

forum historiae iuris

Erste europäische Internetzeitschrift für Rechtsgeschichte

<http://www.forhistiur.de/>

Herausgegeben von:

Prof. Dr. Rainer Schröder (Berlin)
Prof. Dr. Hans-Peter Haferkamp (Köln)
Prof. Dr. Christoph Paulus (Berlin)
Prof. Dr. Albrecht Cordes (Frankfurt a. M.)
Prof. Dr. Mathias Schmoeckel (Bonn)
Prof. Dr. Andreas Thier (Zürich)
Prof. Dr. Franck Roumy (Paris)
Prof. Dr. Juan Sainz Guerra (Jaén)
Prof. Dr. Emanuele Conte (Rom)
Prof. Dr. Massimo Meccarelli (Macerata)
Prof. Dr. Michele Luminati (Luzern)
Prof. Dr. Francesco Di Donato (Benevento)
Prof. Dr. Stefano Solimano (Piacenza)
Prof. Dr. Martin Josef Schermaier (Münster)
PD Dr. Hans-Georg Hermann (München)
Prof. Dr. Thomas Duve (Buenos Aires)

Artikel vom 31. März 2006

© 2006 fhi

Wiederveröffentlichung

Zitiervorschlag:

<http://www.forhistiur.de/zitat/0603koskenniemi.htm>

ISSN 1860-5605

Martti Koskenniemi:

International Law as Political Theology: How to read the *Nomos der Erde*?*

I

Rarely in modern times have Europe and the United States drifted as far apart as they have today. It would be wrong to seek any single cause or a predominant theme for their separation. Much history and trauma, on both sides, is surely involved. A mutual *ressentiment* of the current intensity is not born overnight. But one of the more visible, and perhaps sharper forms in which the divergence has appeared concerns thinking about international affairs. For the Americans, ever since September 11, the old truths of political realism seem to have overwhelmed any hopes for a more peaceful and united world that the end of the Cold War had brought about. The world is still as dangerous as ever, perhaps even more so, due to the extraordinary types of weapon and strategy possessed by America's enemies. A dangerous world requires a hardening of attitudes and more determinate, less conciliatory behaviour. For decades, the United States has agreed to play the diplomatic game with the Europeans and an amorphous „international community“, united often only by its implacable opposition to everything the United States stand for. Now this must stop.

1

The European view of the world could scarcely be more different. „Nowadays...the United Nations Charter has almost universally been recognized as the constitutional document of the international community of States“.¹ Here is Antonio Cassese, former President of the International Criminal Tribunal for the Former Yugoslavia:

2

„at least at the normative level the international community is becoming more integrated and - what is even more important - [...] such values as human rights and the need to promote development are increasingly penetrating various sectors of international law that previously seemed impervious to them“.²

Where Washington decision-makers and their academic epigones see the world as sharply divided between „us“ and the „enemies of freedom“, the Europeans have dusted off constitutional themes familiar from the inter-war period, and apply them not only to the „paradise“ of the European Union but, with an even greater sense of urgency, to the international world. In policy and in doctrine, Europeans embrace the Kantian view that

3

* Previously published in: „Constellations“ 2004, pp. 492-511

1 Bruno Simma & Andreas Paulus, 'The „International Community“ Facing the Challenge of Globalization', 9 EJIL (1998), p. 274.

2 Antonio Cassese, *International Law* (Oxford University Press, 2002), p. 45.

the international world will in due course organise itself analogously to the domestic one, as a vertically constraining system of law manifested in notions such as *jus cogens* or universal jurisdiction over crimes against humanity, and that it is the business of international institutions to bring this about.³ For an old-European thinker such as Jürgen Habermas, the terms of the American-European controversy are clear: „The crucial issue of dissent is whether justification through international law can, and should be replaced by the unilateral, world-ordering politics of a self-appointed hegemon“.⁴

Out of reasons of polemic, but also in a genuine effort to understand, Europeans now often view American policies and attitudes through Carl Schmitt’s writings during the inter-war era and above all in his 1950 *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*. Whatever Schmitt’s political choices, readers have been struck by the expressive force of his critiques when applied to contemporary events: the war on terrorism as a morally inspired and unlimited „total war“, in which the adversary is not treated as a „just enemy“; the obsolescence of traditional rules of warfare and recourse to novel technologies - especially air power⁵ - so as to conduct discriminatory wars against adversaries viewed as outlaws and enemies of humanity; Camp Delta in the Guantánamo naval base with its 660 prisoners from the Afghanistan war as a normless exception that reveals the nature of the new international political order of which the United States is the guardian - the source of the normative order, itself unbound by it.⁶

Such a view puts the „war on terrorism“ squarely within the thematic of the last 100 pages of the *Nomos der Erde* that discuss „the question of the new Nomos of the Earth“. To be sure, Schmitt saw the new world order commence already in the declarations of war on Germany by the allied and associated powers in the first world war and consolidated by the way the Versailles conference was conducted „against“ (instead of „with“) Germany, by

3 For a brief overview of the discussion, see Brun-Otto Bryde, ‘Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts’, 42 *Der Staat* (2003), 61-76. For the tradition of reading of UN Charter as a constitutional document, see Andreas Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (Munich, Beck, 2001), 292-318.

4 Jürgen Habermas, ‘Interpreting the Fall of a Monument’, 4 *German Law Journal* (2003), 706.

5 For Schmitt’s reflections on the change wrought on the nature and regulation of warfare by air power, see *Nomos* p. 293-8.

6 See e.g. Giorgio Agamben, *État d’exception* (Paris, Seuil, 2003), p. 12-14, 41; Etienne Balibar, *L’Europe, l’Amérique, la guerre. Réflexions sur la médiation européenne* (Paris, Découvert, 2003), p. 141-157; Michael Hardt & Antonio Negri, *Empire* (Harvard University Press, 2000), p. 16-17. See also the remarks by Jürgen Habermas and Jacques Derrida in Giovanna Borradori (Ed.); *Philosophy in a Time of Terror. Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago University Press, 2003), p. 38, 53-54, 100-102. Schmittian analysis also informs the useful Ulrich K. Preuss, *Krieg, Verbrechen, Blasphemie. Zum Wandel bewaffneter Gewalt* (Berlin, Wagenboch, 2002), esp. p. 43-48 as well as Günter Frankenberg, *Autorität und Integration. Zur Grammatik von Recht und Verfassung* (Frankfurt, Suhrkamp, 2003), p. 13-45. Among international lawyers, these themes are highlighted e.g. in Frédéric Mégret, ‘War: Legal Semantics and the Turn to Violence’, 12 *European Journal of International Law* (2002), p. 361-400; Gregor Noll, ‘Force, Partisanship, Dislocation: An Essay on International Law in the State of the Exceptional’, in: Jarna Petman & Jan Klabbers, *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi* (Leiden, Nijhoff, 2003), p. 207, 212-219 and Jarna Petman, ‘The Problem of Evil in International Law’, *ibid.* p. 126-128.

