpretation, Schmitt’s theory of ‘democratic dictatorship’ was to neutralize the empowerment of the masses – empowerment, not emancipation, of the masses, because Schmitt was not prepared to acknowledge any self-limiting or self-controlling impetus within the flood of democracy.

With Schmitt, therefore, one has to underline the humanizing possibilities of a symmetric design of counter-concepts. A first question, then, reads: is it possible to transfer this symmetric design to values like humanity or liberal democracy, values that are obviously becoming increasingly important in today’s debate on international law and politics? To a certain extent I think that humanity and liberal democracy not only imply a ‘tyranny of values’, but that they also bear connotations of tolerance, leniency, and brotherhood. More even than the Schmittian concept of the ‘beloved’ enemy, humanity and liberal democracy are open to a strong emphasis on their symmetrical implications.

However, whom could we entrust with implementing the predominance of these symmetrical, non-discriminating, non-degrading, non-tyrannical implications of wars waged under the auspices of humanity or liberal democracy? With regard to this question, I suggest that one argues against Schmitt. Although it might be, from a realistic point of view, hopelessly idealistic, a vision of an emancipated people might hold the ultimate humanization of armed conflict and human enmity. An informed people, free to discuss and to criticize the political decision to go to war, and similarly free to scrutinize individual acts of war, might be the best prevention of barbaric means of warfare. In a certain, albeit perfidious, way, the influence of public opinion on the business of war has already become visible today, although the emancipation of the people has only begun and is far from being complete. After all, the military’s attempt to decrease collateral damage and to not use indiscriminate weapons – at least when there is free, that is, not embedded, journalistic coverage – epitomizes the people’s (self-)awareness that neither humanity nor liberal democracy nor justice actually justifies the arbitrary killing and maiming of fellow human beings.

The ultimate solution to the international problem of how to mitigate the political might thus lie not in the international, but rather in the domestic arena. To interlink the domestic with the international would therefore represent the holistic concept to fend off the reintroduction of asymmetrical just cause into the determination of international war. With Schmitt against Schmitt, and following his grand opening of *Der Begriff des Politischen*, that is, ‘The concept of the state presupposes the concept of the political’, a visionary project might be formulated as follows: ‘the humanization of international armed conflict presupposes the symmetrical design of values, which is entrusted to an emancipated people’.