the institution of the League of Nations as an instrument of British and American policy in Europe and above all, by the criminalization of the war of aggression in the 1928 Briand-Kellogg Pact and the 1945-46 Nuremberg War Crimes trial. To apply Schmitt's description of the new *Nomos* to the behaviour of the Western Powers in Kosovo and Iraq, the 50-year interlude may be explained by the Cold War having prevented a full-scale moralization of international politics. Ironically, then, for half a century, the Soviet Union may have taken the role of the Schmittian *Katechon* - restrainer of the coming of the Antichrist.⁷

Nomos der Erde can be read from different perspectives. On its surface, far from appearing as Schmitt's „most idiosyncratic book“,⁸ it appears to be a history of international law and international relations. Despite its sometimes esoteric mythological or etymological speculations, it recounts much that is commonplace for mainstream historiography in these fields: the importance of the turn from religious medieval „unity“ to the secular system of territorially limited sovereignty under the treaties of Münster and Osnabrück, the contrast between inter-European law and the state of nature projected onto the new world, and the turn to a pacifist universalism under the League Covenant. The direct influence of *Nomos der Erde* has been small: until very recently, it existed only in German, and even for German lawyers, referring to it may have been a *faux pas*.⁹ Nevertheless, Schmitt's voice is clearly audible in such German post-war histories of international law as those by Grewe and Ziegler.¹⁰ Through the writings of Hans Morgenthau, Schmittian perspectives became absolutely central for international relations „Realism“ - a pedigree often left unrevealed.¹¹ *Nomos der Erde* is also often read biographically, as the most developed achievement in Schmitt's turn to international law after his fall from grace in the Nazi party in 1936 and his consequent turn from *Staatsrechtslehre* to more innocent academic pursuits. From this perspective, *Nomos* (which was finalised already in 1945) appears to weave together Schmitt's inter-war arguments on the League of Nations and the „discriminatory concept of war“, aspects of his *Grossraumlehre*, and his war-time texts on the opposition of „Land and Sea“, foreshadowing later commentary on international politics.

6

7 See section IV below.

8 Jan-Werner Müller, *A Dangerous Mind. Carl Schmitt in Post-war European Thought* (Yale University Press, 2003), 88.

9 A French edition was published in 2001 as Carl Schmitt, *Le nomos de la terre* (traduit par Liliyane Deroch-Gurcel, révisé, présenté et annoté par Peter Haggemacher, Paris, PUF, 2001).

10 See Wilhelm Grewe, *Epochen des Völkerrechts* (Berlin 1986), translated into English as *Epochs of International Law* (de Gruyter, 2000). In 1948, Schmitt held Grewe as the „foremost German international lawyer“. Carl Schmitt, *Glossarium. Aufzeichnungen des Jahre 1947-1951* (Berlin, Duncker & Humblot, 1995), p. 203. For reviews highlighting the Schmittian perspective of Grewe's formidable history of international law, see Bardo Fassbender, 'Stories of War and Peace: On Writing the History of International Law in the Third Reich and After', 13 *European Journal of International Law* (2002), p. 479-512 and Martti Koskenniemi, 'Review of Grewe, *Epochs of International Law*', *Kritische Justiz* (2002) p. 277-281. The „hegemonic“ perspective appears also in Karl-Heinz Ziegler, *Völkerrechtsgeschichte* (Munich, Beck, 1994).

11 See generally Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1879-1960* (Cambridge University Press, 2001), p. 413-509.

I will, however, read *Nomos* in the context of Schmitt's general *oeuvre* in order to make the point that the book's arguments should not be understood as mere historiography or contextualised against the background of Schmitt's turn to international politics. Instead, I see the mixture of *Ideengeschichte*, mythical speculation and sharp insight into international politics as fragments from a political theology that is not explicitly articulated therein.¹² Reading it in this light might perhaps suggest a novel twist for the European-American controversy. The idea would be not (only) to employ Schmitt to understand the United States but to think *with* and *against* Schmitt in the interests of today's politics.

7

II

Like international law textbooks, Schmitt represents the history of international law in three stages: the medieval *Respublica Christiana* was a religiously based, homogenous order that received its validity from God as mediated by the right ecclesiastic and secular authorities claiming universal jurisdiction. It was replaced by the territorial State as the principle of delimitation of spatial authority in Europe that realised a sharp distinction between secular and Church jurisdiction. The *Jus publicum Europaeum* that came to regulate the relationship between European States was consolidated through the great discoveries that opened up non-European territory as a field of unlimited European land-taking and made it thus possible for the European order itself to remain stable. The great merit, for Schmitt, of this system lay in the manner it was able to limit inter-European warfare by conceiving it as a public law status between formally equal sovereigns, by replacing the medieval notion of the *justa causa belli* by the formal concept of the *justus hostis*. This enabled treating enemies on an equal basis, through formal rules and without existential enmity. War became a „duel“, a regulated procedure for resolving inter-European rivalries.

8

Schmitt did not hide his admiration for the *Jus publicum Europaeum* and though he recognised that there was no return to it, he still used it as the standard for his criticism of the liberal universalism that animated the post-Versailles system and buttressed the power of Western allies over their enemies, now targeted by a „discriminatory“, in principle total war. By contrast, „[t]he interstate wars of 1815-1914 were in reality orderly procedures, encompassed neutral Great Powers and essentially juridical, in comparison to which modern police actions and pacification of the violators of peace appear as sinister attempts at annihilation“.¹³ In fact, *Nomos der Erde* was less a history of international law than

9

12 In this regard, my reading follows the „theological“ interpretation of Schmitt's work, as influentially proposed in Heinrich Meier, *Carl Schmitt and Leo Strauss. The Hidden Dialogue* (Translated by J. Harvey Lomax and Foreword by Joseph Cropsey, University of Chicago Press, 1995) and Heinrich Meier, *The Lesson of Carl Schmitt. Four Chapters on the Distinction between Political Theology and Political Philosophy* (Transl. by Marcus Brainard, University of Chicago Press, 1998).

13 Schmitt, *Nomos*, p. 158. The dating here is odd. Modern histories of war do stress the limited and „institutional“ nature of late seventeenth and early eighteenth century wars while the post-Napoleonic era already captures mass armies motivated by nationalist ideas while „the purpose of the battle was to annihilate the enemy, not force him to surrender“ - a „descent into total war“, K.J. Holsti, *State, War, and the State of War* (Cambridge University Press, 1996), p. 33.

political manifesto against the moralisation of warfare that Schmitt saw as a cynical instrument to justify the enormous destruction that Western technological superiority was inflicting on its adversaries. The moral arguments made by the British and the Americans in the 20th century may have resembled the notions of the just war but in fact had „nothing in common“ with the moral basis of the medieval legal order, though Western lawyers had started to celebrate 16th century scholasticism (above all Francisco de Vitoria and Francisco Suárez) as their true predecessors. The replacement of true religion through a morality of secular „values“ was in fact a nihilism. And „nihilism is worse than anarchy“.¹⁴

Much in this critique seems correct. But what is problematic is its simple juxtaposition of a virtuous past in which legal rules channelled and limited intra-European warfare with a present period of hypocrisy and danger in which nothing stands in the way of the hegemonic pursuits of a single superpower. The problems are twofold. First, Schmitt's 1950 acceptance of the international law profession's own narrative about the *Jus Publicum Europaeum* during the 400 years of European predominance is not based on a concrete analysis of European societies in 1500-1900, and even less on the reality of European warfare during that time. Instead, it is a projection of his 1922 dictum that „[a]ll significant concepts of the modern theory of the state are secularised theological concepts“.¹⁵ Through the use of the notion of „*Nomos*“ Schmitt gives the impression of describing a „concrete order“ when he is simply describing the logical corollaries of a theory of domestic absolutism.

The second problem lies in Schmitt's apparently vehement rejection of the standpoint of the universal that seems to inform his critique of the nihilism of the secular „values“ behind humanitarian internationalism. In fact, however, Schmitt's attack on the liberal humanists, the neutralisers and depoliticizers, is not based upon a rejection of universalism but on an unarticulated distinction between a „false“ and a „genuine“ universalism. This is, again, not apparent as Schmitt refrains in 1950 from expressing the standpoint on which his own universalism is based and which he uses to make the distinction between the Catholic scholastics of the 16th century and the moralistic enthusiasm of the apologists for the new *Nomos*.

III

Nomos der Erde grounds the European order on the emergence of the state as the political form that regulated the occupation and administration of land inside and outside Europe from the late-15th until late-19th century. This history is constructed out of a definite relationship between three key Schmittian concepts: the concrete order, occupation of land, and statehood. That Schmitt did not tell European legal history in terms of the emergence and transformation of „great principles“ – as had been done by the Alsatian Robert

14 Schmitt, *Nomos*, p. 159.

15 Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (transl. by George Schwab, MIT Press, 1985), p. 36.

Redslob three decades before¹⁶ – followed from his view of law as the „concrete order” (*konkretes Ordnungsdenken*) as opposed to what he characterised in 1934 as the alternative jurisprudential approaches of „normativism” and „decisionism”.¹⁷ That Schmitt always saw himself as a lawyer above all did not mean he thought he represented a marginal technical craft and he positively abhorred the view of the legal scholar as a mere describer of the effects of legislation.¹⁸ He understood law broadly as *Recht* (and *Nomos*) in contrast to *Gesetz* or *loi*, as an expression of the fundamental - and irreducibly political - choice on which lay the unity of the human community - that is, during the European age, the State. It was both wider and narrower, and above all, more fundamental than the positive laws generated by what Schmitt ridiculed as the „motorised legislator” of the legislative State.¹⁹ „The law is *always* wiser than the legislator”.²⁰ For Schmitt, writing in 1943, historical jurisprudence remained the last carrier of this understanding - „the unity of the legal will as opposed to the multiplicity of egoistic parties and factions”.²¹ As „concrete order thinking” jurisprudence would always need to go beyond mere positive laws or legislative „plans”. It would need to grasp the substance of the choice on which a community’s identity dependent. This would not be a mere historiographical or legal-positivist task but involved reaching towards a political standpoint: „The concept of the state presupposes the concept of the political”.²²

To elucidate the concrete order for which international law in the European period gave expression, Schmitt postulated a foundational relationship between order in the human community and the land it inhabited (*Ordnung-Ortung*).²³ If land-taking (*Landnahme*) was the primal act of community, then the method of effective land-distribution in a period provided its concrete order, its *Nomos*. For four hundred years, since the Great Discoveries, the *Nomos* of the earth had consisted of the division of European territory between European States and their expansion through acts of land-taking outside Europe. Since the end of the seventeenth century, this order had been supplemented by the alien

13

16 Robert Redslob, *L’Histoire des grands principes de droit des gens* (Paris, Rousseau, 1923).

17 Schmitt’s ”concrete-order-thinking” as a jurisprudential doctrine was expounded in his 1934 work *Über die drei Arten des rechtswissenschaftlichen Denkens* (2nd edn., Berlin, Duncker & Humblot, 1993).

18 See Carl Schmitt, ‘The Plight of European Jurisprudence’ (transl. from *Die Lage der europäischen Rechtswissenschaft*, 1943/44), in 83 *Telos* 1990, p. 49. This aspect is usefully emphasised in Reinhard Mehling, *Carl Schmitt zur Einführung* (Hamburg, Junius, 2001) as well as in William E. Scheuerman, *Carl Schmitt. The End of Law* (Boston, Rowman & Littlefield, 1999). Likewise Agostino Carrino, ‘Carl Schmitt and European Juridical Science’, in Chantal Mouffe (ed.), *The Challenge of Carl Schmitt* (London, Verso, 1999), p. 180-190.

19 See in particular Carl Schmitt, *Legalität und Legitimität* (Berlin, Duncker & Humblot, Berlin 1988 [1932]).

20 Schmitt, ‘The Plight of European Jurisprudence’, p. 49.

21 *Id.* The article ends in an emphasis on Savigny’s contemporary importance.

22 Carl Schmitt, *The Concept of the Political* (translated and with an introduction by George Schwab, The University of Chicago Press, 1996), p. 19.

23 Schmitt, *Nomos*, p. 13-20.

aspect of the sea, dominated by the people of the sea - the British. But a reasonable equilibrium had been attained by the Peace of Utrecht (1713) between it and the States of the continent especially through the safety-valve created by the unlimited possibility of occupation of land areas outside Europe.²⁴

This new, State-centric system of public order, Schmitt argued, had had the extraordinary merit of limiting and channelling inter-European warfare.²⁵ This was an effect of the agnosticism of that law about matters of religion: *silete Theologi in munere alieno!*²⁶ From this followed the transformation of the religiously inclined *just war* into a purely secular notion of the *formally legal* war between European States. In the European era, and this is central to Schmitt's normative argument, war became a regulated rivalry, a duel between formal States, conducted strictly following the procedures laid down by the *Jus publicum Europaeum* while unlimited enmity was projected „beyond the line“ - into the non-European world.²⁷

This narrative is very dubious both in regard to the nature of the land-taking that it postulated and its categorical view of the principle of „no peace beyond the line“.²⁸ But it is hardly insignificant that it was practically identical with the one told by representatives of the *Jus publicum Europaeum* themselves, in particular German public law experts such as Georg Friedrich von Martens (1756-1822) and Johann Ludwig Klüber (1762-1837), writing in the period of the post-Napoleonic restoration for diplomats and statesmen and restating the formal principles of the diplomacy of the *ancien régime*. Their histories of *Le droit public de l'Europe* restated the narrative of the fall of the medieval *Respublica Christiana* due to dissension peaking in religious civil war and of the Peace of Westphalia as a kind of social contract of mutual toleration - *cuius regio eius religio* - between European sovereigns.²⁹

But in adopting that view of *Le droit public de l'Europe*, Schmitt was in danger of characterising it precisely in the formal and abstract terms which he ridiculed in attempts to defend the Weimar constitution.³⁰ The treatises by von Martens and Klüber consisted of

24 For Schmitt, the sea was always a principle specific for an unlimited, commercial and thus typically „British“ and later „Anglo-American“ order, in tension with the continent. See Schmitt, *Nomos*, p. 144-156 and ‘Das Meer gegen das Land’, in *Staat, Grossraum, Nomos. Arbeiten aus den Jahren 1916-1969* (Berlin, Duncker & Humblot 1995), p. 395-400 as well as ‘Staatlicher Souveränität und freies Meer. Über der Gegensatz von Land und See in Völkerrecht der Neuzeit’, *ibid.* p. 401-430.

25 Schmitt, *Nomos*, p. 112 and *passim*.

26 Schmitt, *Nomos*, p. 96.

27 Schmitt, *Nomos*, p. 142-152.

28 The unlimited nature of the warfare by the colonial powers outside Europe has been challenged in Jörg Fisch, *Die europäische Expansion und das Völkerrecht* (Stuttgart, Steiner, 1984).

29 Martens, G.F. de, *Précis du droit des gens moderne de l'Europe, précédé d'une Introduction et complété par l'exposition des doctrines des publicistes contemporains et suivi d'une Bibliographie raisonnée du droit des gens par M. Ch. Vergé* (2nd French edn. Paris, Guillaumin, 1864); Klüber, J.L., *Droit des gens moderne de l'Europe* (Stuttgart, J.G. Cotta, 1819).

30 Scheuerman, *Carl Schmitt*, p. 178-179.

elaborate classifications and formal distinctions between different types of States, different classes of representatives, groups of treaties, and typologies of procedural relationship. Indeed, the thrust of *Le droit public de l'Europe*, as understood by its predominant representatives themselves, lay precisely in its rigorous formalism, its absolute distance from the social lives of European nations.³¹ That Schmitt could possibly identify this superficial network of diplomatic protocols as the *Nomos* of the world and still believe that what he was describing was neither a naturalist abstraction nor an empty *Vertragspositivismus* was only possible by recourse to a background assumption about the intrinsic worth of European statehood conceived in the pre-revolutionary manner, that is, as *absolutist* statehood.

For Schmitt, as is well-known, the concept of the state presumes the concept of the political, and the political has to do with the opposition between friend and enemy. That Schmitt could see the European States-system of 1492-1890³² as intrinsically beneficent followed from the way he saw it analogously to the Catholic Church as a political form that reduced the *complexio oppositorum* into a manageable set of territorial delimitations controlled by the balance of power between authoritarian units each of which was able to maintain internal order and direct expansive energies to an unlimited rivalry outside Europe.³³ In other words, and though Schmitt avoids making this explicit in the *Nomos der Erde*, his endorsement of the old European order emerges from his pre-war writings on the State which supported precisely the kind of absolutist claims of sovereignty against which the Revolution had been initiated.³⁴

Ostensibly, Schmitt based the concreteness of his analysis of 1950 on acts of *Landnahme* by European States. However, concentrating on claims of territorial jurisdiction by European States with a period of 400 years in fact obscures the wide divergence of forms and intensity of territorial rule in Europe between 1500 and 1900 ranging from the most fragile and tenuous, often *de facto* feudal or aristocratic regimes to centralised military dictatorships. That these various forms of domain came to be labelled „states“ did not result from their attainment of some determinate form of social power or territorial control - indeed, territorial delimitation by means of maps and boundary stones or population censuses developed only in the 18th century³⁵ - but of the development of authoritarian

31 See further Koskenniemi, *The Gentle Civilizer*, p. 19-28. See also Edward Keene, *Beyond the Anarchical Society. Grotius, Colonialism and Order in World Politics* (Cambridge University Press, 2002), p. 14-22.

32 Schmitt is not quite consistent in dating his system. These dates appear at *Nomos* p. 150.

33 The interpretation of the Catholic Church is contained in Carl Schmitt, *Roman Catholicism and Political Form* (New York, Greenwood, 1996). The link between classical balance of power and domestic absolutism is often made. See e.g. Paul W. Schroeder, *The Transformation of European Politics 1763-1848* (Oxford University Press, 1994), p. 5-11.

34 Thus, for example, Schmitt's ironic remark that as the Jacobins attacked the *Kabinettkrieg* of the *ancien régime*, they paved the way for the *levée en masse* and total war, *Nomos*, p. 122-123.

35 Martin van Creveld, *The Rise and Decline of the State* (Cambridge University Press, 1999), p. 143-147.

political theory that secularised monotheism into the theory of the single sovereign. How this the finally came about has been elegantly told by Ernst Kantorowicz through the idea that annexed to his „natural body“, the King also possessed a „body politic“ that „contain[ed] his royal Estate and Dignity“. ³⁶ This ethereal body then joined all those to whom the King asserted his realm extended under his „rule“, conceived in due course in the image of Roman ideas of jurisdiction - rulership through Law, understood not as a general norm but a personal and concrete decision. ³⁷

Schmitt's *Landnahme* was less a sociological act of taking possession - after all most non-European colonies were claimed by discovery, not by effective control until late 19th century, and even then only in part ³⁸ - than a decision by the European monarch that could be interpreted as a „radical title“ as it was now taken with the consciousness of taking place in a global system. Behind its complex formulations, Schmitt's *Nomos* should be seen as the unity of certain events (namely of the voyages of discovery) with a certain consciousness about their meaning (that they take place in a *global* history) that receive concreteness in the ordering act that the claim of public law jurisdiction is. ³⁹

Here, Roman law stood in key position by making a difference between the claims by the feudal monarchs who tended to see their lands as private property and the claims of public law jurisdiction by modern European rulers. ⁴⁰ The new *Nomos*, as Schmitt explained, provided the very basis for that distinction. ⁴¹ Drawing attention to it, Schmitt was putting his finger on the fact that European statehood did not emerge alone but as the political form specific to capitalist social relations that presumed a constitutive distinction between public power, exercised through claims of sovereign jurisdiction (*imperium*) and private power, exercised by private law ownership (property, *dominium*), paradigmatically through the market. ⁴² The reception of Roman law gave expression to this transformation not only by differentiating between public law and civil law but, as Perry Anderson has pointed out, by conceiving sovereignty in equally absolute terms as private ownership under civil law. ⁴³ Here - in the distinction between political and economic forms of power and in the

36 Ernst H. Kantorowicz, *The King's Two Bodies. A Study of Mediaeval Political Theology* (with a new preface by William Chester Jordan, Princeton University Press, 1997 [orig. 1958]), p. 9. Such a „taking over of theological notions for defining the state“ - a „transference of definitions from one sphere to another, from theology to law [- was] anything but surprising or even remarkable“, p. 19.

37 This is the form Schmitt seeks to rehabilitate in *Political Theology*, p. 30-35 and 55-66.

38 See Koskenniemi, *The Gentle Civilizer*, p. 116 et seq, 143-166 and the still useful Julius Goebel, *The Struggle for the Falkland Islands* (Yale University Press, 1927), especially p. 47-173.

39 See the discussion of *Nomos* in Schmitt, *Über drei Arten*, p. 13. The way *Nomos* included both the original act of land-taking and its recognised continuation in time repeated, for Schmitt, the contrast between *pouvoir constituant* and *pouvoir constitué*, both of which he included here, as elsewhere, within his material notion of *Recht*, Schmitt, *Nomos*, p. 50-51.

40 Hagen Schulze, *States, Nations, Nationalism* (Oxford, Blackwell, 1996), p. 27.

41 Schmitt, *Nomos*, p. 16-17, 49.

42 See the very useful Justin Rosenberg, *The Empire of Civil Society* (London, Verso, 1994), p. 83-90, 126-129.

43 Perry Anderson, *Lineages of the Absolutist State* (London, Verso, 1976), p. 24-29.

absoluteness through which these powers were conceived - lay the social distinctiveness of early modernity as the concrete order Schmitt celebrated.

By conceiving the *Jus publicum Europaeum* in terms of the claims of public law jurisdiction (instead of ownership or control), Schmitt appears to be lead into the trap of mainstream international thought, namely the awkward assumption of:

21

„an absolute form of rule which seems never to be absolute in practice even though, for some reason, the formal constitution of the international system rests on the assumption that it is so.“⁴⁴

However, what indeed appears as an enigma of realist theories of sovereignty can be fitted within Schmitt's thinking once it is understood that his *Nomos* is not at all derived from what takes place in the international social world but from a political theology conceived in support of domestic absolutism. As abstract sovereigns, units of the international system, European States of course varied in influence and were engaged in often fierce rivalries. But fluctuations between Spanish, Dutch, and French „epochs“ failed to change the character of the *Jus publicum Europaeum* that lay not in the identity of the leading power but on how the identity of the units - including the leading power - was conceived (including what was left outside as private economy). This was a system of States as seen by Schmitt's heroes Bodin and Hobbes - instruments for avoiding domestic chaos and civil war. „In the struggle of opposing interests and coalitions, absolute monarchy made the decision and thereby created the unity of the state“.⁴⁵ At the same time, it emptied the international realm of any claim for obedience beyond *raison d'état* and balance of power. Absolute internal sovereignty implied absolute external independence.⁴⁶ No relevant change in this regard took place as the locus of sovereignty shifted to the people. Indeed, for Schmitt democracy rested on a principle of homogeneity that presumed no less a determinate decision than absolute monarchy, while sometimes the difference between the two - as in Schmitt's theory of „commissarial dictatorship“ - vanished completely.⁴⁷ Only when the liberal-constitutionalist ideas - originally stated in „the catastrophe of 1848“ - began to prevail the need of political decision came to be discarded: sovereignty was divided between state organs, its focus became legislation by general rules that aimed to regulate even their own suspension. Only then the controlling capacity of sovereignty was undermined and claims by an autonomous „universal“ realm could be entertained.

22

The Schmittian view of European public law, whatever its virtues, is of an order between sovereigns that are absolute in the sense that their sovereignty involves the pre-legal decision that both grounds the domestic order and safeguards control of the international realm. The essence of sovereignty - against the liberal „neutralisers and depoliticizers“ - is

23

44 Rosenberg, *Empire of Civil Society*, p. 127.

45 Schmitt, *Political Theology*, p. 48-9.

46 F.H. Hinsley, *Sovereignty* (2nd edn., Cambridge University Press, 1986), p. 158.

47 See Carl Schmitt, *Die Diktatur*, (4. edn. Berlin, Duncker & Humblot, 1977 [1921]).

that it „is the highest, legally independent, underived power“.⁴⁸ Such a view emerges from a political theology that is structurally homologous to Christian monotheism, historically continuous with religious teaching and, above all, equipped by a supplement of faith that decides who the enemy - „one’s own question as the figure“ - in a concrete situation is.⁴⁹ For Schmitt, here lies the wisdom of Bodin’s theory of the State. *Auctoritas, non veritas facit legem*. The Prince is not bound by the law as he seeks to save the realm: even as the legal order is suspended, the State remains.⁵⁰ But also counterpart is true, namely that the „incapacity or the unwillingness to make [the distinction between friend and enemy] is a symptom of the political end“.⁵¹

This danger arose only in the relatively calm times of the later 18th century. Enlightenment sought to banish the exception from its politics like its theology did with the miracle.⁵² The last phase of the State’s terminal decline began with the heyday of liberal constitutionalism and individualism in the late 19th century, as it was transformed into a „total State“ out of weakness, kidnapped by special interests, equally unable to sustain the unity of the domestic realm as the *Jus publicum Europaeum* against the universalising liberal moralists.

The *Jus Publicum Europaeum* was not state-centric as such. It was *both* state-centric and absolutist and it is the political theory of absolutism and not state-centrism that accounted for the virtues that Schmitt held dear. Humanitarian universalism is not antithetical to the State either. It reserves the State a place in the administration of its hypothesised international society as the night-watchman guarding over the non-political politics of technological and economic progress. But what universalism cannot tolerate is sovereignty as the ultimate power to make the political decision from which each legal system would derive its force and its unity - unless, of course, it is itself precisely such a sovereignty.

IV

Schmitt’s analysis and critique of modern international law in the last 100 pages of *Nomos* is both suggestive and incomplete. It is a strikingly sharp and original discussion that sheds light not only on the situation of international law in 1950 but also on what international lawyers today analyse in terms of the contradictory tendencies of uniformisation of the law under a single superpower and its functional and regional fragmentation into specialised technical regimes in fields such as trade, human rights and the environment.⁵³ The replacement of a single, Eurocentric, public law governed system of sovereignties by

48 Schmitt, *Political Theology*, p. 17.

49 See especially Meier, *Lesson*, p. 1-25 and section IV below.

50 Schmitt, *Political Theology*, p. 8-10, 12.

51 Schmitt, *Concept of the Political*, p. 68.

52 Schmitt, *Political Theology*, p 36-37.

53 For these tendencies, see e.g. Mireille Delmas-Marty, *Trois défis pour un droit mondial* (Paris, Seuil 1998) or the various essays in Michael Byers (Ed.), *The Role of Law in International Politics* (Oxford University Press, 2000). I discuss these at some length in Martti Koskeniemi, ‘International Law and Hegemony. A Reconfiguration’, 17 *Cambridge Review of International Affairs* (2004, forthcoming).

private law relations governing a global free market and the establishment of a morally based imperial order that knows war only as a relation between the police and the criminal have rarely been analysed with a sharper eye.

Yet these discussions are also incomplete. Schmitt never really reveals the standpoint from which he writes, what it is that animates his attack on the new *Nomos*. No doubt, Schmitt's writings emerge from an almost visceral anti-liberalism. But what gives force or provides direction to the attacks on technology, normativism and „depolitisations and neutralisations“ is no more evident in *Nomos* than in his other principal works. The 1950 book is difficult to classify. It is clearly not just a history of international law nor a history of political thought, or of international relations. Schmitt's famous style that prefers striking formulations and paradoxes - even his critics acknowledge their „rare poetic quality“⁵⁴ - over careful analysis does nothing to make his narrative perspective any clearer. No conclusion emerges in *Nomos* to tie the critiques in a single thesis or position.

That *Nomos* is a critique of liberal „universalism“ has understandably suggested to many readers that Schmitt is an anti-universalist, a committed supporter of a State-centred international order. Other focus on his „nihilistic“ decisionism or his admiration of power. Still others assume that they emanate from his nationalism or the ideology of conservative revolution. Though there is something in such understandings, they remain incomplete. Schmitt is no *völkisch* nationalist and he frequently indicates that „power“ is insufficient for grounding an *acceptable* order. Though „statehood“ is important for him, Schmitt understands it only as a contingent principle of ordering human communities. He expressly distinguishes his „concrete order thinking“ from positivistic - and as such „nihilistic“ - decisionism.⁵⁵

Schmitt is not an anti-universalist. He does not attack the Anglo-American, liberal world order because of its universalism but because of its *false* and *nihilistic* universalism. The most plausible (and not wrong merely as the most charitable) interpretation of *Nomos* is one that reads it in view of the opposition Schmitt made soon after its publication that juxtaposed a *philosophical* treatment of the historical problems treated there by a *theological* one, namely Schmitt's own.

In a talk in 1951 in Madrid, Schmitt was uncommonly clear about this. A self-understanding of humanity that was based merely on a philosophy of history was poised between two alternatives. Either it condemned the human species to an „eternal return of the same“ - this, in fact, what political realism does⁵⁶ - or then it recognised a fatal difference in humanity's technological and its moral progress, and having nothing to oppose their separation, marched humanity into a Promethean suicide. In this regard, there was no difference between the ideologies of communism and capitalism, Schmitt wrote.

54 Mark Lilla, *The Reckless Mind. Intellectuals in Politics* (New York Review of Books, 2001), p. 62.

55 Schmitt, *Über drei Arten*, p. 20-24.

56 See e.g. Robert D. Kaplan, *Warrior Politics. Why Leadership Demands a Pagan Ethos* (New York, Vintage, 2003).

Each was embedded in a fully secular understanding of itself, situating their struggle in alternative *philosophical* understandings of history. Schmitt's alternative was to move completely away from a philosophical-naturalist frame into a theological one, to interpret the present in light of a Christian conception of history.⁵⁷

From this perspective, three insights would seem important for grasping the last 100 pages of *Nomos*. One is the interpretation of worldly conflict in terms of the struggle between the Christ and Antichrist that marks the persistence of historical time until, finally, „Babylonian“ world unity will be attained with the victory on earth of the latter, and the end of historical time. The meaning of history from this perspective is not „progress“ or unity, but *salvation*.⁵⁸ The irreducibility of the friend/enemy opposition that defined the political would then appear as a reflection of that fundamental opposition: pretending to „neutralise“ or do away with it through secular norms or institutions would be to play the antagonist's game: „whoever wants to withstand Satan, must insist on enmity“. ⁵⁹ Second would be taking seriously the constant appearance of the figure of the *Katechon* in *Nomos* and elsewhere as the secular „restrainer“ of the coming of the Antichrist. This role would fall in different historical moments on different actors, and the important political decision would be to apprehend what or who at any moment plays that role. A third insight would concern the uniqueness of each historical moment, the inability to make (political) decision by reference to social laws or institutions, however conceived:

„History is not the realisation of rules or regularities or scientific, biological or other types of norms. Its essential and specific content is *the event* that arrives only once and does not repeat itself“. ⁶⁰

These three insights - a Christian concept of time as the frame for salvation, the role of the *Katechon* as the one that extends this time and the single, undetermined event (the decision) as the carrier of all that is meaningful - ground a universalism which from the beginning to the end is based on an unquestioned faith, a faith that provides the only standpoint from which the critiques of the last 100 pages of *Nomos* receive their meaning and against which they can be united as a political rejection of everything represented by those that seek „world unity“ under a secular philosophy of history and thus fall under what Apostle Paul wrote to the Thessalonians: „For when they shall say, peace and security, the sudden destruction cometh upon them“. ⁶¹

So what then is the force and direction of a political theologian's critique of international law? Again, *Nomos* remains unclear because its final sections focus on apparently random diplomatic events and doctrines: the change in the meaning of „war“, the nature of the

57 Carl Schmitt, 'L'Unité du monde' (1951), in *Du politique. Légitimité et légalité et autres essais* (Puisseux, Pardès, 1990), p. 244-249.

58 See on this especially Meier, *The Lesson*, p. 158-173.

59 Meier, *The Lesson*, p. 24.

60 Schmitt, 'Unité du Monde', p. 248 (my translation, emphasis in the text).

61 1 Thessalonians 5:3.

Versailles Treaty as continued discriminatory and limitless war against Germany, its generalisation in the League of Nations, the asymmetrical and flexible use of the Monroe doctrine, the changes in the law and practice of recognition, modern technologies as auguries for total war. Schmitt had discussed such themes already in his inter-war writings. Because they are (intentionally) focused on concrete events and written so as to demonstrate the dominance of Anglo-American universalism, the temptation is to dismiss them as political polemics by a defeated enemy. This would be a mistake. They imply critiques of the main strands of international jurisprudence which, though they are not made express in *Nomos*, appear in a small book from 1938.⁶² This book is a critique of the views Georges Scelle (1878-1961), Professor of International Law at Paris, a socialist and a „solidarist“, and Hersch Lauterpacht (1894-1960), Professor of International Law at the University Cambridge, who had emigrated from Galicia and Vienna to Britain in 1923. Scelle and Lauterpacht - and, as Schmitt saw it, the French and the British legal traditions - complemented each other so as to produce two different, partly conflicting but parallel articulations of the *false* universalism of the new *Nomos*.

The choice of Scelle and Lauterpacht was neither accidental nor misplaced. These were the two most influential international lawyers of the period. They also represented two major directions of international jurisprudence that had come to replace the „empty formalism“ and the *Vertragspositivismus* of the immediate post-war years that, in Schmitt’s view, had only aimed to legitimise the Versailles arrangement.⁶³ That their major works were published in 1933 and 1934 made them theorists of the „evening“, bringing to fruition strands of thought and practice from a half century’s time. Their projects - a sociologically based institutionalism and a court-oriented, informal („Victorian“) naturalism - remain still today the basic alternatives for a liberal articulation of diplomatic practices in terms of an international law. It is therefore useful to sketch them briefly before outlining the nature of Schmitt’s critique.⁶⁴

34

Scelle’s left solidarism based international law on the social law’s of modernity itself. Following Durkheim, Scelle explained social cohesion as an effect of organic solidarity, grounded in the biology of human needs and leading inexorably to federalism.⁶⁵ An implicit „social“ constitution organised the government of common affairs through procedures for legislation, jurisdiction and enforcement. None of this was a matter of choice. Legislation involved an essentially *scientific* task.⁶⁶

35

62 Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (Berlin, Duncker & Humblot, 1988 [1938]).

63 Schmitt, *Wendung*, p. 2-5.

64 I have discussed the views of the two at length in Koskenniemi, *Gentle Civilizer*, p. 266 et seq., 327-338 (Scelle) and 353-412 (Lauterpacht).

65 Georges Scelle, *Précis du droit des gens*, (2 vols. Paris, Sirey, 1932, 1934) Vol 1, p. 2-5.

66 This did not mean that anyone who disapproved of particular legislation could ignore it. Legislation enjoyed the presumption of being in accordance with the objective law (*hypothèse de bien légiféré*). Cf. Scelle, *Précis*, Vol. 2, p. 297-9.

Scelle's world consisted („ultimately“) of relationships between individuals, endowed by society with „essential competencies” and a sphere of discretion that grounded their freedom, conceptualised as the right to life, liberty, movement, trade and economic establishment.⁶⁷ The State was mere fiction: in „reality“, only individuals existed, either as subjects of liberties, objects of behavioural regulation or as administrators (*gouvernants*), between whom the law distributed competencies to do what (objective) law required.⁶⁸ Hence his famous doctrine of the *dédoublement fonctionnel* – the situation where an individual has been put in a position to administer two or more societies - as where national parliaments or governments administer also the international society.⁶⁹ 36

Lauterpacht's writings were altogether different in style and sensibility, constructing only an *implied* world federation from the „common law“ created by international courts and tribunals. In his major works of 1927 and 1933, Lauterpacht gave articulation to the nature of international law as a „complete system“ on a par with domestic law.⁷⁰ No realm of „politics“ had autonomous power against the principles of international law as employed in the work of international tribunals. An appeal to sovereignty, „vital interests“ or „honour“, for example, could always be transformed to the question of whether a rule of law provided that a State was free to act as it wished. 37

The great enemy of Lauterpacht and Scelle was political discretion which they associated with „metaphysical“ or atavistic doctrines of sovereignty, to be in due course eliminated from the way of international federation. Lauterpacht's optimistic cosmopolitanism survived even the darkest times. Here he is speaking at the Royal Institute of International Affairs, Chatham House, London, in 1941 as bombs were falling over Coventry and the members of his family in Poland were being rounded up in a ghetto and soon killed: 38

„The disunity of the modern world is a fact; but so, in a truer sense, is its unity. Th[e] essential and manifold solidarity, coupled with the necessity of securing the rule of law and the elimination of war, constitutes a harmony of interests which has a basis more real and tangible than the illusions of the sentimentalist or the hypocrisy of those satisfied with the existing *status quo*. The ultimate harmony of interests which within the State finds expression in the elimination of private violence is not a misleading invention of nineteenth century liberalism.“⁷¹

67 Scelle, 'Théorie du gouvernement international', *Annuaire de l'Institut de droit public*, 1935, p. 66.

68 Scelle, *Précis*, Vol. 1, p. 9-14.

69 Cf. Scelle, 'Théorie du gouvernement international', p. 54-7 and Antonio Cassese, 'Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in International Law', (1990) 1 *European Journal of International Law* p. 210-34.

70 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (London, Longmans 1927) and *The Function of Law in the International Community* (Oxford, Clarendon 1933).

71 Hersch Lauterpacht, 'The Reality of the Law of Nations', in *International Law. Being the Collected Papers of Sir Hersch Lauterpacht* (4 vols. Cambridge University Press, 1970-1978) Vol. 2 p. 26.

Scelle and Lauterpacht exemplified different but parallel articulations of a liberal-universalist jurisprudence which Schmitt totally rejected. Scelle's institutionalism extended at the international level the French theory of the „legislative State“: law as an abstract project declaring objective social truths and legislation conceived as science and a social technique. What could be more in accord with the liberal tendency of neutralisation and depoliticization? In Scelle's federalist utopia, politics would have become extinct and the global institution would appear as the „total State“ invaded by the economic and social interests between which the institution would preach total „neutrality“. What could be less expressive of the seriousness of the struggles in the international world when interpreted from the perspective of political theology?

39

Today's international lawyers apply a sociology of globalization to articulate international law in terms of its fragmentation into technical „regimes“ and invoke the need for its „constitutionalization“ by hierarchical relations in view of universal values expressed in human rights or general notions such as *jus cogens*.⁷² From Schmitt's perspective, such proposals only introduce a vocabulary that sustains the policies of those (liberal) actors that are well-placed in the diplomatic institutions that decide what they are to mean in concrete cases. As an Ersatz-theology sociology only provides an apparently scientific-neutral language for making political claims. As another Catholic-conservative jurist, Scelle's *nemesis* from the Paris law school, Louis Le Fur once remarked, „social solidarity“ may mean anything one wants it to mean, and not least the solidarity between the lion and the antelope, or master and slave.⁷³

40

In order for „international society“ or „globalization“ (just like „State“ or „individual“) to receive meaning and applicability, an interpretative framework is needed. The framework of lawyers such as Scelle or Lauterpacht, as manifested in the quote above, is faith in the ultimate goodness of human beings and world harmony. By contrast, for Schmitt and Schmittian realists such as Hans Morgenthau, „all genuinely political theories presuppose man to be evil, i.e. by no means an unproblematic but a dangerous and dynamic being“.⁷⁴ For the latter, even if successful, constitutionalization would have no intrinsic merit. It would merely consolidate an order based on somebody's effective decision and control – without guarantee that this decision would be *correct*.⁷⁵

41

Lauterpacht's modest naturalism - his „Grotian tradition“, the judge as the moral conscience of the international world⁷⁶ – avoids this trap but only at the cost of remaining

42

72 For a recent example, see Pierre-Marie Dupuy, *L'Unité de l'ordre juridique international. Cours général de droit international public*, 297 Recueil des Cours de l'Académie de droit international (Leiden, Nijhoff, 2003), especially p. 207-399

73 See my discussion in *Gentle Civilizer*, p. 316-327 and 338-342.

74 Schmitt, *Concept of the Political* p. 61

75 For Schmitt, after a period of hesitation, the political decision requires that one be „able to distinguish correctly the real friend and real enemy“, *Concept of the Political*, p. 37 (emphases mine) and see comment in Meier, *Lesson*, p. 26-27.

76 See Hersch Lauterpacht, 'The Grotian Tradition in International law', XXIII *The British Year Book of International Law* (1946), p. 1-53. See my analysis in *Gentle Civilizer*, p. 406-411.

unable to articulate itself in a philosophically plausible way. This view builds, as I have elsewhere argued, on late 19th century ideas about the civilizing power of pragmatic, liberal reasonableness which, accompanied by an optimistic view of history, is still the mainstay of today's European international legal theory.⁷⁷ The problem is that avoiding philosophical justification, such pragmatism rests on a faith that remains a mystery to itself as it conflicts with its avowed rationalism.⁷⁸ Closer to Schmitt than sociological („scientific”) theories of law, pragmatism emanates from an unselfconscious political theology which, because it does not understand itself as such, could not be in sharper contrast with what consciously interprets the world through the omnipresence of sin.

The critiques of the last 100 pages of *Nomos* are directed against diplomatic and political events and doctrines and not against legal theories. This may be because, from Schmitt's perspective, even if he could take them seriously in 1938, the Second World War had revealed their utter implausibility, perhaps their nihilism. But no novel approaches to international law have emerged since then. The international law Europeans invoke against the unilateralism of the US emerges still from two sources. One is a sociologically informed federalism that views international institutions necessary for the management of a globalized world and worries about their legitimacy in terms not unlike those current in the Weimar debates. The other is a pragmatic naturalism with a focus on courts and hierarchical notions such as universal human rights and *jus cogens* as manifestations of universal „values”, grasped by private intuition rather than philosophical argument. The irony is that taken as legal theories, they can be – and have been – invoked on both sides of the Atlantic, thus suggesting that they are, as Schmitt once suggested, best seen as surfaces over which political conflict is waged, vocabularies whose importance does not reside in what they mean but who it is that can authoritatively decide what they mean in concrete circumstances.

43

V

How should one, then, read *Nomos* in view of the present European-American controversy? One alternative is to suggest that its critical analysis is largely correct. The United States is embarked on a morally inspired crusade opposed by a Europe that invokes the formal law of sovereign equality under the United Nations Charter. There is undoubtedly something right in such an analysis. It is especially hard to avoid thinking about the American rhetoric of freedom as an empty form through which the United States asserts its unconditional sovereignty over the world. This would be empire, and the only remaining question would be whether it is a „rational empire“, inspired by genuine

44

77 Martti Koskenniemi, 'Lauterpacht. The Victorian Tradition in International Law', 8 *European Journal of International Law* (1997), p. 215-263 and *Gentle Civilizer*, p. 353-412.

78 This is the great problem of the morality of „values“ or of „human rights“. On the one hand they are, as Michael J. Perry argues „ineliminably religious“. On the other hand, their *raison d'être* is precisely to replace the vacuum created by the absence of faith. See Perry, *The Idea of Human Rights. Four Inquiries* (Oxford University press, p. 11-41. For their inherent secularism, however, see Luc Ferry, *L'Homme-dieu ou le Sens de la vie* (Paris, Grasset, 1996).

confidence in the universality of the moral truth for which Washington decision-makers see themselves as carriers (in Schmittian terms, the United States as a kind of „commissarial dictatorship“ upholding the substantive constitution of the world by a suspension of its formal provisions); or whether the right characterisation would be of a „cynical empire“, lacking such faith though still using its language.⁷⁹ Both alternatives would be compatible with understanding American acts in terms in terms of political theology (of freedom) in the strict Vitorian sense: one’s unconditional deference to right authority as the sole standard of evaluation whereby one’s acts would be automatically virtuous whether their consequences were good or evil.⁸⁰ This is the logic of (American) nationalism: the unquestioned authority of *my* (liberal-democratic) country as the sole normative standard.⁸¹

It is much harder to accept the (conservative) characterisation Europe as the representative of „international law“ against American „hegemony“. If the critique of legal indeterminacy is correct,⁸² then there is no substantive legal system that could be distinguished as against unilateral assertions of power. In such case, the European appeal to „rules“ - like in fact Schmitt’s invocation of the *Jus publicum Europaeum* - would appear as hegemonic techniques through which Europe would only seek to regain some control by inscribing its preferences on the surface of a legal vocabulary that it claims as universal. „Moral empire“ and „international law“ would then both appear as languages that seek to encompass the universal but do this from a particular point of view. Their clash would be a struggle over whose vocabulary - and thus, whose institutions - would be entitled to claim to speak for everybody. This would be a true clash of incommensurate political theologies. But even if that (ultra-realist) conclusion were correct, it is hard to say what political consequences it entails.⁸³

Another direction is taken by those who, like Habermas, claim a special status to rule-systems and rule-applying institutions against unmediated moral truths. Habermas concedes the correctness of Schmitt’s critique is inasmuch as the:

„unmediated moralization of law and politics would in fact serve to break down those protected spheres that we as legal persons have good reason to want to secure“.⁸⁴

79 For the opposition of „rational“ and „cynical“ empire, see my *The Gentle Civilizer*, p. 489-494.

80 Francisco de Vitoria, *On the American Indians (De indis, 1539)*, in *Political Writings*, (Edited by Anthony Pagden and Jeremy Lawrance, Cambridge University Press, 1991), p. 235-237.

81 This is the explanation usually voiced to support American opposition to international organization: why would the US need to adhere to the wishes of often undemocratic regimes?

82 Something I have elaborated elsewhere. See Martti Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Helsinki, Finnish Lawyers’ Publishing, 1989).

83 See the discussion of the various left and right Schmittian reactions against the liberal universalism of „globalization“ in Müller, *A Dangerous Mind*, p. 222-243.

84 Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight’, in James Bohmann and Matthias Lutz-Bachmann, *Perpetual Peace. Essays on Kant’s Cosmopolitan Ideal* (MIT Press, 1996), p. 146.

Such moralization would result from the „false coding“ of law in accordance with moral-political criteria of „good“ and „evil“ when, in fact, what is central to law is its claim of universality by presuming the judgement of external authority.⁸⁵ Claims of law are not (or not only) veiled moral claims, they are claims that decenter one’s own position, that imply parity between the legal subjects and an unbiased „third party“ that will decide. In fact, as Habermas notes, even the critique of indeterminacy is based on such an assumption: „any deconstructive unmasking of the ideologically concealing use of universalistic discourses actually presuppose the critical viewpoints advanced by these same discourses.“⁸⁶

47

The weakness of this is that there is no agreement on what the correct - „unbiased“, „external“ - procedure is: each contestant invokes institutions (US constitution and the UN Charter) the other regards biased. Each views the very submission of itself to the procedure invoked by its adversary as *ab initio* prohibiting the articulation of its key claims. This type of „differend“ would remain even if one were to concede, in principle, that the respective truth-claims do imply a decentering and a reference to third party.⁸⁷ Even if Europe and the United States are committed by their own assumptions to turn their moral and political positions into generalizeable claims about legal rights and duties, disagreement would remain about how this can be made in an unbiased way in view of the actually existing alternatives. The juxtaposition between the US claim that no legal order can be superior to its constitution and the European view that even such a position can only be invoked in terms of *legal sovereignty (Rechtssouveränität)* will lead into a dead end - unless it is viewed in pragmatic terms as a series of questions about the legitimacy and effectiveness of present domestic and international institutions. Granted, many Schmittian realists shun from institutional reforms, perhaps regarding any engagement with existing institutions as giving in to the enemy. But if calling for such (continued) reform seems too mundane a conclusion in an age when even international lawyers are losing faith in the secular,⁸⁸ well, then it can always be re-described in the Messianic language of present imperfection merely highlighting the brightness of law’s promise;⁸⁹ international law as a self-correcting, secular project whose meaning, nonetheless, would be given by a horizon of transcendence.

48

85 *Ibid.* p. 147.

86 Habermas in Borradori, *Philosophy in a Time of Terror*, p. 42.

87 See famously, Jean-Francois Lyotard, *The Differend. Phrases in Dispute* (University of Minnesota Press, 1988).

88 See David Kennedy, ‘Losing Faith in the Secular: Law, Religion and the Culture of International Governance’, in Mark Janis and Carolyn Evans (eds.), *Religion and International Law* (1999), p. 309-319.

89 See also Martti Koskenniemi, ‘What is International Law For?’, in Malcolm Evans (ed.), *International Law* (Oxford University Press, 2003), p. 105-111.